REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

COMM. CASE NO. 382 OF 2011

BETWEEN

INTRA AFRICA ASSURANCE COMPANY LIMITED.....PLAINTIFF

AND

KIRINYAGA CONSTRUCTION (K) LIMITED.....

DEFENDANT

JUDGMENT

Introduction and Background

1. The Plaintiff is an insurance company based in Nairobi whereas the Defendant is a construction company based in Nairobi that took out various insurance policies with the Plaintiff. As per the Plaintiff's Plaint dated 16th August 2011, it opened Account No. BR-D-****-0**5 for the Defendant on 1st September 1995 to track premiums, debits, and payments and that it was a term of the policies that the Defendant would pay premiums when they fell due. The Plaintiff

claims that the Defendant developed a habit of paying premiums late and in arrears and that despite the Plaintiff providing insurance coverage and compensating the

Defendant for losses when they occurred, the Defendant neglected to clear the

outstanding premium arrears.

2. The Plaintiff states that it applied the "First In, First Out" rule to the account and as of 31st December 2010, after the Defendant moved its business to a broker, the Plaintiff calculated that the Defendant owed Kshs.19,924,772.65/= in outstanding premiums which arrears had accumulated yearly from 2006 to 2010. The Plaintiff thus seeks judgment against the Defendant for the Kshs.19,924,772.65/=, interest and costs of the suit.

3. The Defendant responded through its Defence, Set-off and Counterclaim dated 11th October 2011. It denies that the Plaintiff is entitled to the claimed Kshs.19,924,772.65/= and avers that the insurance policies issued by the Plaintiff were illegal and void. According to the Defendant, the Plaintiff breached **section 156** of the ***Insurance Act(Chapter 487 of the Laws of Kenya)*** and **Regulation 41** of the ***Insurance Regulations, 1994*** and that an

insurer cannot assume a risk unless the premium is paid upfront or guaranteed by a bank. That since the Plaintiff allowed the Defendant to pay premiums in arrears, the Plaintiff was technically not allowed to assume the risk and therefore, the Defendant contends that no valid insurance contract existed, and the Plaintiff was not entitled to any payments.

4. The Defendant denies requesting the opening of Account No. BR-D-***-0**95, claiming it was an internal administrative tool of the Plaintiff that the Defendant had no access to or interest in. The Defendant asserts that if an agreement to pay premiums in arrears existed, it was unlawful and unenforceable. In its counterclaim, the Defendant seeks Kshs.100,273,281.90/= from the Plaintiff and repeats that because the insurance policies were allegedly issued illegally without upfront payment, the Plaintiff never actually undertook any valid risk or liability. Therefore, the substratum of the contract failed. That since the Plaintiff did not provide the valid insurance services it was supposed to, the Defendant argues that the money it paid to the Plaintiff was for nothing and it claims it paid the said Kshs.100,273,281.90/= for no services.

5. The Defendant avers that the Plaintiff, holding itself out as an expert, represented that it was complying with the law and the

Defendant relied on this representation and therefore the Plaintiff is estopped from now denying that it acted properly. For these reasons, the Defendant urges the court to dismiss the Plaintiff's case with costs, enter judgment for the Defendant on the Counterclaim for Kshs.100,273,281.90.00/= plus interest and costs. It also seeks an order that if the court awards anything to the Plaintiff, that amount should be set-off from the much larger sum awarded to the Defendant.

6. When the matter was set down for hearing, the Plaintiff called Anthony Njia Karomo, its Accountant (PW 1) and Moses Murungi Kirima, its Underwriting Manager (PW 2) who relied on his Expert Report dated 31st August 2020. The Plaintiff relies on the List and Bundle of Documents dated 7th May 2012 and the undated Bundle of Documents running from pgs. 1-884 (PExhibit 1-4). On its part, the Defendant called Joseph Waigwa, its Administration Manager (DW 1) who relied on his witness statement dated 3rd July 2012. He produced the Defendant's Bundle of Documents dated 16th May 2012 (DExhibit 1-59). After hearing both parties, the court directed the parties to file written submissions which are on record and since the same are a mirror of the parties' positions highlighted above, I

will not rehash the same but make relevant references in my analysis and determination below.

Analysis and Determination

7. As these are civil proceedings, it should not be lost that the court's determination is on a balance of probabilities and is guided by the principle that he who alleges must prove. Denning J., in **Miller v Minister Of Pensions [1947]2 All ER 372** discussed the burden of proof and he stated as follows:

> *"That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'we think it more probable than not', the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un) convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."*

8. The aforementioned position has now been espoused by our superior courts and finds statutory comfort in **sections 107 and**

108 of the ***Evidence Act(Chapter 80 of the Laws of Kenya)*** which provide as follows:

> ***107. Burden of proof.***
> *(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*
> *(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.*
> ***108. Incidence of burden.***
> *The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.*
> (Also see **Ignatius Makau Mutisya v Reuben Musyoki Muli [2015] KECA 612 (KLR)**.

9. From the parties' submissions, I find that the court is being asked to determine the following abridged issues:

    a) *Whether there is an insurer – insured relationship between the Plaintiff and the Defendant.*
    b) *Whether the Plaintiff issued any insurance policies or assumed any risk or undertook any liability by way of insurance in respect of any purported insurance policies.*
    c) *Whether the Defendant is liable to pay any amount or the Kshs.19,924,772.65/= to the Plaintiff.*

d) *Whether the set-off and counterclaim has merit and whether the Defendant is entitled to reimbursement of Kshs.100,273,281.90/=*
e) *Who should bear the costs of the suit and counterclaim?*

Insurer-insured relationship

10. The Plaintiff submits that a valid contract existed based on the Defendant's express requests for new covers, bonds, and renewals directly and through brokers, that the Plaintiff issued policy documents, motor certificates, and "yellow cards", and paid statutory duties on these policies and that entities like the *National Bank of Kenya* and the *Ministry of Roads* sought and received confirmation from the Plaintiff regarding the Defendant's coverage status for tenders and projects.
11. Going through the evidence, it is indeed clear that a valid and subsisting insurer-insured relationship existed between the parties from 1995 until the Defendant moved its business in 2010. The relationship was not just a formality but was actively created and maintained by both parties over 15 years and the Plaintiff's documents overwhelmingly demonstrates a continuous course of dealing. This was admitted by DW 1 in his testimony where he

acknowledged the Debit Notes, Fire Insurance Policy, Insurance Certificates for Motor Vehicles and “Yellow Cards”, which he explained were insurance covers from one country to another by road. The Defendant, through its officials repeatedly and expressly requested insurance covers, renewals, bonds, and certificates which I find to be the unequivocal action of a party seeking to be insured.

12. As noted by PW 2 and admitted by DW 1, entities like the *National Bank of Kenya* and the *Ministry of Roads* sought confirmation of cover from the Plaintiff for the Defendant's projects. This external validation confirms that a recognized insurance relationship was in place. This leads me to conclude that the Defendant's claim that the insurance account was a mere "internal administrative tool" is untenable given that it actively generated the debits by requesting services and relied on the resulting cover to operate their business and secure contracts. (see Pgs. 1-251 of PExhbit 1). I therefore find in the affirmative that there was an insurer – insured relationship between the Plaintiff and the Defendant

Assumption of risk and undertaking of liability by way of insurance in respect of the insurance policies

13. Having found that the Plaintiff issued insurance covers to the Plaintiff, the next issue for determination is whether the Plaintiff assumed risk and undertook liability by way of insurance in respect of the insurance policies. I do not think it is in dispute that the service provided by an insurer is the assumption of risk and the promise to indemnify. PW 2's evidence that the Plaintiff performed this core function was not substantially challenged by the Defendant and that the Plaintiff provided the Defendant with assurance and peace of mind for 15 years, allowing them to tender for government contracts that required insurance and operate their fleet of vehicles. The Plaintiff's evidence between pgs. 252-321 of PExhibit 2 is replete with documents showing the Plaintiff settling claims for the Defendant for various vehicles and the Defendant accepted these payments. It cannot now, in hindsight, claim the contract was "void" after having enjoyed its benefits for a decade and a half. This is a clear case of approbating and reprobating.

14. I find that the Defendant's argument that the policies are void for violating **section 156(1)** of the ***Insurance Act*** is fundamentally flawed. The said provision provides that

> "*No insurer shall assume risk in Kenya in respect of insurance business unless and until the premium payable*

thereon is received by an insurer. An intermediary shall not receive any premiums on behalf of an insurer.

15. The Plaintiff correctly invokes **section 77** which states that "*subject to this Act, failure on the part of an insurer, broker or agent to comply with any provision of this Act shall not invalidate any policy issued by an insurer.*" In short, an insurance contract does not become invalid merely because it contravenes a provision of the ***Insurance Act***. The remedy lies with the regulatory authority to penalize the insurer, not with the insured to avoid payment after the fact and this court and the Court of Appeal has consistently upheld this principle (see **Cannon Assurance (Kenya) Limited v Mohansons Food Distributors Limited [2020] KEHC 9492 (KLR)** and **Nizar Virani t/a Kisumu Beach Resort v Phoenix of East Africa Assurance Company Limited [2004] KECA 145 (KLR)]**

16. In my view, **section 156** is a regulatory measure designed to protect the insurer and ensure the solvency of the insurance market. It is a shield for the insurer against the risk of providing cover for uncollected premium. It is not a sword for a dishonest

insured to use as a technicality to avoid paying for services they have already received and benefited from.

17. From the various correspondences, I note that by agreeing to the Defendant's repeated pleas for forbearance and by continuing to provide cover and settle claims, the Plaintiff waived its right to strictly enforce the "premium before cover" rule. The Defendant is estopped from now relying on that very rule to invalidate the contract. It is therefore my finding that the Plaintiff issued valid policies, assumed the risks, and undertook liabilities as evidenced by its conduct and the settlement of claims.

The Defendant's liability to pay any amount or the Kshs.19,924,772.65/= to the Plaintiff

18. My findings above lead me to conclude that the Defendant is indeed liable to pay the outstanding premiums to the Plaintiff. Even if I was to accept the flawed argument by the Defendant that the policies were technically irregular, I will find that the Defendant has been unjustly enriched. It received a risk cover for 15 years and payment of claims for which they did not fully pay. The law of restitution demands that it compensates the Plaintiff for the value of the benefit conferred. The outstanding premium is the measure of that benefit. The Defendant's own conduct also constitutes an

acknowledgment of the debt. Its repeated requests for forbearance, promises to pay by way of a payment plan as seen from some of their correspondence and its participation in meetings to reconcile the account are all admissions that the debt was due and owing. It never, during the currency of the relationship, claimed the policies were void.

19. The Plaintiff's statement of account and corresponding debit notes found at PExhibit 4 provide a clear, chronological, and itemized breakdown of the debt. While the Defendant claims the account was an internal tool, it had every opportunity to dispute the individual debits when received them and the accompanying policy documents. The correspondence in PEXhibit 2 shows it was capable of raising queries such as duplication of policies, yet it did not fundamentally dispute the validity of the premiums charged. It is therefore my finding that the Defendant is liable to pay Kshs.19,924,772.65/= to the Plaintiff.

The Defendant’s set-off and counterclaim

20. The Defendant’s counterclaim is based on the same flawed legal premise as the Defence. The Defendant seeks the return of over Kshs. 100 million in premiums paid over 15 years for services they received. To grant this would be to allow it to have had 15 years of

free insurance, including the payout of its claims, which would be a patently unjust and absurd outcome. Its argument that there was a total failure of consideration is false. The consideration was the assumption of risk and the promise to indemnify. The Plaintiff provided this consideration in full for the entire period. The fact that the Defendant did not pay the full premium for the final years does not mean the consideration for the prior years' premiums failed. Therefore, I find that the Defendant is estopped from claiming a refund for premiums paid on policies it now claims were void. By paying those premiums without protest at the time, it affirmed the validity of those specific insurance contracts. I find no merit in the Set-off and Counterclaim and thus dismiss the same.

Costs of the suit and counterclaim

21. As the Plaintiff has been successful in its suit and the Defendant failed in its set-off and counterclaim, I exercise discretion and award the Plaintiff costs for both.

Conclusion and Disposition

22. In the upshot, I allow the Plaintiff's suit and make the following dispositive orders:

    1) **Judgment be and is hereby entered in favor of the Plaintiff as against the Defendant for the sum of Kshs.19,924,772.65/=.**

2) **The Defendant's Counterclaim dated 11th October 2011 be and is hereby dismissed.**
3) **The Plaintiff shall have interest on the sum awarded above at court rates from the date of judgment until payment in full.**
4) **The Plaintiff is awarded the costs of the suit and the counterclaim.**

DATED SIGNED and DELIVERED virtually at NAIROBI this 19TH DAY of MARCH 2026

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J.W.W. MONGARE
JUDGE

IN THE PRESENCE OF

1. Mr. Mburu for the Plaintiff.
2. Ms. Nyangweso holding brief Mr. Ojiambo SC for the Defendant.
3. Amos- Court Assistant