Flagship Insurance Brokers Ltd v Heritage Insurance Co. Ltd (Appeal E091 of 2021) [2024] KEHC 845 (KLR) (Commercial and Tax) (30 January 2024) (Judgment)

Neutral citation: [2024] KEHC 845 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

APPEAL E091 OF 2021

FG MUGAMBI, J

JANUARY 30, 2024

BETWEEN

FLAGSHIP INSURANCE BROKERS LTD ..... APPELLANT

AND

HERITAGE INSURANCE CO. LTD ..... RESPONDENT

(Being an appeal from the decision of the Chief Magistrate's court at Nairobi Hon. D.M. Kivuti delivered on 31st January 2020 in CMCC No. 263 of 2010)

JUDGMENT

Background

1. The dispute before the Court arose from an insurance underwriting agreement between the parties. It is not disputed that in this arrangement the appellant was tasked with the mandate of collecting insurance premiums from insured clients and remitting the same to the respondent after deducting their commission. The respondent instituted a suit against the appellant by an amended plaint dated 4th January 2010 claiming an amount of Kshs. 1,234,149/= in respect of premiums collected by the appellant but not remitted to the respondent. The claim was specifically for insurance policies for the period running between 24th August 2004 and 14th December 2007.

2. The appellant filed a defence and counterclaim in which it denied the averments in the plaint. It was the appellant's case that parties had agreed that the accounts would be separated into a pre-2006 and post 2006 accounts. The appellant blamed the respondent for failing participate in the reconciliation of the accounts thereby frustrating the process. It was also the appellant's case that it had cleared the outstanding sums on the post-2006 accounts.

3. As for the pre-2006 accounts it was established that the respondent owed the appellant a sum of Kshs. 2,787,685.50 being overpayments made to the respondent, which the respondent failed to pay.

4. The Learned Magistrate after hearing the testimony of the witnesses and evaluating the evidence entered judgment in favour of the respondent against the appellant for the sum of Kshs. 1,234,149/= plus costs and interest and dismissed the counterclaim by the appellant, leading to this appeal.

5. The memorandum of appeal dated 29th September 2021, cites the following grounds of appeal:

   i. The Learned Magistrate erred in law and in fact in awarding the respondent a sum of Kshs. 1,650,998/=, costs of the suit and interest.

   ii. The Learned Magistrate erred in law and in fact in interpreting the appellant's witnesses' evidence stating that it had no problem with payment subject to proof as an admission.

   iii. That the Learned Magistrate erred in law and in fact by interpreting that the appellant did not deny that policies were issued thereby shifting the burden of proof to the defence as the respondent did not attach any one policy that had been issued.

   iv. The Learned Magistrate erred in law and in fact by not properly considering the evidence presented and holding that the Debit Notes were not denied despite not being admitted as indicated in the defence.

   v. The Learned Magistrate erred in law and in fact dismissed the appellants' counterclaim and further stated that filing the counterclaim was an afterthought as the appellant had not pursued the same prior to filing of the claim.

6. The appeal was heard by way of written submissions. The appellant filed submissions dated 21st December 2022, while the respondent filed submissions and supplementary submissions dated 13th January and 22nd August 2023 respectively.

Analysis

7. I have carefully considered the pleadings, the impugned judgment and the written submissions filed by the rival parties. In my view, 2 issues arise for determination. That is whether the trial magistrate erred in entering judgment in favour of the respondent for the sum of Kshs. 1,234,149/= and secondly whether the trial court erred in dismissing the appellant's counterclaim.

8. As the first appellate Court, I am cognizant that the role of this Court is to revisit the evidence on record, evaluate it and reach my own conclusion in the matter as per the holding in Selle & Anor V Associated Motor Boat Co Ltd, (1968) EA 123. I also remain cognizant that an appellate court will not ordinarily interfere with findings of fact by the trial court unless they were based on no evidence at all, or on a misapprehension of it or the court is shown demonstrably to have acted on wrong principles in reaching the findings.

9. Turning now to the first issue, the appellant submits that the respondent failed to prove its claim to the required standards. The appellant takes issue with the Learned Magistrate for holding that since the appellant had not denied it, the policies had actually been issued and the appellant was therefore liable to pay to the respondent the amount claimed. This is despite the respondent not providing any evidence that the said policies had in fact been issued.

10. It is the appellant's case that the Learned Magistrate erred in interpreting the lack of denial by the appellant to mean an admission, and thereby shifting the legal burden of proof to the appellant. The

appellant faults the trial court for entering judgment without having the respondent produce the insurance policies and risk notes relied on.

11. In rebuttal submissions the respondent defends the decision of the trial court. The respondent submits that the Court was right in finding that the appellant had not denied that it had not remitted monies due from the contractual arrangement between the parties. The respondent further submits that the claim was well supported by the debit and credit notes that formed part of the record.

12. The legal basis for the legal burden of proof is provided for in Section 107 of the *Evidence Act*, Cap. 80 of the Laws of Kenya. The said section states as follows:

> " 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."

13. Additionally, the Halsbury's Laws of England, 4th Edition, Volume 17, at paras 13 and 14: describes the legal burden of proof in the following terms:

> " The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case...."

14. The appellants have also cited the majority decision of the Supreme Court in Presidential Election Petition No. 1 of 2017 between Raila Amolo Odinga & Another V IEBC & 2 Others, (2017) eKLR. The Court differentiated between the legal and evidentiary burden of proof in the following words:

> " Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static and remains constant through a trial with the plaintiff, however, depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.
>
> It follows therefore that once the Court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the petitioner bears an evidentiary burden to adduce 'factual' evidence to prove his/her allegations of breach, then the burden shifts and it behooves the respondent to adduce evidence to prove compliance with the law."

15. Although the above decision was with respect to an election petition, the principles in law relating to the legal and evidential burden of proof remain constant. The observations of the Supreme Court are recounted in the case of Ahmed Mohammed Noor V Abdi Aziz Osman, [2019] eKLR. The Learned Judge pronounced himself thus:

> " For clarity, the legal burden of proof in a case is always static and rests on the Claimant throughout the trial. It is only the evidential burden of proof which may shift to the Defendant depending on the nature and effect of evidence adduced by the Claimant."

16. Turning back to the matter before hand, the onus was on the respondent to prove his case against the appellant. The respondent was bound to adduce cogent and credible evidence to prove its allegations

as laid out in the plaint to the satisfaction of the Court on a balance of probabilities. This is fixed at the onset of trial and is the legal burden of proof.

17. The Court further noted in Ahmed Mohammed Noor V Abdi Aziz Osman (supra), that the plaintiff on whom the legal burden of proof lies may or may not adduce sufficient and admissible evidence in proof of any of the allegations in the plaint. If no sufficient evidence is adduced to the required standard, then the allegations ought to fail and it all ends there. On the other hand, if evidence is adduced to the satisfaction of the Court then it becomes the burden of the defendant to adduce evidence rebutting the allegations by the plaintiff.

18. The trial court found (at pp 34 and 35 of the judgment) that the respondent's claim of a liquidated nature was evidenced by the fact that the policies left the respondent's offices and were issued to the insured clients, the appellant was paid premiums and therefore the demand by the respondents was against the debit notes issued.

19. I am not convinced that the evidence provided by the respondent was sufficient to elucidate such a finding which in my view lies at the heart of this appeal. The trial magistrate acknowledges the business arrangement between the parties which was confirmed by PW1, Jackson Mbuthia, a Legal Manager with the plaintiff. The arrangement was such that the appellant would request and the respondent would issue insurance covers to clients. It is on the basis of these covers that the appellant would then collect premiums from the insured clients, deduct its commission and remit the premiums to the respondent.

20. In cross examination PW1 confirmed that the respondent's claim was based on 144 cases. He confirmed that besides the debit notes, the respondent had not provided any evidence of corresponding requests for cover or the policies issued in respect of the 144 cases. There was also no schedule tallying the documents to the figure claimed. In the absence of this documentary evidence, how then would the trial court would have held as it did? It was the duty of the respondent to lay a basis for its claim by producing the actual policies on which the debit notes stood.

21. I say this noting that the debit notes provided secondary information that needed to have been verified from the actual policies including the name of the agency, the insured, the policy type and number, class of business and the period of cover. The debit notes also indicate the amount of premium payable, commission due to the appellant and amounts due to the respondent. It is clear that for the credit or debit notes to take effect, there had to be written instructions from the appellant to the respondent to issue the covers.

22. The trial court took the view that the debit notes and the insurance policies were not denied by the appellant, which may have largely contributed to the finding by the Learned Magistrate. I do note on the contrary that the appellant had taken issue with the lack of supporting evidence to the debit notes. DW1 in cross examination (at pg 26 of the typed proceedings) stated that the appellant had no problem paying the amount allegedly due, so long as the respondent provided evidence of letters of instructions with respect to the alleged business to support the debit notes.

23. I further note that this is not the first time that the appellant had raised the issue with the respondent. At paragraph 8 of the statement of defence and counterclaim the appellant disputed the claim by the respondent on account of:

    i. Monies from polices that had not having been authorized or instructed by the respondent and for which the appellant was therefore not liable to remit premiums to the respondent or;

    ii. Monies received by the appellant in respect of third party covers which were changed to comprehensive covers and which therefore meant that it was an overpayment by the appellant;

iii. Renewals made without the instructions of the respondent and

iv. Covers for a longer period that what was instructed or authorized by the respondent.

24. Looking at the pleadings and correspondence between the parties, the onus was on the plaintiff (the respondent) to provide cogent evidence that indeed, its claim was based on actual business authorized and for which premiums were due and owing. The respondent did not provide instruction letters from the appellant and corresponding policies that were issued for the specific claims. This is so despite the fact that one would have expected that these are documents that would be in the respondent's possession in the ordinary cause of business.

25. I have looked through the record and I note that the respondent produced a host of credit notes and debit notes but did not explain how these related to the claim before the Court or how the figures were arrived at. At the very least, the Court needed some way of connecting these unpaid debit notes to the actual business. Further, noting that the debit notes had always been contested, contrary to the finding of the Learned Magistrate, I am of the view that the trial Court erred in relying on the debit notes as conclusive proof that the policies were issued to the insured clients and the monies were therefore due to the respondent.

26. I am therefore inclined to concur with the appellant that for these reasons, the respondent had failed to discharge the evidentiary burden of proof to the required standards for the same to shift to the respondent, to disprove the respondent's claims. Having failed to do so, it is my finding that both the legal and the evidentiary burden of proof never shifted to the appellant.

27. The next question is whether the appellant proved the counter claim to the required standards. The appellant's claim against the respondent is for Kshs. 2,787,685.50 being monies overpaid to the respondent. The evidence submitted by the appellant consisted of cheques evidencing premium payments against schedules of policy covers.

28. There is also a schedule prepared by the appellant in which the amount claimed is broken down into covers with no FIB instructions accounting for Kshs. 1,721,126/=; covers with credits needed accounting for Kshs. 355,305/= and finally excess payments of Kshs. 711,254/=. The total of this is the Kshs. 2,787,685.50 claimed by the appellant. There are also numerous cheque counterfoils produced by the respondent.

29. I dare say that the same submissions on the required burden and standard of proof would apply conversely to the counterclaim. DW1 confirmed that the sum demanded by the appellant amounts to sums that arose out of excess payment of premiums for the period 2002-2017. The appellant did not present specific evidence of how the excess premiums arose and in which specific transactions choosing instead to rely on a schedule of accounts and the huge bundle of documents as evidence of the overpayment made.

30. Not much of an explanation was given to the Court about the connection between the documentation produced to the overpayment. Numerous cheques and cheque counterfoils were produced for various payments over the period but no specific cheques were earmarked as the ones resulting to overpayment of premiums.

31. I have rummaged through the schedule of the outstanding payments and the supporting documents and needless to say, I am unable to make the connection between the two. It does not help much when the Court is left to search through bundles of documents with no explanation from the parties on the relevance of the documents. On this account, it is my finding that the trial court was right in holding that the appellant had failed to prove its counterclaim against the appellant.

Determination

32. The totality of all this is that the appeal succeeds in part. The judgment of the lower court in favour of the respondent is hereby set aside in its entirety. The decision of the lower court dismissing the counterclaim is however upheld. The appellant shall have half of the costs of the appeal.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 30TH DAY OF JANUARY 2024.

F. MUGAMBI

JUDGE