Kenindia Insurance Company Ltd v Jack & Jill Supermarket Limited (Civil Suit 119 of 2019) [2023] KEHC 347 (KLR) (Commercial and Tax) (27 January 2023) (Ruling)

Neutral citation: [2023] KEHC 347 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL SUIT 119 OF 2019

A MABEYA, J

JANUARY 27, 2023

BETWEEN

KENINDIA INSURANCE COMPANY LTD ..... APPLICANT

AND

JACK & JILL SUPERMARKET LIMITED ..... RESPONDENT

RULING

1. Before court is an application dated July 28, 2022. It was brought under article 50(1) of *the Constitution*, sections 137, 139 and 144 of the *Evidence Act*, sections 3A, 63(e) and 80 of the *Civil Procedure Act*, and Orders 45 Rule 1 and Order 51 Rule 1 of the *Civil Procedure Rules*.

2. The application sought that the ruling and order of this Court made on February 9, 2022 be reviewed and the legal opinion by the applicant/defendant's advocates on record appearing at pages 9-13 of the plaintiff's bundle of documents dated December 10, 2019 be expunged from the court's record.

3. The grounds for the application were set out on the face of it and on the supporting affidavit of Winnie Awuor sworn on July 28, 2022. It was contended that during the hearing of the matter on November 9, 2022, the defendant's advocate objected to the production of the legal opinion dated December 3, 2013 on the grounds that it was a privileged document and there had been no waiver on the same by the defendant.

4. That the plaintiff argued that the defendant had produced the opinion at the proceedings before the Insurance Regulatory Authority (IRA) and it was a public record, thus the defendant had waived its privilege.

5. That the Court disallowed the objection vide its ruling of February 9, 2022 and found that the legal opinion was protected by privilege, but if the defendant produced it by its own volition, the privilege was waived and the plaintiff could produce the opinion.

6. That however, the Court however invited the defendant to prove that it had not submitted and produced the document and waived its privilege as contended by the plaintiff. That the defendant had subsequently perused the proceedings before IRA and found that upon the plaintiff's then advocates request for the defendant's assessor's report, IRA's Manager one Mrs. Monicah Thirima, shared the report as well as the legal opinion with the plaintiff's advocate vide an email sent on November 3, 2017.

7. That there was however no indication that the defendant shared the opinion with the plaintiff, IRA, or any other person. That without prejudice, even if it had shared the opinion with IRA, IRA's email disclaimer indicated that the contents of the email were confidential, and if sent to the wrong recipient, any disclosure or distribution was prohibited.

8. That the plaintiff's advocates had only requested for the report only thus the legal opinion was mistakenly sent to it. Consequently, the plaintiff was not entitled to rely on it as it remained privileged.

9. The respondent opposed the application vide the replying affidavit sworn by Schon Ahmed Noorani on August 25, 2022, and Grounds of Opposition similarly dated August 25, 2022. It was contended that the Court had pronounced itself on the issue of inadmissibility of the legal opinion thus the application for review was res judicata and sought re-litigation of decided issues.

10. That upon lodging a complaint with IRA against the defendant for its failure to indemnify the plaintiff under several policies, the defendant appointed M/s Protectors Limited as their agents in those proceedings, and instructed the said agent to generate a report for production before IRA. That the plaintiff's advocate and the agent freely exchanged documents for transparency in the proceedings. That the report submitted to IRA included a bundle of annextures including the impugned legal opinion by M/s Oraro & Co. Advocates.

11. That the defendant sought to rely on that report but had conveniently left out the annexures, thus the report was incomplete. That the report was voluntarily submitted to the plaintiff by the defendant through their agent and the same amounted to direct or indirect waiver of privilege. That the agent never protested to the use of the information. That the report was sent to the plaintiff's former advocate thus the allegation that they were not the intended recipients was false.

12. The application was heard orally in court on November 10, 2022. Mr. Mbaluto, Learned Counsel for the defendant argued that the legal opinion was privileged and it was mistakenly forwarded to the plaintiff together with the loss adjusters report and a fee note. That where a party discloses information by mistake, it does not amount to waiver. That the legal opinion had not been pleaded and its production was unnecessary.

13. On the other hand, Mr. Maingi Learned Counsel for the plaintiff submitted that the plaintiff had demonstrated how it obtained the legal opinion through the defendant's agent who willingly tendered the report to IRA. That there was an intention to waive the privilege. That even a mistake could waive privilege and the objection was belated as it came after pre-trial.

14. Mr. Mbaluto responded that the authorities relied on were clear that one cannot waive privilege by mistake and that the loss adjustor was not the maker of the document.

15. This Court has considered the pleadings, evidence and submissions made by Learned Counsel. The main task is to determine whether the defendant waived its privilege by availing the legal opinion to IRA.

16. Vide this Court's ruling of February 9, 2022, the Court made a finding that according to section 137 of the *Evidence Act*, the legal opinion was privileged, but the same was waived if it was proved that the defendant had produced it in the proceedings before IRA. The Court found that if the document was truly produced at those proceedings, it would have been prejudicial to the plaintiff to strike it out at that stage.

17. In the premises, the Court invited the defendant to demonstrate that it had not produced the same at the said proceedings. This was to enable this Court determine whether or not the document was privileged. Based on this background, the application cannot be said to be res judicata and is fit for determination on merit.

18. The proceedings before the IRA and correspondence between the parties were produced before this Court as WA1-W4. The plaintiff contended that the defendant had appointed M/s Protectors Limited as it agent to represent it before the Tribunal. That the said Protector's Limited shared their report with IRA and the legal opinion was attached thereto and therefore formed part of the report. There is evidence in the correspondence in annexure WA-3 that indeed, M/s Protector Limited was acting on behalf of the defendant. The defendant did not deny this allegation.

19. The rules of agency dictate that any act done by an agent is deemed to be done by its principal. There is evidence that both the report and the legal opinion formed part of the proceedings before the IRA. There is also evidence that the report and legal opinion was submitted by the defendant's agent, and subsequently sent to the plaintiff.

20. From the email dated November 3, 2017 sent from the plaintiff's advocate, it can be inferred that the legal opinion had been attached to the report and thus formed a part of it. It was written that;

> " In toto, the assessors report including the legal opinion attached thereto acknowledges the validity of Jack & Jill's claim..."

21. There is enough evidence to support the allegation that the legal opinion formed part of the proceedings before the IRA having been produced by the defendant's agent on its behalf. It would seem that from the onset, the plaintiff relied on the legal opinion in support its case and there was no objection from the defendant either before the IRA or during pre-trial before this Court.

22. In *Tom Ojienda t/a Tom Ojienda & Associates Advocates v Ethics and Anti-Corruption Commission & 5 others* [2016] eKLR, the court found that privilege was waived a client voluntarily submitted his documents to investigators. It was held that: -

> " In the nature of things therefore, the investigation had to follow a paper trail starting from the client who voluntarily availed its documents to the investigators and necessarily the next point of call was the Petitioner's bank account. If the client then voluntarily waives any privilege of communication, how can the advocate benefit from that privilege? Under section 134(1) of the *Evidence Act*, the privilege flows from the express consent of the client and not the advocate.

23. Though the defendant sought to rely on the email disclaimer by IRA, the same relates to emails that are sent erroneously to unintended recipients. That is however not the case before me. The disclaimer is inapplicable owing to the fact that the defendant's agent intended to submit the report and its attachments to IRA as per the agreement in the various meetings and proceedings before IRA.

24. Further, upon the plaintiff's advocate request for the report vide their emails of July 21, 2017 and August 21, 2017, IRA's official willfully availed the report and its attachments to the plaintiff's advocate. The plaintiff's advocate was therefore not a wrong recipient of the email forwarding the documents such that the disclaimer would be applicable.

25. It was submitted for the defendant that the opinion was sent by mistake. Authorities were cited to support the position that privilege is not lost if a document is disclosed by mistake. My view is that, nothing was produced to show that the defendants agent disclosed the report together with the opinion to the IRA proceedings by mistake. There is nothing to show that the said agent did not intend that the IRA does not consider or see the said opinion. Accordingly, I reject the submission that the same was by mistake.

26. In any event, the fact that the plaintiff produced that document in its bundle of documents way before the trial, was a sure and clear intention on its part that it intended to rely on it. The bundle was served upon the defendant in good time. At no time after service or even at pre-trial was any objection raised. It is at the pre-trial stage that such objections are usually supposed to be taken. Raising the objection so late in the trial is but evidence that the same is an afterthought.

27. In view of the foregoing, the Court finds no merit in the defendant's application and proceeds to dismiss the same with costs to the plaintiffs. Consequently, the plaintiff will be at liberty to have that part of PExh1 that was excluded from the exhibit produced in its entirety and the same be referred to in the evidence accordingly.

28. The hearing will proceed on the allocated dates as earlier fixed.

It is so ordered.

DATED and **DELIVERED** at Nairobi this 27th day of January, 2023.

A. MABEYA, FCIArb

JUDGE

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