



**Britind Industries Limited v APA Insurance Limited (Civil Case 183 of 2016)
[2023] KEHC 956 (KLR) (Commercial and Tax) (17 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 956 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 183 OF 2016
A MABEYA, J
FEBRUARY 17, 2023**

BETWEEN

BRITIND INDUSTRIES LIMITED PLAINTIFF

AND

APA INSURANCE LIMITED DEFENDANT

JUDGMENT

1. The plaintiff instituted this suit against the defendant by a plaint dated May 13, 2016. It sought judgment against the defendant for special damages amounting to Kshs 82,333,324.78, general damages for expenses paid to experts and consultants, loss of business and business profit and an order for aggravated damages.
2. The plaintiff's case was that on December 31, 2015, its factory and business premises caught fire and all the plant and machinery, manufactured products, raw materials, finished products, furniture and fittings were destroyed by the fire. It was the plaintiff's case that it was insured against losses resulting from fire by the defendant under an insurance contract for the period of November 12, 2015 to November 11, 2016.
3. That despite demand, the defendant refused to pay the claim alleging that the plaintiff may have caused the fire. The plaintiff contended that the defendant's investigator influenced witnesses to change their statements and delayed to complete investigations. On that basis, the plaintiff prayed for judgment against the defendant as aforesaid.
4. By a defence dated June 7, 2016, the defendant admitted insuring the plaintiff against business risks and losses arising from fire. That the reason why it refused to settle the plaintiff's claim was because the plaintiff was guilty of non-disclosure of material facts. That the plaintiff acted in unethical behavior by attempting to defraud the defendant. It prayed that the claim be dismissed.



5. At the hearing the plaintiff paraded 8 witnesses. Pw1 was Santosh Kumar Singh, a director of the plaintiff company. He relied on his witness statement dated May 17, 2016 and produced the bundles of documents dated October 11, 2016 and June 27, 2018 as exhibit 1(a) and (b), respectively.
6. He testified that before the insurance policy was signed, the defendant had conducted a risk assessment and valuation by Regent Valuers who gave the value of the machine and property as Kshs 63.25 million. That on December 31, 2015 while he was at a party he received a call from the security contractor who informed him that his company premises was on fire. On receiving the news, he rushed to the scene and with the help of a fire brigade, the fire was put out. He testified that the Insurance investigator asked him for a bribe in order for him to write a favourable report.
7. In cross examination, he stated that the materials the company manufactured were highly flammable. That the fire and burglary report gave recommendations on the insured property which he had complied with. That on the day the fire broke out, a security man saw a man running away from the premises and an examination of the padlock showed that it was cut and the door hinges broken. He testified that he met Mr Ndegwa (Dw4) several times in hotels but he never recorded a statement with him. That Dw4 had asked him for a bribe which prompted him to report the matter to the defendant and the police.
8. In re-examination, he clarified that he wrote to the defendant informing them that Dw4 was demanding money from him in exchange for a good report from him. That the police investigated the incident and concluded that he, Pw1 was not involved in the fire incident.
9. Donald Collins Odhiambo Akoko (Pw2) was a quantity surveyor who was contracted by the plaintiff to ascertain the cost of installation works. He carried out the valuation and ascertained that they would cost Kshs 35,130,575/-. He produced a bill of costs as his evidence to that effect.
10. Charles Ayoko Abukuse (Pw3) was a caretaker at the Tetrapak. He confirmed that the end of year party was in Tetrapak a neighbouring company and that he saw Pw1 at the party.
11. Yasser Bhatti testified as Pw4. He told the Court that he owned the security company known as Black Hawk Security Limited that had been contracted to offer security services at the plaintiff's factory. On the material night, he received a call from one of his guards reporting the fire and he immediately informed Pw1 of the same and proceeded to the scene. By the time he got there, a crowd was already forming and on the arrival of Pw1, he helped with opening of the gate. His statement was that the padlock was tampered with and he increased security guards at the factory after the incident.
12. Pw5 Hellen Anesiwas an employee of the plaintiff. She testified that on the material day and time, she was attending the end of year party with all the other employees of the company. That Pw1 was with the rest of the employees at the party. That Pw1 shouted fire then took off and the rest of the employees followed him to the factory. Upon reaching there, they realized that the padlock had been cut and the factory was on fire.
13. Pw6 Patrick Wafula Sakwawas a guard with Black Hawk Security Limited. When he arrived at the plaintiff's factory for duty that day, he patrolled the area and confirmed that all the locks were secure. That when he saw the fire, he informed his boss Pw4 of the fire. Pw4 arrived at the premises and shortly thereafter Pw1 came and helped in opening the gate. Later on, he was contacted by Dw4 and they met at south B. Dw4 gave him Kshs 500 for him to say that Pw1 was in the building.
14. PW7 was Mr Jomo Kerochi Gwako. He testified that he was a security guard at the time guarding a company known as Indian Spray Auto Garage that was situated opposite the plaintiff's factory. On the material night, he witnessed the fire and together with others tried to assist where they could. Shortly



- after the incident, he was approached by Dw4 who took him to town, bought him some drinks and made him sign a statement. Dw4 gave him Kshs 500/- and on another day took him to an office where he was made to sign a document without knowing the contents thereof. He denied the contents of that affidavit. He denied that there were any vehicles outside the premises and further denied that Pw1 was inside the premises or ever asked for their help in opening the gate.
15. PW8 Engineer Omondi Eric Ouma, a Structural Engineer was engaged by the plaintiff to carry out structural examination of the premises after the incident. He confirmed that the building was extensively damaged by the fire and could not withstand structural integrity test. He produced his report as exhibit 1A.
 16. The defendants called a total of 4 witnesses. DW1 was Mr John David Miners, a Loss Adjustor. He prepared a report dated March 11, 2016 wherein he advised that the quantum on damage ought to be Kshs 11,911,258/-. In cross examination, he testified that he engaged experts to advise on the correct scope of work. He did not consider the plaintiff's quantity surveyors report.
 17. Professor Joseph Karanja Thiong'o a Chemical Scientist from the University of Nairobi testified as Dw2, He told the Court that he was engaged by the defendant to investigate the possible cause of the fire. Upon doing his investigations and analyzing samples from the plaintiff's factory, he concluded that the cause of fire was arson. He prepared a report which he produced as evidence. That in his investigation, he found seven distinct fire start up points in different rooms and houses and buildings on either side. That turpentine could have been used either as an accelerant because there was no evidence of common fire accelerating agents such as petrol, diesel or parafin.
 18. Festus Mwenda Githinji, an Assistant Claims Manager with the defendant was Dw3. He confirmed that the complaints about the investigator were made to the defendant before the decision of rejecting the claim was made. However, he did not act on the plaintiff's complaints against Dw4. After receiving the first report from Dw4, he instructed him to file another supplementary report.
 19. Dw4 George Ndegwa Muhiawas the investigator who was commissioned by the defendant to investigate the incident. He carried out his investigations and prepared two reports dated February 2, 2016 and February 26, 2016, respectively. He denied asking Pw1 for a bribe in exchange of a good report. That he had never been charged of the bribe allegations. That he had examined the gate at the plaintiff's factory and the padlock was still intact and not broken. It was his testimony that it was true that he had a meeting with Pw7 and recorded a statement. He thereafter gave him bus fare.
 20. In cross examination, he admitted having no Certificate as a trained forensic investigator. He admitted not having any witness who saw Pw1 lighting the fire although he had indicated in his report that it was Pw1 who had lit the fire. He admitted giving Pw7 money three times.
 21. The parties filed their respective submissions which I have considered. It is not in dispute that there existed a contract of insurance covering the plaintiff from loss resulting from fire for the period between November 12, 2015 and November 12, 2016. The sum insured is also not disputed. What the parties contest is the cause of the fire and whether the plaintiff ought to be indemnified by the defendant for the loss.
 22. By an Insurance policy dated November 27, 2015, the defendant agreed to indemnify the plaintiff against loss occasioned by fire. According to the policy schedule, the sum insured was Kshs 83,450,000/-. It was a term of the policy that the defendant would pay the insured the value of the property at the time of the happening of the destruction or the amount of the damage or reinstate or replace the property.



23. On the night of December 31, 2015, an incident occurred whereby the plaintiff's factory was engulfed in fire as a result whereof the plaintiff incurred losses. The plaintiff reported the incident to the defendant but the latter refused to pay the sum insured on the allegation that the fire was self-inflicted, thus the genesis of this suit.
24. From the evidence on record, the plaintiff's evidence was that the fire was caused by a person not known to it. It occurred when its employees were attending an end of year party away from the premises. That Pw1 was called while he was at that party and was informed that the plaintiff's factory was on fire. That as a result of the fire, the plaintiff suffered the loss claimed. As already stated, the defendant would hear none of that and claimed that the fire was started by Pw1.
25. The basic principle of proof in civil matters is set out in section 107(1) and (2) of the *Evidence Act* which provides that: -
- (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."
26. Further, section 109 of the *Evidence Act* provides: -
- "The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence..."
27. In *Madison Insurance Limited v Solomon Kinara t/a Kisii Physiotherapy Clinic* [2004] eKLR, the Court of Appeal expressed itself as follows: -
- "In their book "The Law of Insurance", 2nd Edition, under the heading "The Contract of Insurance" and sub-heading "Indemnity" at page 4, Preston and Colinvaux state as follows:
- 'Indemnity, it has been said, is the controlling principle in insurance law, and by reference to that principle a great many difficulties arising on insurance contracts can be settled. Except in insurance on life and against accident the insurer contracts to indemnify the assured for what he may actually lose by the happening of the events upon which the insurer's liability is to arise, and in no circumstances, is the assured in theory entitled to make a profit of his loss. That rule might be inferred as being the intention of the parties, having regard to the aim of a contract of insurance, but there are further powerful reasons for its application. Were it not so, the two parties to the contract would not have a common interest in the preservation of the thing insured and the contract would create a desire for the happening of the event insured against. Where in fact the assured has a prospect of profit, there and there only can arise the temptation to crime, fraud or such carelessness as may bring about the destruction of the thing insured.'
- That is very powerful language, but the passage nevertheless brings out the basic concept underlying a contract of insurance, namely that the party whose property is being insured pays premium not with the intention of making any profit out of the transaction but rather with the intention that were the items assured to be destroyed, stolen or damaged, the other party offering the policy would replace the stolen or destroyed item or pay the reasonable charges for its repair."



28. The defendant's failure to honour the insurance claim by the plaintiff was based on the grounds that the plaintiff was guilty of non-disclosure of material fact, that the fire was started by the plaintiff's director Mr Santos (Pw1). The burden of proof was therefore upon the defendant to show that the fire was willfully caused by the plaintiff's agent.
29. Pw1 testified that he was alerted of the fire by the owner of the security firm guarding the premises. He proceeded to the scene and with the help of other people and the fire brigade managed to control the fire. His evidence was corroborated by Pw3, Pw4 and Pw5 who testified that the Pw1 was at the end-year party. That he went to the scene after the fire had already started.
30. These testimonies are in contrast with that George Ndegwa (Dw4) who was the defendant's investigator. He relied on his investigation report dated February 9, 2016 wherein he observed that the fire was solely lit by Pw1. That Pw7, who was one of the guards from a neighboring property rescued Pw1 from the fire.
31. On his part, Pw7 distanced himself from the allegations of Dw4. He testified that Dw4 had made him sign documents which he did not know the contents of as he did not understand English. That Dw4 had given him money. Dw4 admitted giving Pw7 money three times.
32. From the evidence on record, the defendant's only evidence of the involvement of Pw1 with the fire is the affidavit sworn by Pw7. The said witness however repudiated the said affidavit and statement given to Dw4. Before Court are MPESA messages from Dw4 to Dw7. I saw Dw4 testify. He struck me as a shrewd person who would go to any ends to achieve what he wanted. I did not believe his testimony. I was not convinced that he only sent money to Pw7 for fare as he wanted the Court to believe. The view the Court took was that the money was meant to influence Pw7 to agree to implicate Pw1.
33. It should also be recalled that Pw1 and Dw4 had an encounter. It turned out not to have been a too good one because, out of it Pw1 accused Dw4 of asking for a bribe. Pw1 did not only report the matter to the defendant but did also report to the police. It is also worthy to note that even with such a damning report from its client, the defendant neither investigated the complaint nor did it take any action. It is likely that it is after Dw4 had failed to get the cooperation of Pw1 that he decided to implicate him.
34. It is not clear why DW4 had to take PW7 to his own advocate to sign an affidavit written in English. PW7 himself denied knowing the contents of the document he signed. Further, although he also took a statement from PW6, he did not make him swear an affidavit as he made PW7 do.
35. The Court finds that, other independent witnesses exonerated Pw1 from the possible involvement with the fire. Dw4 was at the defendant's bidding. His investigation and report was self-serving. His evidence is unreliable.
36. In this regard, I find that the defendant failed to demonstrate that it is Pw1 who started the fire or was involved in the cause of the fire. The upshot of this is that, the defendant was liable to indemnify the plaintiff for the loss suffered. This is so because, the plaintiff had established that the peril of fire was within the terms of the insurance policy. It is the risk that had been insured and it had attached.
37. The next issue is to establish the extent of the liability on the part of the defendant for the loss suffered. The question is whether the plaintiff is entitled to the whole amount as per the insurance policy or the defendant should only compensate a part thereof.
38. The insurance contract between the parties provides: -

“The company agrees (subject to the conditions contained herein or endorsed or otherwise expressed hereon which conditions shall so far as the nature of them respectively will permit



be deemed to be conditions precedent to the right of the insured to recover hereunder) that after payment of the premium of the property insured described in the said schedule or any part of such property be destroyed or damaged by fire or lightning at any time before 4 o'clock in the afternoon of the last day of the period of insurance named in the said schedule or of any subsequent period in respect of which the insured shall have paid and the company shall have accepted the premium requirement for the renewal of this policy, the company will pay to the insured the value of the property at the time of happening of the destruction or the amount of such damage or at its option reinstate or replace such property or any part thereof.

Provided that the liability of the company shall in no case exceed in respect of each item expressed in the said schedule to be insured thereon and in the whole total sum insured hereby, or such other sum or sums as may be substituted therefore by memorandum hereon or attached hereto signed by or on behalf of the company.”

39. From the foregoing, the defendant has three options either to pay the value of the property at the time the fire took place or to pay for the damage suffered or replace the property. The plaintiff submitted that the defendant ought to pay what was insured as the valuation report that informed the policy was only conducted two months before the fire.
40. On its part, the defendant submitted that the plaintiff's claim of Kshs 82,333,324.78 had not been strictly proved as the plaintiff had not provided the step by step calculation of how the amount was arrived at.
41. I have perused the report dated March 11, 2016 relied upon by the Loss Adjustor Mr Miners Dw1 and on the part headed construction building. He contended that the quantity surveyors priced bill was excessive and he therefore reduced the amount insured for the various items.
42. I note however that the report did not clearly demonstrate the basis for omitting some amounts and the reduction. For instance, with respect to the construction of the building, there was a reduction of Kshs 17.75 million from the overall cost of construction without giving detailed information of how Dw1 arrived at that figure. The same goes with the other items including the furniture.
43. The plaintiff's evidence shows that the business premises was operational before the fire occurred. It was the plaintiff's evidence that the factory closed down after the incident and it was not reopened. The loss was total. I am persuaded that the insured amount was contractual and thus the plaintiff had a right to require compensation as per the contract.
44. From the evidence on record, it is clear that the factory was exposed to structural damage with respect to the foundation and the walls. The same has to be rebuilt afresh. The evidence provided by the plaintiff is to the Court's satisfaction that the loss was total. The finished goods were completely lost and the plant and machinery badly damaged. I also take cognizance of the fact that the defendant had relied upon its own valuers report in coming up with the policy and the amount of insurance. It cannot therefore be allowed to depart from it in ascertaining the correctness of the claim or loss suffered. There was evidence that the loss suffered was total.
45. In the upshot, I find that the plaintiff has proved its case to the required standard. It has demonstrated that it is entitled to the sum insured and ought to be indemnified by the defendant to that extent.
46. I find merit in the claim for Kshs 82,333,324.78 against the defendant and enter judgment accordingly. The said sum shall attract interest at court rate from the date of the suit until payment in full.



47. The claim for loss of business cannot stand as the plaintiff did not demonstrate how the loss was mitigated. Further, there was no basis that was laid for the claim for exemplary damages. Those claims fail.

48. The plaintiff shall have the costs of the suit and interest thereon in any event.

It is so decreed.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF FEBRUARY, 2023.

A.MABEYA, FCIArb

JUDGE

