



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO.184 OF 2018

JIBRIL KONSE ALI.....PLAINTIFF

-VERSUS-

AIG KENYA INSURANCE COMPANY LIMITED.....DEFENDANT

RULING

Background

1. The Plaintiff/Applicant herein, **JIBRIL KONSE ALI**, sued the Defendant/Respondent through the plaint filed on 10th May 2018 seeking the following orders: -

- a) A declaration that the defendant in its refusal to compensate the plaintiff is in breach of the contract of insurance between the plaintiff and the defendant.*
- b) Compensation of the insured interest in the sums of Kshs 10,902,575.00.*
- c) Compensation for the actual and continuing losses suffered by the plaintiff as indicated in paragraph 8 and 13 above in the sums of Kshs 29,356,759.25.*
- d) Such other or further orders as this Honourable court may deem fit to grant.*
- e) Costs of this suit and interest thereon.*

2. The plaintiffs case is that he entered into a contract of insurance with the defendant in March 2014 wherein the defendant issued him with a standard cover policy insuring his hardware business against loss of damage by fire, lighting, bush fire, earthquake fire and shock, explosion, storm, tempest etc.

3. The plaintiff states that on 9th May 2015, a fire broke out at his hardware thus destroying his stock worth Kshs 16 million after which he lodged a claim with the defendant but that despite supplying the defendant with all the requisite documentation, the defendant rejected his claim thus necessitating the filing of this case.

Application

4. Through the application dated 3rd June 2019, the applicant seeks orders that: -

1. Spent

2. That this honourable court be pleased to issue an order directed at the defendant to produce and avail clear copies to the plaintiff herein the various documents in regards to matters in question in this suit, and particularly: -

a. All the documents particularized in the Plaintiffs' Notice to Produce dated 11th February 2019 and served on the defendant on 15th February 2019.

3. That the costs of this application be provided for.

5. The application is supported by the affidavit of **JIBRIL KONZE ALI** and is premised on the grounds that: -

- 1. The plaintiff entered into a contract of insurance with the defendant in March 2014 which was a standard cover policy insuring the Plaintiff's Hardware business against loss of damage by fire, lightning, bush fire, earthquake fire and shock, explosion, storm, tempest, flood overflowing and/or bursting of water pipes and tanks, aircraft, impact, riots, strikes, civil commotion and malicious damage and special perils. This insurance policy was renewed on 23rd March 2015.*
- 2. The plaintiff complied at all times with the numerous terms and conditions of the Insurance Policy and in particular remitting his insurance premiums on time, renewing the Insurance Policy as required and keeping accurately his stock records.*
- 3. Before the insurance policy was renewed on 23rd March 2015, the defendant through its agent visited the plaintiff's hardware where the renewal terms of the insurance policy were discussed. Upon assessing the plaintiff's inventory and stock records, the defendant through its agent approved and renewed the Plaintiff's Insurance Policy for the sum of Kshs 10,902,575.00.*
- 4. The plaintiff invested substantial sums of money and goodwill and entered into commercial obligations with third parties based on contractual terms of Insurance Policy and with the legitimate expectation that the defendant will at all times act fairly, consciously and in good faith in covering his hardware against the insured risks and compensating him of any loss and/or damage occasioned by any of the insured risks.*
- 5. On 9th May 2015, there was a fire outbreak in the Plaintiff's Hardware resulting from an electrical fault. In the absence of any affective equipment in this area, the fire spread throughout the hardware destroying the entire plaintiff's stock worth kshs 16,000,000.00 and his stocks records.*
- 6. The insurance cover being in place during the time pf the said fire, the plaintiff lodged a claim with the defendant on 19th May 2015 in accordance with the Insurance Policy, detailing on the Claim Form the various properties destroyed and the total value thereof. However, the defendant unlawfully, unfairly, uncontractually and speculatively rejected the claim, first on the alleged account of arson and later alleged breach of safe and books clause of the Insurance Policy.*
- 7. That prior to the fire the defendant's agent KCB Bank Moyale prepared and supplied the stocktaking list and conducted assessment/valuation of the goods that determined the insurance amount, hence the defendant is in possession of the said stocktaking list.*
- 8. Receipts and assessment forms are in the custody of the defendant since the defendant keeps records of the premiums paid.*
- 9. That therefore, the only person in possession of the said documents is the defendant/respondent herein.*
- 10. That this documents entails material that are very crucial to fair and just determination of these case and the applicant will be prejudiced if the same are not supplied.*
- 11. That the applicant has satisfied the requirement of 35(2) (b) of the Constitution as the information is required in the enforcement of the constitutional rights under the Bill of Rights.*
- 12. That the discovery is both a tool and an enabler of the right to access to information and fair hearing.*
- 13. That the documents are in possession of the defendant herein and there is no prejudice for their production, as they will be afforded an opportunity to file a supplementary list of witnesses and documents in response to materials applied herein.*
- 14. It is in the interest of justice that the orders sought in the present application to be granted.*

6. The respondent opposed the application through the Replying Affidavit sworn by **Grace Kabue**.

7. Parties canvassed the application by way of written submission which I have considered.

8. The main issue for determination is whether the applicant is entitled to orders for discovery.

9. The plaintiff is predicated on the provisions of Article 35(1) (b) of the Constitution and Section 69 of the Evidence Act which stipulate as follows: -

69. Notice to produce a document

Secondary evidence of the contents of the documents referred to in [section 68\(1\)\(a\)](#) of this Act shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, or to his advocate, such a notice to produce it as is required by law or such notice as the court considers reasonable in the circumstances of the case:

Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases—

“35 Access to information

(1) Every citizen has the right of access to—

(a)

(b) information held by another person and required for the exercise or protection of any right or fundamental freedom

69. Notice to produce a document

Secondary evidence of the contents of the documents referred to in [section 68\(1\)\(a\)](#) of this Act shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, or to his advocate, such a notice to produce it as is required by law or such notice as the court considers reasonable in the circumstances of the case:

Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases—

(i) when the document to be proved is itself a notice;

(ii) when from the nature of the case, the adverse party must know that he will be required to produce it;

(iii) when it appears or is proved that the adverse party has obtained possession of the original by fraud or force;

(iv) when the adverse party or his agent has the original in court;

(v) when the adverse party or his agent has admitted the loss of the document;

(vi) when the person in possession of the document is out of reach of, or not subject to, the process of the court;

(vii) in any other case in which the court thinks fit to dispense with the requirement.

10. Halsbury's Laws of England 4th Edition Volume 13 states as follows at paragraph 1 on function of discovery of documents: -

'The function of the discovery of documents is to provide the parties with the relevant documentary material before the trial so as to assist them in appraising the strength or weakness of their relevant cases, and thus to provide the basis for the fair disposal of the proceedings before or at the trial. Each party is thereby enabled to see before the trial or to adduce in evidence at the trial relevant documentary material to support or rebut the case made by or against him, to eliminate surprise at or before the trial relating to the documentary evidence and to reduce the cost of litigation.'

11. In *Concord Insurance Company Limited v NIC Bank Ltd* [2013] eKLR the court defined discovery as follows: -

"The disclosure by the defendant of facts, titles documents, or other things which are in his exclusive knowledge or possession, and which are necessary to the party seeking the discovery as a part of a case or action pending or to be brought in another court, or as evidence of his rights or title in such proceedings"

12. The purpose of discovery was discussed in *ABN Amro Bank N.V. v Kenya Pipeline Company Ltd* [2019] eKLR as follows: -

"The purpose of discovery is mainly to ensure that all documents or information necessary for the just determination of the suit are made available to the parties as well as the court"

13. In the said *ABN Amro Bank* case (supra) the court further stated as follows on the threshold to be met by an applicant for an order of discovery: -

"The application I am faced with is essentially one of disclosure of information held by another person which the applicant says is relevant and necessary to these proceedings, for, they are directly connected with the suit and will assist the court to determine the real issues in controversy completely and effectually. Discovery as a compulsory disclosure, at the request of a party, of information that relates to the litigation in a civil suit is provided for in Section 22 of the Civil Procedure Act and Order 11 rule 3(2) of the Civil Procedure Rules, and given the nature of the discovery, I would class it as a means of access to information in the sense of Article 35(2) (b) of the Constitution. And as Justice Kimondo J stated in the Oracle productions case, I too conclude that "the true purpose of discovery is to level the litigation field, to expedite hearing, reduce costs and allow parties to gauge the case they will face at trial." It, therefore, serves a higher objective as the enabler of fair hearing. Needless to state primary devices of discovery are interrogatories, depositions, request for admissions, inspection of documents and requests for production

of documents etc. But such application seeking information and documents is measured on a new yardstick; the applicant must; a) identify the information and documents; and the person holding the information; and d) show that the information and or documents are required for the exercise or protection of a right or fundamental freedom. The latter enjoins the applicant to show the information is relevant and necessary to determination of the suit. This constitutional test must be met before orders of discovery are issued.”

14. In *Rafiki Microfinance Bank Ltd v Zenith Pharmaceuticals Ltd* [2016] eKLR the court stated as follows regarding the circumstances under which order for discovery will not be made: -

“As illustrated by the learned authors in Halsbury’s Laws of England, Volume 13 at paragraph 38, the court will not make any orders for documents which have no significance or relevance to the matter. The learned authors state: -

“Discovery will not be ordered in respect of an irrelevant allegation in the pleadings, which even if substantiated, could not affect the result of the action nor in respect of an allegation not made in the pleadings or particulars nor will discovery be allowed to enable a party to “fish” for witnesses of for a new case, that is to enable him frame a new case. Each case must be considered according to the issues raised; but where there are numerous documents of slight relevance and it would be oppressive to produce them all, some limitation may be imposed.”

15. Applying the principles espoused in the above cited cases and text to the instant application. I note that the defendant did not dispute the plaintiff’s position that it entered into a contract of insurance with the defendant. In fact, at paragraph 3 and 4 of the defence, the defendant states as follows: -

“3. In response to paragraph 3 of the plaint, it is admitted that the defendant insured the Plaintiff’s business- Tabarak Hardware and Spare Parts (“the Hardware”). The defendant avers that this insurance was predicted upon the policy between the parties. The defendant is a stranger as to whether the plaintiff operated the said business at all material times and therefore denies the remainder of the contents of paragraphs 3 of the plaint and puts the plaintiff to strict proof thereof.

4.Paragraph 4 of the plaint is admitted save to add that the insurance policy between the parties required strict compliance with its terms and conditions on the part of the plaintiff. The defendant denies that any liability could arise where the plaintiff fundamentally breached the terms of that insurance policy and/or the law.”

16. The defendant also admitted paragraphs 5 of the plaint wherein the plaintiff states as follows: -

“5. The plaintiff entered into a contract of insurance with the defendant in March 2014 which was a standard cover policy insuring the plaintiff’s hardware business against loss of damage by fire, lighting, bush fire, earthquake fire and shock, explosion, storm, tempest, flood overflowing and/or bursting of water pipes and tanks, aircraft, impact, riots, strikes, civil commotion and malicious damage and special perils. This insurance policy was renewed on 23rd March 2015.

PARTICULARS OF THE INSURANCE POLICY

Insured	Jibril Konse Ali
Insurer	AIG Kenya Insurance Co. Ltd
SME Policy No.	0700480668
Risk Note No.	NBD0011390
Value/Sum insured	10,902,575.00
Period of Cover	23/03/2015 to 22/03/2016
Lien Clause	Kenya Commercial Bank Ltd

17. The plaintiff’s Notice to produce documents dated 11th February 2019 requires the defendant to produce the following documents at the hearing of the case: -

- 1. Stocktaking lists of the Plaintiff’s Hardware dated 26th January 2015 prepared and supplied by the Defendant’s Agent KCB Bank Moyale.**
- 2. Receipts and/or statements of premiums paid to the defendant by the plaintiff with respect to SME Policy number 070048068 for the years 2014 and 2015.**
- 3. Assessment Forms and/or valuation reports on the assessment and/or valuation of the Plaintiff’s Hardware and Stock dated**

March 2015.

18. The plaintiff explained, both in the application and the affidavit in support thereof that its stock records were destroyed in the fire that gutted his entire hardware shop and stock.

19. At the hearing of the application the respondent's counsel **Mr. Wakhisi** submitted that the documents sought by the plaintiff are actually in the knowledge, possession, under custody of the plaintiff and that the third document was in fact already filed by the plaintiff in their bundle of documents.

20. I have perused the plaintiffs list of documents filed on 10th May 2018 and I note that the 3rd document listed therein is Loan Application and Approval form dated January 2014 as opposed to the document listed at No. 3 on the Notice to produce documents which are Assessment Forms and valuation report.

21. Having noted the plaintiff's position that its records were destroyed in the fire that led to the instant claim, I find that it cannot be expected that the plaintiff has the documents sought in the discovery. My take is that the instant application would not have been filed if indeed the plaintiff had the documents in question. My finding is that the documents listed in the Notice to Produce Documents are relevant and necessary for the fair and just determination of the suit herein as they are limited to the matters in dispute.

22. Consequently, I direct that the defendant produces the documents particularized in the Notice to Produce Documents dated 11th February 2019 within 14 days from date of this ruling failure to which the defendant's defence will be stand struck out with costs.

Dated, signed and delivered via Microsoft Teams at Nairobi this 22nd day of April 2021 in view of the declaration of measures restricting court operations due to Covid -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Wakhisi for Ms Ngige for Defendant.

No appearance Muma & Kanjama for Plaintiff

Court Assistant: Sylvia.