REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CIVIL CASE NO. 1 OF 2019

THE KENYA ALLIANCE INSURANCE CO. LTD.....PLAINTIFF

VERSUS

EUNICE NYABOKE NYARIBARI.....DEFENDANT

AND

CLEOPHAS NYAMONGO.....INTERESTED PARTY

JUDGMENT

This court dismissed the plaintiff's suit against the defendant by a ruling dated 29th March, 2019 and the judgment herein pertains to the Defendant's counter claim against the plaintiff.

In summary the prayers in the counter claim are: -

> ***"a) A declaration that the Plaintiff/Defendant to the counter claim is fully responsible and liable to offset the outstanding loan payable to NIC Bank Limited of Kshs.2,544,040.96 together with accrued interests and penalties if any.***
>
> ***b) That the court do direct the plaintiff to reimburse the defendant/Plaintiff Kshs.1,602,980 being her insurable interest in the suit vehicle the same being calculated as a sum of Kshs.881,200 deposit paid for the vehicle, a sum of Kshs.113,000/- being loan agreement fees, Kshs.2, 544, 040.96 owed to NIC Bank in regard to the suit motor vehicle and monthly instalment of Kshs.86,940/- with effect from January 2017 to July, 2017 (In total a sum of Kshs.608,580) when the vehicle was involved in the accident.***
>
> ***c) In the alternative the plaintiff be compelled to indemnify the defendant/plaintiff in the counter claim by repairing and restoring the insured motor vehicle registration No. KCK 263 C to its pre-accident state and clear all the outstanding monthly loan instalment together with all the accrued penalties and interest payable to NIC Bank Ltd as per the terms of Asset Finance Agreement, from the date of accident up to the time when the insured vehicle shall be handed back to the defendant duly repaired.***
>
> ***d) Costs of the suit and counterclaim.***
>
> ***e) Interest at court rates (14%) from the date of filing suit until payment in full.***
>
> ***f) Exemplary damages for acting with impunity and fraudulent in its dealing thus exposing the defendants to serious loss, hardship and financial embarrassment."***

The plaintiff disputed the defendant's counter claim in total in a defence to counterclaim filed on 5th December, 2019 and put her to strict proof.

The genesis of this case is an insurance policy taken by the defendant from the plaintiff in respect to motor vehicle registration No. KCK 263C after she purchased it through a hire purchase agreement with NIC Bank. On 25th July, 2017 the motor vehicle was transporting goods for the defendant's client to Nairobi from Kisii when it was involved in an accident at a place called Damside along the Keroka-Kisii Road. It was said that the accident occurred when the driver of the vehicle lost control, veered off the road, hit a cliff and overturned as a result of a tyre burst. Following the accident the motor vehicle's turn boy filed a suit for damages in Keroka Principal Magistrate's court to wit Keroka PMCC No. 23 of 2017 prompting the plaintiff to bring the disclaimer proceedings which this court dismissed on 29th March, 2019. It was and still is the plaintiff's contention that it is not liable to satisfy any claim arising from the accident be it to compensate the defendant or to

repair the motor vehicle because according to it the motor vehicle was ostensibly being used for a purpose other than the one it was insured for. According to the plaintiff the motor vehicle was insured for risks arising from own use of the motor vehicle but not for risks arising from hire and reward. The defendant's case however is that the insurance cover she took from the plaintiff was for hire and reward (general cartage) and that therefore the plaintiff was liable to repair the motor vehicle or to compensate her as agreed in the contract of insurance. It is also her contention that as a result of the plaintiff's blatant refusal and/or neglect to repair the motor vehicle she was unable to service the loan with NIC Bank and the loan continues to accrue interest and penalties to her detriment and further that her business has been paralysed as a result of the plaintiff's conduct and as such the plaintiff should be made to compensate her.

She also contended that the plaintiff engaged in fraudulent illegal and unfair business practices through the Bank which was its agent. She produced a risk note which she alleged she was made to sign by the plaintiff's agent at the Bank and stated that she had made it clear to the bank's agent that she was going to use her vehicle for hire and reward but not otherwise. At the hearing the defendant stated that upon entering into the hire purchase agreement with the Bank the Bank told her that it had insurance and that is how she got the insurance with the plaintiff. She stated that the insurer did not furnish her with any documents but that the bank assured her that whether the lorry got an accident or caught fire it still belonged to the bank and it was covered by the insurance they had given her. She stated that she dutifully paid the hire purchase installments which includes the insurance premiums without any default until the lorry was involved in the accident. She testified that she reported the accident to the police and to the plaintiff following which the vehicle was towed to Keroka police station and an inspection was carried out at the behest of the plaintiff. Thereafter the plaintiff caused the vehicle to be towed to a garage in Kisumu for repairs but it was never repaired because the plaintiff did not authorize the repairs. She testified that when she approached the Bank it told her that the plaintiff was responsible for the repairs. She stated and adduced evidence by calling a witness from the Insurance Regulatory Authority (IRA) that when the plaintiff refused to pay she lodged a complaint with the Insurance Regulatory Authority (IRA) which heard her and the plaintiff and ruled in her favour and ordered the plaintiff to repair the motor vehicle. She stated that thereafter the plaintiff wrote a letter dated 15th April, 2019 to the Insurance Regulatory Authority (IRA) in which it indicated that it would compensate her. She stated that during the proceedings at the Insurance Regulatory Authority (IRA) the plaintiff produced a proposal form purportedly signed by her but which she disputed and when she reported the forgery to the police investigations were instituted which subsequently revealed the signature was not hers. She contended that because of passage of time the vehicle has been vandalized to a shell and has become irreparable. She stated that as a result she had suffered damage as she could no longer carry on her business and she had to borrow money whenever she required transport to Nairobi. She further stated that the Bank was claiming Kshs. 4 million yet she cannot pay as the vehicle was her only a means of income. She contended that she would not be owing the Bank that amount but for the plaintiff's refusal to repair the vehicle. She also contended that the vehicle used to pay itself. She reiterated that she continued paying the insurance premiums even after the lorry was taken to the garage. She urged this court to grant her the prayers in the counter claim.

The plaintiff/Defendant- in-counter-claim called two witnesses. Antony Kariuki (DW1) the Legal and Technical Manager at the company testified that the cover pertaining to motor vehicle KCK 263C was purchased by NIC Insurance Agency a wholly owned subsidiary of NIC Bank which financed the defendant to purchase the vehicle. He was emphatic that the vehicle was insured for carriage of own goods or stock in trade and stated that if the cover issued to the Defendant was falsified only NIC Bank could answer for it. He stated that what transpired is that NIC Bank and NIC Insurance Agency internally issued a Risk Note which was for general cartage which is perhaps the cover they intended to purchase but they instead purchased from the plaintiff a cover for own goods. He stated that after the accident and after this court ruled that the case filed by the Plaintiff to repudiate liability was filed out of time the plaintiff caused the vehicle to be inspected and the cost of repairs to be assessed and the same were assessed at Kshs. 300,000/-. He stated that the plaintiff agreed to restore the vehicle into the state it was in before the accident and was always willing to pay the cost of repairs limited to Kshs. 300,000/- only. He contended that the company had not received any assessment report to discredit the cost of repairs as assessed by its own Assessor and hence that is all the plaintiff is liable to pay. He contended that the loan agreement was a private contract between the defendant and NIC Bank and as such the plaintiff is not bound or liable to refund the loan deposit, the loan instalments paid or the sum demanded from the defendant by the Bank. He urged this court to dismiss all the prayers in the counter claim and instead enter judgment that the defendant do pay the cost of repairs of Kshs. 300,000/-. He also urged this court not to find the plaintiff liable to pay the costs of the suit as it had offered to pay the sum of KSsh.300,000/- before the plaintiff filed this suit. He produced a letter dated 26th March, 2019 written to the defendant by the plaintiff and an email from her Advocate on record dated 29th March, 2019. He stated that the plaintiff's position is that it is willing to pay the cost of repairs. In cross examination he conceded that although the accident occurred in 2017 the defendant has to-date not been indemnified. He also conceded that following the recommendation of the Insurance Regulatory Authority the plaintiff accepted it was liable to indemnify the Defendant. He however insisted that the bank was the agent of the defendant but not the plaintiff and contended that the only reason the Plaintiff accepted liability was because the Insurance Regulatory Authority, which is the insurance industry's regulator, ruled that they do.

Francis Mwangi Wambui DW2, a Motor Vehicle Assessor at the Plaintiff insurance company testified that he inspected and assessed the vehicle's costs of repairs at Sunshine Kisumu Garage and prepared a report dated 1st September, 2017. He stated that his opinion was that the vehicle was repairable at Kshs. 300,000/-. He stated however that the had not seen the vehicle since the inspection and assessment and he cannot vouch for its current state.

Counsel for the parties summed up their client's cases and made their closing arguments through written submissions. While counsel for the Defendant urged that the Defendant was entitled to a lot more than the sum of Kshs.300,000/- that is being offered by the Plaintiff, Counsel for the plaintiff maintained the position that the plaintiff is not bound and is not liable to indemnify the defendant the reason being that at the time of the accident the motor vehicle was being used for a purpose other than that for which the plaintiff had insured it. My considered view however is that this position can no longer hold as it was overtaken by the plaintiff's acceptance of the Insurance Regulatory Authority's determination that it was liable to pay and its admission in writing and orally in this court through the evidence of DW1. Following the proceedings at the Insurance Regulatory Authority and as was stated by Antony Kariuki (DW1) in his testimony, the plaintiff wrote a letter to the defendant dated 26th March, 2019 in which it stated:-

> ***"*****.....**
>
> ***Dear Mrs. Nyaribari,***
>
> ***RE: ACCIDENT TO YOUR M/V REG. NO. KCK 263C***

Please refer to the above and the telephone conversation today with our Mr. Augustus Kioko.

You advised that you have since instructed your advocates to handle this matter and advised us to get in touch with you only through them.

That does leave us in a difficult position, seeing we don't have their contacts. Considering there is no longer any contention in the matter, we can only wait to hear from them.

Yours faithfully,

(signed) signed

A.K. Ndeleva A.N. KARIUKI

(Assistant Claims Manager) (Head –Technical & Legal Services)

*****.....”(Underlining mine)***

On 15th April, 2019 the plaintiff also wrote a letter to the Insurance Regulatory Authority for the attention of Emily Onyango and stated:-

“RE: ACCIDENT TO M/V REG. NO. KCK 263C ON 1/07/2017 INSURED: EUNICE NYABOKE NYARIBARI

Please refer to the above matter. Following meetings with IRA where we, the Baucassurance team from NIC Bank and the policy holder made respective representations, we have since resolved to indemnify the insured, and did in fact call on her with a settlement proposal on the AOD Claim. The motor vehicle is repairable, and we had deemed the easiest, most convenient means of indemnify to be a cash settlement of the repair costs.

Considering that the insured insisted that we deal with her advocates we are dispatching that offer to them.

With regards to the third party personal injury suit.....

Kind regards

(signed) signed

A.K. Ndeleva Antony N. KARIUKI

(Assistant Claims Manager) (Head –Technical & Legal Services)”

(underlining mine)

Antony Kariuki (DW1) produced in evidence a letter (EXb D8) dated 13th April, 2019 written to the Plaintiff by the defendant's Advocates. In the letter the Advocate acknowledged the plaintiff's letter dated 26th March 2019 and regretted to note that the plaintiff was yet to settle the claim despite its express admission that there was no more contention in the matter. The Advocate then gave the plaintiff five days to do so failing which he would contact the Insurance Regulatory Authority to request them to take measures against the plaintiff. Clearly therefore it was not the defendant's advocate that caused the none payment. In fact it would appear that it is the letter (EXBD.8) by the defendant's advocate that prompted the plaintiff's letter dated 15th April, 2019 (EXBD. 6) to the Insurance Regulatory Authority referred to earlier. It is my finding that the aforementioned letters by the plaintiff and DW1's testimony in court constitute an admission that the Plaintiff is bound to indemnify the defendant and the issue of whether they are liable or not can no longer arise. It is instructive that the letters were not written on a "without prejudice" basis and hence are an express admission that the plaintiff would indemnify the defendant. Indeed, in his testimony, Antony Kariuki (DW1) admitted that the plaintiff was bound to indemnify the defendant. He also stated on oath that the plaintiff was still willing to do so.

It is also my finding that the issue of whether the NIC Insurance Agency was an agent for the plaintiff or for the defendant is immaterial. With due respect the plaintiff having admitted in writing and during the hearing of this case that it was liable to indemnify the defendant and this court having dismissed the plaintiff's disclaimer suit it is misleading for Counsel for the plaintiff to have raised that issue in his submissions.

In my view the only issue that remains for determination between the parties is the extent of indemnity due to the defendant; is it confined to the cost of repairs at Kshs. 300,000/- as assessed and asserted by the plaintiff or should it extend to the loan deposit, the loan instalments paid and the sum claimed by NIC Bank from the defendant?

Counsel for the plaintiff referred to the above sums as **consequential losses a**nd submitted that the plaintiff was not bound to pay the defendant any sums other than the cost of repairs (Kshs.300,000/=) as the plaintiff was not party to the contract between the defendant and the NIC Bank. For this he relied on the case of **PERMUGA AUTO SPARES & ANOTHER v MARGRET KORIR TAGI [2015] eKLR** where the court stated:-

> ***"(12) It is the court's view that once a vehicle has been written off, the only compensation is pre-accident value, less salvage value as assessed and other reasonable consequential expenses that are subject to prove (sic). There would ordinarily be assessment charges, towing charges, excess but not loss of user. The payment of the pre-accident value is made to bring the owner to the state he would have been if not for the accident and loss."***

Counsel for the Plaintiff also cited the case of **JOHNSON M. MBURUNGU v FIDELITY SHIELD INSURANCE COMPANY LTD [2006] eKLR** where the court of Appeal stated:-

> ***"It appears however from paragraph 1 of the plaint we have quoted above that the appellant is seeking the damages on grounds that the respondent in refusing to accede to his claim immediately has subjected him to loss of earnings that he was getting daily from his business. In our view, that would amount to punishing the respondent for exercising its legal rights to dispute the claim."***

Counsel for the plaintiff contended that a comprehensive insurance policy relates to the motor vehicle and does not cover the insured's business or the insured and that there exists a separate insurance policy for loss of business and/or profit and as such the Plaintiff is not liable to pay for any **consequential loss**. Counsel further argued that the contents of the Assessment Report having not been challenged through a competing report the motor vehicle is repairable at a cost of Kshs. 300,000 and this court ought to find that the plaintiff's liability is limited to that extent only.

As earlier stated the plaintiff having admitted liability the issues whether the vehicle was being used for the purpose it was insured for, the issue of whether the NIC Bank Insurance Agency was the plaintiff's or the defendant's agent and whether the signature on the proposal form was the defendant's or was a forgery are no longer moot and this court shall therefore not make any determination on the same.

On the issue of the extent of the indemnity due to the Defendant I note that neither the plaintiff nor the defendant produced the insurance policy in respect to the cover (it transpired during the hearing that the plaintiff did not issue a policy to the defendant) and it is not therefore possible for this court to determine what the exact terms of the insurance contract between the parties were. The general practice however is that where an accident vehicle is repairable an assessment of the damage is done and the insurer meets the cost of repairs but where the motor vehicle is declared a write-off the insurer indemnifies the insured by paying the value of the motor vehicle subject to the insured making good of the charges such as the excess and towing charges agreed in the insurance policy. In other words, the insurer is expected to put the insured in as much as a position as they were prior to the accident. The plaintiff's case is that it is not liable to pay more than Kshs. 300,000/= as that was the cost of repairs as per its Assessor's report and the same was not controverted by the defendant through a competing report. The position of the defendant on the other hand is that the vehicle is no longer repairable due to the fact that it was vandalized. Counsel for the defendant submitted that the document produced by the plaintiff to prove that the damage was only Kshs. 300,000/- was incomplete and is therefore of no probative value. It was also the defendant's case that the plaintiff did not adduce any evidence to prove that the cost of repairs is still Kshs. 300,000/- or indeed that the vehicle is still repairable; That moreover the plaintiff has acted maliciously, oppressively and had used its financial power to oppress the defendant and in the circumstances it is liable to pay the claims made out in the counter claim and also pay damages for breach of contract as was held in the case of **TWIGA v PHOENIX E.A. ASSURANCE CO. LTD [2016] eKLR.**

I have considered the evidence by the parties and the rival submissions of their Advocates very carefully. Whereas I am in agreement with Counsel for the plaintiff that an insurer is not liable to pay more than the cost of repairs in the case of a repairable accident vehicle it is my finding that that general rule cannot apply in this case given its unique and peculiar circumstances. It is my finding that the circumstances of this case are peculiar because this accident occurred in July 2017 and the inspection and assessment of the cost of repairs was done on 1st September, 2017. From the record the inspection and assessment was carried out at a garage in Kisumu where the vehicle was towed by the plaintiff. From September, 2017 to date is five years and clearly the cost of repairs today cannot be what it was five years ago. He who alleges must prove and my finding is that the onus was on the plaintiff and not on the defendant to prove that the cost of repairs is still Kshs.300,000/= - **(See Section 109 of the Evidence Act).** The onus was upon the plaintiff therefore to prove on a balance of probabilities that the cost of repairs remained unaffected by inflation by carrying out another assessment to bring the previous one up to date. In the absence of proof that the cost of repairs remains the same I am not persuaded that the sum of Kshs. 300,000/- would be sufficient to restore the motor vehicle to its pre-accident value. It is instructive that the motor vehicle continues to be in the custody of the plaintiff who after towing it to a garage of its choice with a promise that they were going to repair it has to-date not authorized the repairs. Even after they admitted liability to IRA in the year 2019 they still persisted in their refusal to have it repaired. As a matter of fact, the plaintiff filed this suit after its admission in writing that it was liable to indemnify the defendant. I agree with Counsel for the defendant therefore that the plaintiff has been capricious, malicious and oppressive in its conduct towards the defendant. This can also be seen in its Advocate's persistent submission that it is not liable. This despite its own admission in writing and in the testimony of its own Legal and Technical Manager and also the dismissal of its disclaimer suit by this court. To hold that it is liable to pay only Kshs. 300,000/- which is what it should have paid five years ago would be an affront to justice. Indeed, I agree with the submissions of counsel for the defendant that the circumstances of this case being rather sad and peculiar there is need for this court to be innovative. Taking everything into account therefore the order that best commends itself to me is that the plaintiff shall repair the defendant's motor vehicle and restore it to its pre-accident state to her satisfaction and in the event that the vehicle is irreparable then it shall indemnify her by paying her a sum equivalent to its pre-accident value.

As to whether the plaintiff is liable to compensate the defendant for the **consequential loss** the issue was settled by the Court of Appeal in the case of **MADISON INSURANCE COMPANY LIMITED v SOLOMON KINARA T/A KISII PHYSIOTHERAPY CLINIC [2014] eKLR** where it held: -

> ***".....ordinary or standard form policies or contracts of insurance do not cover consequential loss unless the parties specifically contract that such loss would be covered. The policy of insurance between the Appellant and Respondent was an ordinary or standard form contract and as such there was nothing to import into that policy the element for consequential loss. The Respondent's claim was that the loss was occasioned by the Appellant's wrongful repudiation or refusal to pay for the loss of the items the policy covered, but we do not think this takes the matter any further. The parties could have covered such an eventuality in their policy of insurance and <u>in the absence of such a provision, the respondent was not entitled to claim</u>***

consequential loss of profits. This was what this court rejected in the case of CORPORATE INSURANCE CO. LTD v LOISE WANJIRU WACHIRA to which we have already referred" (Emphasis mine).

It is my finding that similarly in this case no evidence was tendered to prove that the Defendant's policy covered consequential loss and my finding therefore is that the plaintiff is not entitled to the same.

I am however persuaded and I so hold that the circumstances surrounding this case entitle the defendant to an award of exemplary damages. The facts and circumstances of this case are very similar if not worse than those in the case of **S. M. THIGA v PHOENIX E.A ASSURANCE CO. LTD [2016] eKLR** where relying on a passage in Mac Gillivray on Insurance Law, 11th Edition, Sweet & Maxwell and the Canadian case of **WHITTEN v PILOT INSURANCE COMPANY [2002] 1 S.C.R 595 [2OO2] S.C.C 18** Sewe, J concluded that general and punitive damages though rare are obtainable as the plaintiff had presented cogent evidence demonstrating loss and culpability of the defendant for acting in bad faith. The plaintiff herein has and continues to demonstrate bad faith by its persistent refusal to indemnify the defendant even after its express admission of liability and I am satisfied that the defendant is likewise entitled to exemplary and punitive damages. In 2016 Sewe, J awarded the plaintiff Kshs. 1,000,000/- and taking everything into account and doing the best I can, I award the defendant herein exemplary damages in the sum of Kshs. 2,500,000 (two million five hundred thousand shillings).

In the upshot the Defendant's counterclaim is allowed and judgment is hereby entered for the Defendant against the plaintiff as follows: -

1) That the plaintiff shall within thirty days of this judgement cause the defendant's motor vehicle Registration No. KCK 263C to be re-inspected and the cost of repairs to be re-assessed and shall cause the motor vehicle to be repaired to the satisfaction of the defendant in accordance with the current assessment report.

2) That in the event that the motor vehicle is not repairable the Plaintiff shall within thirty days of this judgment indemnify the defendant by paying to her a sum of money equivalent to the pre-accident value of the vehicles.

3) That the Plaintiff shall pay to the Defendant exemplary damages in the sum of Kshs. 2,500,000/-

4) That the Defendant is awarded the costs of the suit and of this counterclaim.

5) That the Defendant is awarded interest on (3) and (4) at court rates.

SIGNED, DATED AND DELIVERED ELECTRONICALLY THIS 28TH DAY OF OCTOBER, 2021

E.N. MAINA

JUDGE