Invesco Assurance Company Limited v City Hopper Limited (Commercial Civil Case 405 of 2010) [2022] KEHC 62 (KLR) (Commercial and Tax) (31 January 2022) (Judgment)

Neutral citation number: [2022] KEHC 62 (KLR)

Republic of Kenya

In the High Court at Nairobi (Milimani Commercial Courts Commercial and Tax Division)

Commercial Civil Case 405 of 2010

DAS Majanja, J

January 31, 2022

Between

Invesco Assurance Company Limited

Plaintiff

and

City Hopper Limited

Defendant

Judgment

1.This suit was commenced by the Plaintiff by the plaint dated 2nd June 2010 against three defendants but at a later stage of the proceedings, it withdrew the case against two defendants, CFC Bank Limited and CFC Stanbic Bank Limited, leaving the Defendant, City Hopper Limited.

2.The Plaintiff is a limited liability company licensed to conduct insurance business within Kenya. The Defendant is also a limited liability company carrying on the business of public transport within Nairobi City. The Plaintiff's case against the Defendant as set out in the Plaint is as follows.

3.On 14th May 2007, the parties entered into an insurance contract for the Defendant's 194 buses whereby the Plaintiff issued two commercial vehicle motor pool policies; WN/084/1/00833/2007 and INN/081/1/000092/27("the Insurance Policies") to the Defendant to run from 1st May 2007 to 30th April 2008 at an agreed premium payable of KES. 43,175,146.00. In order to finance the premiums, the Defendant entered into an Insurance Premium Finance Agreement dated 14th May 2007, ("the IPF Agreement") with its bankers, CFC Stanbic Bank ("the Bank"). Under the IPF Agreement, the total premium payable was KES. 44.53 million inclusive of interest to be repaid in 10 monthly installments of KES. 4,453,085.00.

4.The Plaintiff made a business decision to grant the Defendant a cash discount of 40% of the total premiums amounting to KES. 17,812,000.00 meaning that the Defendant would repay the Bank a total of KES. 26,688,850.00. The Defendant would pay KES. 2,670,000.00 with the Plaintiff topping up KES. 1,781,234.00 per month for the 10 months.

5.Based on this arrangement, the Plaintiff claims that it issued 6 cheques of KES. 1,780,000.00 totaling KES. 10,687,00.00 but the Defendant had defaulted and only remitted 4 cheques. The Plaintiff further claims that the Defendant did not make any premium payments to it or any repayments to the Bank but continued to utilize the insurance cover by bringing claims for payment and displaying insurance stickers on their 194 vehicles.

6.On 7th January 2008, the Bank issued a letter to the Plaintiff advising it that the Defendant had defaulted on the payments and that the Defendant had advised it to cancel the IPF Agreement. The Plaintiff claims that the Defendant did not issue to it a notice of cancellation and that the Defendant did not return the 194 insurance stickers or issue a statutory declaration of loss of certificates in lieu of thereof. It therefore contends that the polices remained in force and effect until the expiry date. Thus, the Plaintiff seeks the following reliefs against the Defendant:a.KES. 43,145,538.00 being the premium for policies that remain unpaid or;b.In the alternative, a declaration that owing to the Defendant's failure to furnish any consideration to the contract of insurance, the Plaintiff is entitled to avoid all claims against the issued insurance policies.c.A sum of KES. 10,680,000.00 being the cash discount paid by the Plaintiff.d.Interest at commercial rates.

7.The Defendant responded to the suit by filing a Defence and Amended Counterclaim dated 21st July 2017 in which it denied the Plaintiff's claim. It states that it honoured all its obligations under the IPF Agreement and that all insurance policies continued to subsist until cancellation of the policies. It however states that following the Plaintiff's offer of a discount, the Plaintiff issued 6 cheques to it for KES. 1,781,234.00 each but 2 of the cheques were returned unpaid causing it loss in the form of bank charges. It further states that under the IPF Agreement, it was not required to make any payment to the

Plaintiff and that the proceeds of the facility granted to the Defendant were to be paid in form of a fixed deposit. It therefore emphasizes that no payment was due from it to the Plaintiff.

8.Under the Counterclaim, the Defendant states that despite meeting all its obligations under the IPF Agreement, the Defendant declined to settle all the legitimate claims worth KES. 9,651,116.00 by 10th May 2017 which it had to settle. It states that there are 27 claims pending in various court which ought to be settled by the Plaintiff. It therefore prays for judgment against the Plaintiff as follows:a.The sum KES. 1,780,000.00 with interest thereon at court rates from 1st June 2007 until payment in full.(aa)The sum of KES. 961,116.99 and interest thereon at court rates from 12th June 2010 until payment in full.b.A declaration that the Plaintiff is obligated to settle the Defendant's claims on twenty (27) cases pending determination in court in matters and/or arising from accidents that occurred within the period covered under Insurance Policies No. INN 084/1/ 0000833/2007 and INN.080/1/000092/2007.c.Costs of and incidental to the Counterclaim.

9.As part of the pre-trial directions, the parties agreed on the following facts:1.On 14th May 2007, the Defendant entered into an insurance contract with the Plaintiff for insurance of 124 buses whereby the Plaintiff issued the Defendant with the Insurance Policies which commenced on 1st May 2007 and were to expire on 30th April 2008. The premium for the policies was KES. 43,175,146.00.2.On 14th May 2007, the Defendant entered in the IPF Agreement with CFC Stanbic Bank Limited for the sum of KES. 44,530,850 which sum included the premium plus interest to be repaid in 10 monthly instalments of KES. 4,453,085.00 each.3.That since the Plaintiff has offered the Defendant a cash discount equaling 40%, it meant that the Plaintiff was to repay its share amounting to KES. 26,688,850.00 making a total of KES. 44,530,850.00.

10.The matter was set down for hearing with both parties calling one witness each; Peter Gichuhi (PW 1) for the Plaintiff and Abackson Nduma (DW 1) for the Defendant. Their testimony mirror what they pleaded in their respective pleading as I have set out above and which I will not outline. The issues in dispute revolved around the interpretation of the agreements between the parties. Further, the parties agreed on facts and the documents produced were not contested thus narrowing the scope of the dispute. I shall refer to the testimony and written submissions in the event of contested facts.**Analysis and Determination**

11.In my view, there are two main issues in contest. First, whether the Defendant paid the full insurance premium to the Plaintiff. Second, whether the insurance policies were cancelled.**Payment of the premium**

12.The Plaintiff described its case in quite graphic terms as a classic case of insurance fraud committed by the Defendant in collusion with the Bank by non-payment of premiums which the Defendant owed the Plaintiff. It asserts that it never received any premium from the Defendant, the cancellation of the insurance was improper as there was insufficient notification to the Plaintiff and that the Defendant had ceded its legal right to cancel the insurance contract to the Bank. The Plaintiff contends that it was subjected to double losses as it serviced the Defendant's claims under the Insurance Policies, made cash discounts to the Defendant and that the Defendant never returned insurance stickers to it.

13.At the center of the parties' dispute is the IPF Agreement and its construction. The Court of Appeal explained the approach to construction of contracts as follows in Sun Sand Dunes Limited v Raiya Construction Limited MLD CA Civil Appeal No. 26 of 2017 [2018] eKLR:The object of construction of terms of a contract is to ascertain its meaning or in other words, the common intention of the parties thereto. Such construction must be objective, that is, the question is not what one or the other parties meant or understood by the words used. Rather, what a reasonable person in the position of the parties

would have understood the words to mean.It is trite law that parties to a contract are bound by the terms and conditions stipulated therein. That is the case in the instant appeal since the facts confirm that the parties acknowledged having entered into the agreement for the sale of the suit land. None complained of fraud or coercion and they are accordingly bound by its terms. This what this Court had in mind in National Bank Of Kenya V Pipeplastic Samkolit (k) Ltd & another [2001] eKLR;"The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved."

14.I therefore proceed on the basis and presumption that the IPF Agreement was lawfully entered into by the parties and therefore legally binding on all of them, a fact that is not disputed. Under the IPF Agreement the total premium payable was KES. 43,175,146.00 and that the Defendant was to make 10 monthly installment payments of KES. 4,453,085.00. Since the Plaintiff had granted the Defendant a 40% cash discount, it means that the Defendant was to pay 60% of the premium which translates to approximately KES. 2,670,000.00 per month and the Plaintiff was to top up the remaining 40% by paying the sum of KES. 1,781,234.00 within the said 10 monthly installments. Though not expressly stated in the IPF Agreement, the parties agree that the insurance premium and repayment sums were to be remitted and held in a fixed deposit account in favour of the Plaintiff.

15.From the evidence and again it is agreed that the Plaintiff made 5 installment payments of KES. 1,781,234.00 under the IPF Agreement as part of its 40% obligation and not 4 payments. This was expressly admitted by DW 1 and the bank statements produced in evidence which show that there was only 1 reversal out of the 6 cheques deposited. The Plaintiff accused the Defendant of not making any payment to the Bank under the IPF Agreement. The Defendant on the other hand states that it fully complied with its obligations and continued to make its 60% contribution to the Bank even after the Plaintiff stopped its payments.

16.From the documentary evidence, the Bank by the letter dated 14th May 2010 confirmed to the Plaintiff that the premium of KES. 43,175,146.00 was paid to the Plaintiff in favour of the Defendant. The Plaintiff responded to the aforesaid letter by a letter erroneously dated 26th April 2010 and admitted that the said sum was deposited in a fixed deposit account in its favour. Further and by a letter dated 10th June 2010 addressed to the Defendant and copied to the Plaintiff, the Bank confirmed that the proceeds of the premium advanced under the IPF Agreement was, "paid to Invesco Assurance in form of a fixed deposit in their name and that the Defendant subsequently honoured its obligations to the Bank in respect of the IPF Agreement as evidenced by the Acknowledgement of Debt and Settlement Agreement and letter dated 28th May 2013.

17.When these letters confirming payment of the premium by the Bank to the Plaintiff were put to PW 1 in cross-examination, he stated that they were 'misleading', 'incorrect' or 'illegal' without controverting them by any other documentary evidence. PW 1 stated that even though the fixed deposit account was in the Plaintiff's name, and the money was deposited in the said account, the Plaintiff could not access it until after 10 months. He, however, admitted that there was no express provision under the IPF Agreement that this amount was to be in a fixed deposit lien account and that it could not access this account until after the 10th month. PW 1 also admitted that the Defendant could not access this account as it was being administered by the Bank. Even though PW 1 imputed fraud and collusion on the Bank and 'other unknown persons' including the Defendant, the allegation was not backed by any evidence and it remained just that, an allegation.

18.I can only restate the provision of section 109 of the Evidence Act (Chapter 80 of the Laws of Kenya) that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. Further, the purport of section 107 of the Evidence Act is that the legal burden of proof lies upon the

party who invokes the aid of the law and substantially asserts the affirmative of the issue (see Evans Otieno Nyakwana v Cleophas Bwana Ongaro HBY HC Civil Appeal No. 7 of 2014 [2015] eKLR and Central Bank of Kenya v Giro Commercial Bank Limited & 3 others ML HCCC No. 204 of 2004 [2019] eKLR).

19.It was upon the Plaintiff to prove that the fixed deposit account was a lien account that could not be accessed until after the 10th month. It was also upon the Plaintiff to prove its allegation of fraud or collusion between the Bank and the Defendant to deny the Plaintiff the proceeds of the insurance premium held in the said fixed deposit account and that the either the Bank and/or the Defendant illegally accessed the said account. The Plaintiff did not discharge this burden.

20.In my view, whether the Defendant paid the insurance premium is not a difficult question. As the name suggests, the singular purpose of the IPF Agreement was to enable the Defendant pay the premium on the Insurance Policies. In short, in consideration of the Bank paying the premium to the Plaintiff on behalf of the Defendant, the Defendant agreed to pay the amount paid by the Bank in monthly instalments. I therefore find and hold that the Plaintiff was paid the full premium of KES. 43,175,146.00 by the Bank on behalf of the Defendant once that amount was place in the fixed deposit account in the Plaintiff's favour.

21.The Plaintiff has not proved that the Defendant accessed the fixed deposit account held by the Bank in favour of the Plaintiff or any collusion between the Bank and the Defendant to illegally access the said account as has been insinuated by the Plaintiff. As was held in Mususa v Dhanani [2001] 2 EA 471, "Mere suspicion is not enough, there must be circumstances incompatible with honest dealing and fraudulent conduct must be distinctly alleged and distinctly proved and it is not allowable to leave fraud to be inferred from facts."

22.At this point, I find it relevant to say that the Plaintiff elected to withdraw its case against the Bank. It is only the Bank which would have answered all the questions, allegations, suspicions, insinuations and misgivings that the Plaintiff had on the fixed deposit account because as admitted by the Plaintiff, it is the Bank which administered the account. If the Plaintiff alleges that it never received any money from this account or that the account was illegally accessed, then the only entity capable of giving eye-opening answers was the Bank and not the Defendant. Further, the court cannot make adverse findings of fraud and collusion against the Bank as it is not a party to this suit. Any such findings would amount to a breach of the rules of natural justice (see Pashito Holdings Limited & Another vs Paul Ndungu & 2 Others NRB CA Civil Appeal No. 138 of 1997 [1997] eKLR).

23.On the issue whether the Plaintiff was paid the premium, I return a finding and reiterate that the Defendant paid the Plaintiff the full insurance premium of KES. 43,175,146.00 through the Bank under the IPF Agreement.**Cancellation of the Insurance Policies**

24.From the parties' evidence, there was an attempt to cancel the insurance policies but this attempt was rebuffed and disregarded by the Plaintiff. The Bank's letter dated 7th January 2008 addressed to the Plaintiff requested for cancellation of the insurance policies under the terms of the IPF Agreement due to the Defendant's default. PW 1 stated that under Clause C of the IPF Agreement, the Bank's interest was embedded so as to render the Defendant incapable of canceling the IPF Agreement without direct authorization or consent from the Bank. Further, under Clause G, the Defendant specifically ceded the right to cancel the Insurance Policies to the Bank so that the Defendant did not have the right to cancel the insurance policies. It is on this basis that the Plaintiff disregarded the cancellation notice from the Bank purportedly on the advice of the Defendant. Further, under the insurance contract between the Plaintiff and the Defendant, the Defendant was required to surrender all the 194 policies seven days

upon issuing of cancellation notice which they failed to do.

25.The said letter by the Bank states in part as follows:'…We regret to advise that the client has defaulted in their loan repayment and has advised us to cancel the said facilityConsequently, under the terms of the Insurance Premium Finance Agreement, we request to cancel the insurance policy covered under this particular account after giving the 7 days notice and refund the Premium pro-rata basis to us after expiry of the notice'

26.The aforesaid letter states that it was the Bank and not the Defendant which requested cancellation of the policies after giving the 7 days' notice and as admitted by the Plaintiff, it is the Bank that had the right of cancellation. I am in agreement with the Plaintiff that the 7-day notice referred to by the Bank was never issued and as such, the Insurance Policies never cancelled and ran their full course. In any case, I find that this position is now common between the parties hence the conclusion that the Insurance Policies were never cancelled is inevitable.

27.The effect of this, coupled with my finding that the insurance premium of KES. 43,175,146.00 was paid in full, is that the Plaintiff, as the insurer, is liable for all claims arising out of the policies between 1st May 2007 and 30th April 2008 as it assumed the risk on behalf of the Defendant under the Insurance Policies. As a consequence, I find and hold that the Plaintiff is not entitled to any of the prayers it has sought in the Plaint.**The Defendant's counterclaim**

28.I now turn to the Defendant's counterclaim. First, the Defendant claims the sum of KES. 1,780,000.00 which it states it paid on behalf of the Plaintiff in respect of its fifth installment payment. I have already found that the Plaintiff paid five installments therefore the Defendant's contention that it paid this fifth installment is without basis. In any case DW 1 admitted that the Plaintiff paid the first five installment payments.

29.The Defendant further claims to have paid claims worth KES. 9,651,116.00 and seeks reimbursement of the sums paid in settlement of the said claims from the Plaintiff. The Defendant produced the schedule of claims settled arising from accidents which occurred during the currency of the Insurance Policies. Since I have found that Insurance Policies were never cancelled and that the full insurance premium was paid to the Plaintiff, it follows the Defendant's claim on this account is merited.

30.The Defendant further claims that there are 27 pending court cases arising from accidents occurring within the insurance policy period. The Defendant has attached a schedule of the said cases and consequently and similarly, I allow this prayer as the Plaintiff is the one obligated to settle these claims.**Disposition**

31.For the reasons I have set out above, I now make the following final orders:a.The Plaintiff's case be and is hereby dismissed with costs to the Defendant.b.The Defendant's counterclaim is allowed to the following extent:i.The Defendant is awarded KES. 9,651,116.00 and interest thereon at court rates from 12th June 2010 until payment in full.ii.A declaration be and is hereby issued that the Plaintiff is obliged to settle the Defendant's claims on twenty-seven (27) cases pending determination in courts in matters and/or arising from accidents that occurred within the period covered under insurance policies no. 084/1/000833/2007 and 080/1/000092/2007. **iii.The Defendant is awarded costs of the counterclaim. **

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JANUARY 2022.D. S. MAJANJA JUDGE Court Assistant: Mr M. OnyangoMr Rop Instructed by Kibet Rop and Company Advocates for the Plaintiff.Ms Nyagah instructed by Ngatia and Associates Advocates for the Defendant.