



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO 4663 OF 1988

KOPAR AND ASSOCIATES LIMITED.....PLAINTIFF

VERSUS

SOUTH NYANZA SUGAR COMPANY LTD.....DEFENDANT

JUDGMENT

This is an action for damages for breach of contract for insurance brokerage services and defamation. It is brought by Kopar and Associates limited, a limited liability company, which company will hereafter be referred to as “the plaintiff” against South Nyanza Sugar Company Limited, a limited liability company, which will hereafter be referred to as the “defendant”.

The defendant is a large sugar manufacturing firm and also owns a large sugar estate in South Nyanza District of Kenya. The plaintiff is on the other hand, a registered insurance brokerage firm representing various insurance firms. In 1986, the defendant, being desirous of engaging the services of an insurance broking firm invited tenders from registered insurance brokers and agents to enter into contract to advice it on insurance policies to be taken out on its property and employees. And also to place policies with insurance companies for its properties and employees for the period 1st July, 1986 to 30th, June, 1987. In response to the aforesaid tender, the plaintiff submitted two quotations for the said services containing the amounts which the defendants would be charged by Alico Insurance Company Limited which company will hereafter be referred to as “Alico”, with which company the plaintiff had an agency agreement, if its quotations were successful for a period of 1 year and/or 4 years period, were both dated 9th June, 1986.

On receipt of the plaintiff’s quotations and I suppose by way of vetting, the defendant sought confirmation of the quotations from Alico. The letter dated 19th July, 1986 reads as follows and was stated to be urgent: -

“Very Urgent

Confidential

19th June, 1986

Alico Kenya,

PO Box, 49460

Nairobi.

Dear Sirs,

Insurance Quotation by M/s Kopar Associates Ltd PO Box 1953, Kisumu We are giving serious consideration to the above mentioned insurance broker M/s Kopar and Associates Ltd, insurance brokerage for our company.

Would you please provide us with the following details preferably before Monday, 23rd June, 1986:

1. Confirm to us whether, the firm has reputable business conduct, ie reliability, and suitability (for) carrying out large insurance business.
2. Confirm in writing that the quotation provided to us by them had your prior approval and knowledge. That in your view and judgment they are acceptable to your firm for insurance purposes (copy of quotation attached). If you concur, please stamp a copy and return to us for further action.
3. Confirm to us that you are able to provide insurance coverage with all conditions and terms stated in the attached quotation schedule and related attachments.”

On receipt of the above letter Alico, by a letter dated 20th June 1986 and signed by one Leonard A Amolo, who gave evidence for the plaintiff as PW II, answered the questions raised by the defendant in favour of the plaintiff. Consequently by letter dated June 30th, 1986 the defendant addressed the plaintiff as follows:

“Company Insurance-1986/87

I am pleased to inform you that you have been awarded business to insure all company properties and all other assets. This will be done as per your quotes duly agreed upon by Messrs Alico Insurance Co Ltd. You are also required to review the existing premiums, policy etc and advise us of adequacy or inadequacy of risks covered. This is a back up service. This business will cover 1986/1987 financial year.

Please indicate to us your acceptance of this offer by signing a copy of this letter and returning to the under signed.

Wishing you all the best.

Yours faithfully, South Nyanza Sugar Company limited

Dr J O Aoll”

In addition to the above letter which according to Mr Kopar, the plaintiff’s Director, was first delivered, on the same day, he also received another one similarly headed from the defendant which did not specify the period. The plaintiff accepted the above offer on the same day through Mr Kopar, its Director by signing duplicate copy of the one, which did not have the period. The policies to be placed were to be based on the quotations given by Alico through the plaintiff in its letter of June 9th, 1986 produced in Court as Ex 2 (a). As already stated, when the quotations for the financial year 1986/1987 were forwarded to the defendant, the plaintiff also offered the defendant a quotation for a tender period of 4 years (produced as Ex 2 (b)) which according to the plaintiff and his principal, Alico, would save the defendant the sum of Kshs 1,750, 000/- over the period. According to Mr Kopar the option which had been accepted by the defendant was the 4 year one and the plaintiff’s appointment should have therefore expired on 30th June, 1990 and the policies were to be placed yearly through the plaintiff.

Mr Kopar’s evidence shows that after the plaintiff accepted the appointment as the broker of the defendant and placed policies for the first year, at the request of Alico he was required to obtain written contract for the four year period. While he was still discussing the matter with the defendant, he received a letter dated 27th April, 1987 in which Alico was advising the defendant of the renewal premium and

that when he saw the Financial Controller he was assured that the defendant had in fact appointed the plaintiff for four years. He in fact produced a copy of the letter dated 27th April, 1987 in which the Financial Controller had confirmed that fact. Shortly after that, by a memorandum dated 6th August, 1987, the defendant confirmed that the length of the appointment was 3 years as from 1st July, 1987, as the 1st year had lapsed. The policies were in fact received through the plaintiff for the years 1987/1988 and 1988/ 1989 for all the assets of the company.

While the plaintiff was rendering the services expected of it, it appears that some business jealousies cropped up. Some time in June, 1988, it came to the plaintiff's knowledge that the Minister for Commerce was pressurizing the defendant to appoint his company as brokers to the defendant company in breach of the agreement with the plaintiff. Although initially denied by the defendant, by a letter dated 22nd September, 1988, the defendant wrote to Alico as follows: -

“Insurance Broker

We are writing to inform you that Sony has decided to engage the services of a registered insurance broker to look after the insurance services of the company. Quotations have been invited through the mass media and selection of a reputable firm would be carried out in due course. A name of a selected firm will be communicated to you as soon as selection is finalized. In the interim period, you are advised to deal with Sony direct on all insurance matters. Kopar and Associates have been informed about this new arrangement. The existing discount agreement on policy 05/00700 39 (machinery break down) will be maintained until such a time that the new business arrangement is negotiated”.

Contrary to the information given to Alico in the above letter that the plaintiff had been informed of the new arrangements, it was not until 26th September, 1988 that a letter of that date was sent to the plaintiff which letter read as follows: -

“Insurance Brokerage Services

You will have noted in the media that Sony has invited quotations for an insurance broker to handle the insurance matters of the company. Should your company wish to tender for this service, you should do so in the manner indicated in the press. Please note however, that with effect from the date of this letter that Sony would no longer expect to be represented by Kopar and Associates and as such would deal directly with the insurance company until new agreement is negotiated.”

Soon after receiving the above letter, Mr Kopar saw the advert alluded to above in the press on the 29th September, 1988. The plaintiff did not tender for the services and by a letter dated 22nd November, 1988, the plaintiff's business was awarded to Thabiti Insurance Consultants Limited.

During the currency of the appointment, according to the evidence of Mr Kopar, in the first year, 1986/87 he had earned a commission of Shs 471,482, 1987/88 Shs 515,299/- and in 1988/89, the commission earned but not paid as the agency was terminated before the year was over, was after receipt of Shs 98,579/10 a balance of Shs 667,879/80. Mr Kopar also gave evidence that during 1988, he carried out re-evaluation of the defendant's assets for purposes of insurance jointly with the senior officials of the defendant, namely the General Manager, the Factory Manager, the Management Accountant, the Production Manager, and had established that the insurance needs of the defendant would have entailed an increase of 186%, thereby raising the plaintiff's expected commission to Shs 2,500,782/-.

On the issue of defamation, Mr Kopar stated that in his view the letter of 22nd September, 1988 was defamatory of his company. On cross-examination Mr Kopar confirmed that the role of his company as a broker is to bring about the relationship of insurer and insured. He also confirmed his evidence in chief. The evidence of Mr Kopar was also confirmed by Mr Amolo, PW2 and that the business introduced to Alico by the plaintiff was for a period of 4 years ending June 30th, 1990. He also produced the long term agreements for 3 years as from 1st July, 1987.

On account of the business being taken away by the defendant to another broker, the plaintiff filed the current suit claiming the balance of the commission he should have been paid during 1988/89 financial year of Shs 667, 879/- and general damages for breach of contract and defamation. The defendant denied liability. In particular it denied the existence of contract of agency, especially after 1987 and that the letter on 22nd September, 1988 was not defamatory or that it would only be defamatory on proof of malice as it was covered by qualified privilege.

Prior to the hearing the parties had taken out summons for directions and the issues to be determined were:-

- (a) Whether there was an agency/brokerage contract between the plaintiff and the defendant between the period commencing 1st July, 1986 to 30th June, 1987, wherein the plaintiff was to advise the defendant on insurance policies to be taken out on the defendant's property and employees and also procure insurance companies to insure the defendant's property and employees aforesaid as alleged in the plaint.
- (b) If so, whether the said agency/brokerage contract was in existence beyond 1987.
- (c) If so, whether the said agency/brokerage contract was breached by the defendant.
- (d) Whether the long term agreement/undertaking dated 6th August 1989 constituted an agreement between the plaintiff and the defendant and whether it could and did extend any such contract.
- (e) Whether in any event there could be a binding agency between the plaintiff and the defendant beyond 1987.
- (f) Whether words quoted in the plaint and complained about were complete and defamatory of the plaintiff and whether they gave a slanted and misleading impression and in any event whether they were capable of having the meaning attributed to them.
- (g) Whether the words "quoted have been invited through the media and selection of a reputable firm would be carried out in due course," were ever or could be understood to be in reference to the plaintiff.
- (h) Whether the defendant's letter of 22nd September, 1988 was subject to qualified privilege.
- (i) Whether the plaintiff has suffered loss and damage and if so, to what extent.
- (j) Who is to pay the costs of the suit.

The defendant did not call any evidence. Both parties filed written submissions in support of their respective cases.

On the main issue, whether there was ever a valid agreement between the parties herein, Mr Wasuma for the plaintiff submitted that the plaintiff having submitted tenders, one for one year and the other for four years, a valid contract came about as soon as acceptance of the plaintiff as the defendant's insurance agent was communicated by letter dated 30th June, 1986. He also argued that as a result of the said acceptance, the defendant in fact accepted that position as confirmed by agreements entered into by the defendant and the plaintiff's principal, Alico. On account of the said acceptance, the plaintiff was entitled to act as the defendant's agent for a period of 4 years and in breach be compensated for any loss thereby suffered, by the defendant.

The learned counsel for the defendant was of contrary view. He submitted that there was no contract entered into by the parties hereto, more especially for 4 years. He stated that the letter from the defendant dated 30th June, 1986 brought about only a contract for one year and not four years between the defendant and Alico and not with the plaintiff. He argued that if the correspondence is analysed minutely,

it would be clear that there was no intention for a contractual relationship to be brought about between the parties hereto.

In particular he relied on the letter dated 9th June, 1986 Ex 2 (b) as showing that the contractual relationship was to be between the defendant and Alico, and not the plaintiff. The learned counsel also urged that no oral evidence should be accepted to prove the terms of written agreement. In this regard he referred the Court to the case of *Lulume vs Coffee Marketing Board* [1970] EA 135, as authority for that contention and that oral evidence cannot be accepted in evidence unless it must have been mutually intended and necessary to give business efficacy to the document.

It is common ground that the dispute arises out of insurance transactions, which are of necessity a special line of business. It is of common usage in that industry for insurance agents for various insurance firms to set up businesses as such agents whose primary duty is to introduce business to such firms and to be paid on commission basis for every business introduced by the agent for as long as that business is covered through such agent. On the other hand on account of the specialized nature of insurance activities in this Country, large entities such as corporations now retain the services of reputable insurance agents to place policies in their behalf and to advise them when deciding on insurance and to pursue claims on behalf of such clients. Such insurance firms are invariably remunerated through being paid out by the client to the insurance firm and if they did not carry out their duties they could be liable both in contract and tort. Indeed in *Winther vs Langrish Southern Ltd* [1966] EA 292, Harris, J, held that the insurance agent is liable in contract to his client and the above decision was only reported on the point of liability on tort. By analogy, therefore, it is this Court's view that the client would similarly be liable to the agent in contract if he did not make payments to enable the agent to be remunerated by the insurance company involved.

In the instant case, the defendant advertised for tenders for appointment of an insurance agent. It is also not denied that the defendant duly appointed the plaintiff by letter dated 30th June, 1986 as its insurance agent and treated him as such until 26th September, 1988 when the agency was terminated after having previously extended the duration of the policies introduced by the plaintiff to four years by long term agreement signed in July, 1987. Taking all those facts together and in the absence of evidence to the contrary, this Court is satisfied that there existed a contract between the parties to retain the services of the plaintiff as the defendant's insurance agent for four years. Indeed when the contract with the plaintiff was terminated, another agent was contracted almost immediately. The answer therefore, to issue (a) which is the main one, is that there was a contract of agency between the defendant and the plaintiff and that the defendant was under obligation to make payments for the policies placed through the agent or at the instigation of the agent to enable the agent to be remunerated by its principal, the insurance company as is the custom in the insurance industry.

As regards issues (b), (d) and (e) it is observed that the letters from Alico were sent to the defendant through the plaintiff and did not say that the services of the plaintiff would be dispensed with. It is also common knowledge that in the insurance industry, all business introduced by an agent remains to his credit until agency is determined. In the result, in the present case, it is clear that the long term agreement was entered into so as to confirm the appointment of the plaintiff as agent for a period of four years. On a balance of probabilities, in the absence of evidence explaining why Dr Aoll should have commented that the Board of Directors of the defendant had appointed the plaintiff as its insurance agent for a period of four years, it is this Court's finding that the plaintiff's contract of agency was for a period of four years and not for only one year. The brokerage agency was in existence beyond 1987 and the long-term agreements are evidence of such appointment. I see no reason why the agency could not have extended to beyond 1987 as confirmed by Dr Aoll's endorsement and the letters of 22nd and 26th September, 1988 in which the contract was formally terminated by the defendant.

Issue (c) can be dealt with shortly. On account of this Court's earlier finding that the contract was for 4 years, the contractual period should have expired on 30th June, 1990. Termination of the relationship by 26th September, 1988 was therefore a breach of the four year contract. It was one and half years too soon and the defendant is therefore liable in damages to the plaintiff for loss suffered by him.

On issues (f), (g), and (h) it is clear that the words complained of on their own were not defamatory.

However having regard to the fact that the plaintiff to the knowledge of the defendant was a registered insurance broker, it was defamatory to that extent, especially in the eyes of the plaintiff's principal, Alico, to whom the letter was addressed. It is also trite law that privilege only applies to communicators which parties are under a duty to communicate to the other. In the present case this Court is unable to find any such obligation in the relationship between the defendant and Alico. I therefore find that even though the words complained of on their own, were not defamatory, they were nonetheless defamatory in view of the special facts known by the defendant and Alico, and to suggest that the plaintiff was not duly registered insurance broker was tantamount to saying that it was not a fit and proper firm to represent the defendant. Such insinuation was not privileged.

On issue (i) the evidence on record, which is not challenged shows that at the date the termination of the contract was made, the plaintiff had also placed policies for which he was also entitled to a commission of Shs 766,558/90 of which he had only been paid Shs 98,579/10 leaving a balance of Shs 667, 879/80, which amount he had earned as he had already placed policies for same. There is also evidence that the insurable assets after a survey done by the defendant and the plaintiff in 1988 for the year 1989/90, would have yielded a commission of Shs 2,500,782. By reason therefore of the untimely termination of its agency by the defendant, the plaintiff lost:-

a) Balance of commission for 1988/ 1989 Shs 667,879/80

b) Expected commission for 1988/1989 Shs 2,500,782

Total Shs 3,168,661/80

No evidence was led to me to show the expenses which the plaintiff would have had to incur before earning the above commission. Doing my best in such unfavorable circumstances, I would think he would possibly have to incur say office stationery expenses and/or management expenses to provide back up services as stated in the letter of appointment which could at the lowest, amount to say 10% of the total amount due, namely Shs 316,866/20, leaving a balance of Shs 2,851 795/60, which I hereby award for breach of the contract.

On damages for defamation, it is observed that publication was minimal. It was to Alico only, the business associate of the plaintiff. If believed, it could have led to immediate loss of business. Fortunately it was not and the plaintiff is still in business. Hence this claim does not warrant substantial damages. Doing the best in the absence of any sufficient evidence to show loss suffered, I would award Shs 100,000 as damages on this head or prayer.

The plaintiff also claims interest and costs. The usual practice is for interest to accrue from the date the actual loss of specific matter arose and for interest on general damages to be awarded as from date of judgment. In the present case Shs 667,879/80 less 10% should have been paid soon after policies were placed ie 1st July, 1988 or demanded. As this was not done I award interest at court rates on the net sum of Shs 689,903 which is less the 10% deducted for expenses, as from the date the suit was filed and I award interest on the balance of the amount awarded herein at court rates as from the date of this judgment. I also award the costs of this suit to the plaintiff to be paid with interest thereon at the usual court rates as from the date of this judgment.

Orders accordingly.

Dated and delivered at Nairobi this 24th day of February, 1992 .

G.P MBITO

JUDGE