REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CORAM: F. MUGAMBI, J

CIVIL SUIT. NO. 054 OF 2020

BETWEEN

FRED BLACK INSURANCE BROKERS LTD ……. PLAINTIFF

VERSUS

JETWAYS AIRLINES LTD …… DEFENDANT

JUDGMENT

Introduction and Background

1. The dispute before this court arises out of an agreement for provision of insurance services by the Plaintiff to the Defendant. The Plaintiff is a licensed insurance broker who offers aviation and general insurance brokerage services on behalf of insurance Companies in Kenya.

The Plaintiff's case:

2. The Defendant entered into a contract with the Plaintiff for provision of such services for their aircrafts in 2018. Upon entering into the contract, the Plaintiff secured insurance covers on aircraft hull, spares hull, war, aircraft liability and personal accident insurance covers with ICEA Lion General Insurance Company Limited and Lloyd's of London as 100% Reinsurance of ICEA Lion General Insurance Company Limited through Ed Broking LLP.

3. The insurance cover was for a period of one year beginning 3rd December 2018 to 3rd December 2019.The Cover Note entailed terms and conditions of the insurance together with the payable premiums which were to be paid quarterly at the rate of 25%. Subsequently, and with the instructions of the Defendant, the Plaintiff amended the initial Cover note through addendum numbers 4,5,6 and 7. The terms and rates of payment of the premiums remained unchanged. The Plaintiff states that the Defendant breached the terms of their agreement by failing to settle their insurance premiums which had accrued to a total of **USD. 245,009.03** and which the Plaintiff now asks this court to enter judgment against the Defendant. The plaintiff also seeks

interest on these sums at court rates from September 2019 until payment in full.

4. In support of their claim, the Plaintiff called **Pernille Duckworth,** the founder and CEO of the Plaintiff Company to testify on its behalf. It was her testimony that the outstanding amounts which the Defendant owes the Plaintiff was USD.245,0009.2/= which had been outstanding since 2018. She emphasized that they had held meetings with the Defendant to reconcile their accounts and provided statements of account to the Defendant. She testified that they agreed on the amount due and that there was no dispute. Additionally, it was her testimony that a Cover Note was evidence of the existence of an insurance policy.

The Defendant's case:

5. The Defendants opposed the claim, denying any liability for the sums sought by the Plaintiff. Instead, they attribute fault to the Plaintiff for failing to provide reinsurance slips and treaties relating to the insurance coverage for the Aircrafts. The Defendants argue that a Cover Note does not constitute an insurance policy. They contend that the Cover Note

referenced included provisions for lay-up credit applicable to grounded Aircrafts, which they assert was never extended to them. On this basis, they maintain that the Plaintiff is indebted to them for lay-up credit, as their Aircraft, registration 5Y-SMQ, remained grounded for a period of nine months. The Defendants reiterate that the Plaintiff was obligated to furnish insurance slips prior to any reconciliation of accounts. Accordingly, they urge this Court to dismiss the Plaintiff's claim with costs.

6. The Defendants called one witness, **Dawood Vito,** as their witness during the hearing. He testified that they were willing to pay the outstanding amounts subject to reconciliation of accounts. He contended that the Plaintiff did not provide any accounts and that they had to request for reconciliation severally from the Plaintiff. Further he testified that they requested for additional documents to ascertain that they were insured and that their premiums were being received. In closing, he emphasized that accounts were never reconciled.

Analysis and Determination

7. Having considered the pleadings, the oral testimonies and parties' written submissions, the issues for determination are:

i. *Whether the Cover Notes issued by the Plaintiffs constituted an insurance policy or valid cover and if yes,;*
ii. *Whether the Defendant breached the insurance contract;*
iii. *Whether the Defendant is entitled to a credit lay-up;*
iv. *Whether the Defendant is entitled to profit commission; and*
v. *Whether the Plaintiff proved its claim.*

Whether the Cover Notes issued by the Plaintiffs constituted an insurance policy or valid cover:

8. In his authoritative text, ***General Principles of Insurance Law***, ER Hardy Ivamy (at page 62) defines a cover note as follows:

> ***"The cover note is in itself a Contract of Insurance governing the rights and liabilities of the parties in the event of loss taking place during its currency. The assured is, therefore entitled to***

enforce the contract, contained in the cover note, provided that he has complied with its conditions e.g. as to payment of premium."

9. I have perused the Cover Note and addendums thereto at **pages 1 to 29** of the Plaintiff's trial bundle. The Cover Note provided detailed and comprehensive terms of the insurance contract between the parties. It laid out amongst others, the agreed period of insurance, risk covered, sum insured, territorial limits of the cover, conditions and payment of premiums. The Cover Note and its addendums were expressly issued *subject to the terms, conditions, and exclusions of the policy*. This means that the Cover Note, together with its addendums, were not intended to operate independently of the insurance policy but rather as an integral part of it.

10. By being expressly issued subject to the terms, conditions, and exclusions of the policy, my view is that the Cover Note was a supplementary instrument that drew its authority and scope from the main policy document. In effect, the Cover Note and

addendums were binding contracts of insurance. Judicial authority has consistently affirmed that contracts may be embodied in multiple documents through the doctrine of incorporation and this I believe, is one such instance.

11. The Defendant cannot be allowed to enjoy the benefits of insurance services, as is evident from the correspondence exchanged between the parties, during the period, only to later deny liability once it was sued for non-payment. Indeed, the Defendant's own claim for lay-back credit is founded upon the very Cover Notes in question. It is also undisputed that the Defendant paid premiums to the Plaintiff, and no alternative explanation has been advanced for such payments. I am therefore satisfied that these payments were made pursuant to the terms and conditions of Cover Note No. FB/18158/AVN031218 dated 17th December 2018, together with Addenda Nos. 3, 4, 5, 6, and 7.

12. As Platt JA observed in ***Kenya National Assurance Co. Ltd V Kimani & Another, [1987] KLR 236***:

> ***"The premium is the consideration of the contract and it can be said***

that payment of the premium keeps the contract alive. The payment of the excess is done as part of the performance of the contract. The excess is not of the same nature as those conditions which must be fulfilled in order the contract will not be avoided ab initio."

13. It follows, therefore, that an enforceable and binding insurance contract did exist between the parties, and that the Cover Notes, together with the addenda, constituted valid insurance covers.

Whether the Defendant breached the insurance contract:

14. The Plaintiff alleges that the Defendant breached the terms of the contract by failing to remit the premiums as and when they fell due, giving rise to the present suit. It is a well settled principle that courts cannot rewrite contracts for parties. The Court of Appeal underscored this position in ***National Bank of Kenya Ltd V Pipeplastic Samkolit (K) Ltd & Another, [2001] KECA 362 (KLR)*** and later

reaffirmed it in ***Centurion Engineers & Builders Limited V Kenya Bureau of Standards, [2023] KECA 1289 (KLR)***. The Court stated in the latter decision that:

> ***"As this Court has severally stated, and now a longstanding principle of law, that parties to contract are bound by the terms and conditions thereof, and that it is not the business of courts to rewrite such contracts."***

15. Informed by these pronouncements, it was a term of the contract that insurance premiums would be paid quarterly at the rate of 25% with a subsequent warning that should the premiums not be paid, then the Plaintiff would be at liberty to terminate the contract upon giving notice. The Premium Payment Clause in the Cover Note emphasized that:

> ***"It is understood and agreed that the premium due at the inception of this Policy shall be payable in the following instalments. …"***

16. The Statement of Account presented by the Plaintiff confirms the outstanding amount of USD 245,009 as at 29th October 2019. The Debit and Credit Notes in support of the said figure were equally produced before this Court. The Defendants did not question the veracity of the statement or the notes or provide evidence that they had settled the debit note payments. In fact, from **pages 77 and 78** of the Plaintiffs Trial Bundle, it is clear that the parties held a meeting on 17th December 2019 to reconcile accounts and the Plaintiff wrote to the Defendant on 7th January 2020 confirming the outcome of that meeting and formally demanding for payment of the outstanding amount, which is the amount claimed in this suit. These facts were collaborated in the testimony of PW1.

17. The presence of these documents plus other demands made by the Plaintiff even prior to the meeting brings to doubt the testimony of DW1 that they had on numerous occasions asked for statements of account and reconciliation meetings without any success. While the Defendants maintain that they did not confirm that these were the amounts due upon reconciliation of accounts, they

did not equally disown the contents of the letter of 7th January 2020.

18. The submission by DW1, that they were prepared to settle any outstanding amounts only upon confirmation that their payments were being received by the underwriter, is implausible. This is particularly so given that some premiums were indeed paid, albeit in certain instances later than stipulated in the Cover Note. The Cover Note, being the contractual document, expressly confirmed that insurance had been arranged with ICEA Lion and Lloyds of London. If the Defendant's doubt had been genuine and made in good faith, it would not have remitted any premiums from the inception of the policy. That, however, is not the case. Moreover, the existence of the cover is clearly evidenced by the documents produced in the Plaintiff's Supplementary List of Documents.

Whether the Defendant is entitled to a credit lay-up:

19. It was the Defendant's position that they are entitled a credit lay-up as one of their aircrafts was grounded for a number of months during the subsistence of

the cover. Even though the Plaintiffs agreed that the Defendants were entitled to this claim, they contended that the same would be payable only after it was ascertained that the aircraft was grounded, the duration of grounding and the reasons for which it was grounded. Indeed, from the **Lloyds of London's AVN1C's Aviation Standard Policy Terms at Clause AVN26 – Aircraft Laying-up Returns Clause**, these three perquisites needed to have been proved.

20. According to the Plaintiff, the three prerequisites could only be established from an aircraft's journey logbook. DW1 acknowledged during his testimony that such a logbook would indeed have been necessary to ascertain this information. However, he struggled to clarify whether the document presented at **pages 4 to 118** of the Defendant's bundle was in fact the logbook for aircraft 5Y-SMQ. Notably, the numerous pages produced were not specifically linked to that aircraft, and the details required to verify the prerequisites were not provided. The documents merely reflected the number of flights and their duration, without furnishing the precise information necessary for the purpose at hand.

21. What is more, the document at **pages 4–118** of the Defendant's bundle appears to be a tabulation rather than a primary record, seemingly lifted from an original source. ***Section 106B of the Evidence Act***, which governs the production of electronic evidence, is critical in ensuring the authenticity and reliability of such material. Compliance with this provision is mandatory, as the Court of Appeal emphasized in ***County Assembly of Kisumu & 2 Others V Kisumu County Assembly Service Board & 6 Others, [2015] eKLR*****.** In that decision, the Court held that:

> ***"65. Section 106B of the Evidence Act states that electronic evidence of a computer recording or output is admissible in evidence as an original document "if the conditions mentioned in this section are satisfied in relation to the information and computer.***
>
> ***66. In our view, this is a mandatory requirement which***

was enacted for good reason. The court should not admit into evidence or rely on manipulated (and we all know this is possible) electronic evidence or record hence the stringent conditions in sub-section 106B(2) of that Act to vouchsafe the authenticity and integrity of the electronic record sought to be produced."

22. Accordingly, the lack of any such certificate accompanying the Defendant's documents renders them unreliable as electronic evidence. The Defendant having failed to discharge the evidentiary burden required to allow this claim, the same is dismissed.

Whether the Defendant is entitled to profit commission:

23. The Defendants claim that they are entitled to a profit commission which may, if allowed, reduce their liability. DW1 testified that the claim was standard in the industry considering that they had not made any

claim during the period of the cover. This claim is denied by the Plaintiff. In the email dated 7th January 2020 the Plaintiff informed the Defendant that such commission would only have become payable if the Defendant had renewed its cover with the Plaintiff.

24. In support of this position, the Plaintiff relied on **Clause AVN 88** of the *Lloyds Aviation Underwriter's Association Standard Form*, which expressly deals with profit commission. The Clause stipulates that such commission shall apply *after expiry of this policy ...and subject to renewal with the insurers hereon, Insurers agree to return to the Insured a profit commission. ...'.* The Defendants have not denied that no such renewal was effected. On the contrary, at **pages 141 to 153** of the Defendant's bundle, there is clear confirmation that the Defendants renewed their cover from 3rd December 2019 to 3rd December 2020 with a different insurer.

25. Accordingly, the lack of any such renewal with the Plaintiff disentitles the Defendants from claiming profit commission under **Clause AVN 88**. The contractual condition precedent was not satisfied,

and therefore the claim for profit commission cannot stand.

Disposition

26. In light of the above, it is my considered view that the Plaintiff has discharged its evidentiary burden to the requisite standard of the balance of probabilities, thereby entitling it to the reliefs sought.

27. Consequently, I enter judgment in favour of the Plaintiff against the Defendant for the amount of **USD245,009.03/=** together with interest at court rates from September 2019 until payment in full. The Plaintiff shall also have the costs of the suit.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS *20TH* DAY OF *FEBRUARY 2026*.

F. MUGAMBI
JUDGE

Delivered in presence of:
Mr Miano HB for Mr Lusi for the plaintiff
Ms Talu HB for Mr Mugalo for the defendant
Court Assistant: Lillian