REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. 447 OF 2016

PATRICK OMONDI LUKIRI t/a TRILUK DRILLING LIMITED.....PLAINTIFF

VERSUS

JUBILEE INSURANCE COMPANY LIMITED.....DEFENDANT

JUDGMENT

The Plaintiff's case

1. The plaintiff herein describes himself as an adult of sound mind residing in Ongata Rongai in Kajiado County. He states that he is engaged in borehole drilling business under the name Triluk Drilling Limited. He sued the defendant herein, a limited liability company governed by the Insurance Act (hereinafter **"the Act"**) seeking the following orders:-

a) Special damages of Kshs 8, 000, 000. 00 as the sum assured.

b) Special damages of Kshs 23,200.00.

c) Compensation for loss of business or a sum of Kshs 38,182,620.00.

d) Interest on prayers (a),(b) and (c) above and

e) Costs of this suit.

2. A summary of the plaintiff's case is that he was at all material times the owner of a drilling machine registration number KBP 108P, an Ashok Leyland (hereinafter **"the Machine"**) which he insured with the defendant under Policy Number P/NRB 2580/2014/120565 as from 7th May 2015 to 6th May 2016. He avers that the total sum insured was Kshs 8 million and the premium payable was Kshs 64,000/=.

3. The plaintiff avers that he remitted all the premiums to the defendant and that on or about 19th March 206, while lawfully drilling a borehole at Malanga Primary School in Busia County, the compressor unit of the drilling machine burst into flames thereby causing extensive damage to the separator, starter, pipes and other parts of the machine.

4. It is averred that the incident was reported to Funyula Police Station and later to the defendant to whom a formal claim for indemnity was lodged on 28th March 2016.

5. The plaintiff contends that the defendant repudiated the claim on the grounds that there was no actual fire and that the parts of the machine, were consumed by heated oil and further, that the incident fell under clauses excluded from indemnity under their insurance policy. It was the plaintiffs case that the refusal to indemnify him, in the circumstances of the case, amounts to breach of contract. He listed the particulars of breach by the defendant as follows:-

a) Baselessly dismissing the fire incident without an objective analysis of what happened.

b) Setting out a made up explanation to the events surrounding the fire outbreak in order to defeat claims of indemnity by the plaintiff.

c) Failing to indemnify the plaintiff for damages occasioned by fire by paying for the replacement costs at Kshs 8,374,000.00.

d) Failing to indemnify the plaintiff at all even for damage as a consequence of loss arising from a breakdown as contemplated in the policy.

6. The plaintiff further contends that an analysis of the extent of damage showed that the replacement of the machine would cost a global sum of Kshs 8,374,000. The plaintiff further claims that as a result of the breach of contract, he has suffered loss of business in the sum of Kshs 38,182,620 the particulars of which he listed to be as follows:-

a) Borehole drilling contract with Rota Link Engineering Company Limited for drilling two (2) boreholes in Kakuma Turkana County valued at Kshs 3,700,000.00.

b) Borehole drilling contract with Barns Water Wells Limited for drilling four boreholes in Lodwar Turkana County valued at Kshs 7,200,000.00.

c) Borehole drilling contract with Barns Water Wells Limited for drilling one borehole at Turkwell Child Family Programme Turkana County valued at Kshs 1,182,620.00.

d) Borehole drilling and equipment contract with Housing and Industrial Contractors Limited with respect to three boreholes at Kipeto Housing Project, Kajiado County valued at Kshs 26,100,000.00.

7. At the hearing of the case, the plaintiff testified that he insured the machine compressor for Kshs 8 million and that on 19th March 2016, during the currency of the insurance cover, the machine burst into flames during a borehole drilling exercise at Malanga Primary School. He conceded that he did not witness the fire incident but added that his employees at the site put out the fire which burnt the machine to ashes.

8. He produced a bundle of documents comprising the police abstract report of the incident, the Insurance Policy and the motor accident form and the loss adjusters report. He added that he reported the loss to the defendant who refused to compensate/indemnify him for the loss. He further testified that he lost 4 contracts amounting to a total of Kshs 38,186,220 as a result of the failure, by the defendants, to indemnify him.

9. On cross examination, the plaintiff testified that he could not remember the last time that the machine was repaired prior to the fire incident however. On further cross examination, he stated that the machine had been repaired barely a month before the incident. On examination by the court, the plaintiff conceded that he did not take any action to mitigate the loss of the pending contracts as he had faith that the defendant would indemnify him for the loss.

10. PW2 Mr. **Peter Sakwa,** a loss adjuster and assessor, testified that on 19th September 2016, the plaintiff instructed him to assess the loss and make a report to explain the cause, nature and extent of the damage caused to the machine. His testimony was that his report was informed by his visual examination of the damaged components of the machine and the information that he received from the plaintiff's workers and the dealers who had earlier carried out repairs on the machine.

11. He stated that the machine was at the dealers' premises as at the time of his examination and that it had already been dismantled. He noted that the machine's components, which are designed to withstand high temperatures, were charred and ashy. He attributed the condition of the said components to exposure to flames and noted that a similar machine currently costs Kshs 8 million. He produced a copy of his report as an exhibit.

12. On cross examination he attributed the bursting of the pipe to hydraulic pressure which in turn caused hot hydraulic liquid to spill all over the engine thereby causing the compressor fans to spark and cause the fire.

The defendant's case

13. Through its statement of defence filed on 27th July 2017, the defendant concedes that, in consideration of the premium, it agreed to indemnify the plaintiff in respect to the machine for any unforeseeable and sudden physical loss or damage from any cause other than mechanical breakdown.

14. The defendant denies every other claim made by the plaintiff in the plaint and states that the plaintiff's case ought to be dismissed with costs.

15. DW1, **Anne Kanake,** the defendant's Legal Officer testified that the insurance policy document signed by the plaintiff and defendant had an exclusion clause that precludes the defendant from paying the policy when external damage occurred to the machine where such damage was caused by fire. Her testimony was that the cause of the fire was not identifiable. She testified that fire caused by a mechanical breakdown was not covered under their policy.

16. DW2 **Raphael Ojuando Nguta**, the defendant's loss adjuster produced an assessment report as an exhibit during the hearing. His conclusion was that the fire was occasioned by the failure of the hose pipe which is a mechanical defect that was not covered under the insurance policy. He stated that his report was informed by the verbal enquiries that he made from the dealers as he did not interview any eye witnesses to the fire incident. His testimony was that from his experience, a machine can catch fire due to negligence, lack of maintenance and manufacturer's defects.

17. Parties filed written submissions in support of their respective positions which I have carefully considered.

Analysis and determination.

18. I have considered the pleadings filed herein, the testimonies presented by the witnesses, the submissions of counsel and the authorities that were cited. The main issue for determination is whether the plaintiff has made out a case for the granting of the reliefs sought in the plaint.

19. It was not disputed that the defendant herein entered into an insurance contract with the plaintiff wherein it agreed to insure the plaintiff's drilling machine for the sum of Kshs 8 million. It was also not disputed that the plaintiff duly paid the requisite insurance premiums.

20. The plaintiff's case was that on 19th March 2016, during the currency of insurance cover, the drilling machine caught fire that damaged it beyond repair thereby prompting him to lodge his insurance claim with defendant for compensation under the said insurance policy. Needless to say, the defendant repudiated liability to settle the plaintiff's claim.

21. The bone of contention is that the defendant declined to indemnify the plaintiff, despite the insurance cover, on the basis that the fire occurred in circumstances that were excluded from indemnity under the insurance policy. The defendant's assertion that the fire was caused by a mechanical defect was based on an investigation report prepared by its loss assessors. During its submissions, the defendant pointed out that the plaintiff's bundle of documents indicated that the machine had a mechanical defect as the compressor would overheat on and off. The defendant argued that the plaintiff should have taken reasonable precautions to prevent the damage.

22. In advancing its position, the defendant relied on the exclusion clause at page 3 of the policy document which at paragraphs (b),(c), (d) and (e) thereof provides that:

> ***The Company shall not be liable for:***
>
> > ***a) …..***
> >
> > ***b) Loss or damage due to electrical or mechanical breakdown, failure, breakage or derangement, freezing of coolant or other fluid, defective lubrication or lack of oil or coolant, but if as a consequent of such breakdown or derangement an accident occurs causing external damage, such consequential damage shall be indemnifiable.***
> >
> > ***c) Loss or damage to the replaceable parts or attachments such as bits, drills, knives or other cutting edges, saw blades, dies, moulds, patterns, pulverizing and crushing surfaces, screens and sieves, ropes, belts chains, elevator and conveyor bands, batteries, tyres, connecting wires and cable, flexible pipes, jointing and packing material regularly replaced;***
> >
> > ***d) Loss or damage due to explosion of any boiler or pressure vessel subject to internal steam or fluid pressure or of any internal combustion engine.***
> >
> > ***e) Loss of or damage to vehicles designed and licensed for general road use unless these vehicles are exclusively used on construction sites.***

23. On his part, the plaintiff submitted that by declining to indemnify the plaintiff on the allegation that the loss fell within the exclusion clause of the policy, the burden of proof shifted on to the defendant to prove this assertion. Reliance was placed on the decision in ***Ukwala Supermarket (Kisumu Limited v Kenindia Assurance Company Limited*** [2017] eKLR wherein the question of how the court should apply the reverse burden of proof came up for consideration, and it was held that:

> ***"…The insurers cannot bring the clause into play simply by asserting that the loss was excluded by a particular exception, and challenging the insured to prove the contrary. They must produce evidence from which it can reasonably be argued that (a) as state of affairs existed or an event occurred falling within an exception; and (b) the excepted peril directly or indirectly caused the loss. It is only when an arguable case of this nature is made out that the insured is required to prove it….."***

24. It was submitted that the loss and damage was caused by actual fire and that the defence was unable to give a plausible explanation on how they arrived at the conclusion that the loss was caused by mechanical breakdown or failure at the trial. Counsel noted that the defence expert witness **Raphael Nguta** (DW2) admitted that the defendant did not conduct a physical inspection of the damaged drilling rig and compressor and neither did they conduct interviews of the people who operated the drilling rig at the time of the fire.

25. This court appreciates the plaintiff's argument that by repudiating liability to indemnify the plaintiff, the burden of proof shifts to the defendant to show, on a balance of probabilities, that the loss fell within the exclusion clause of the policy. This was the position adopted in ***Slattery v Mance*** **[1962]1 All ER 525, 526** the court held that,

> ***"[O]nce it is shown that the loss had been caused by fire, the Plaintiff has made out a prima facie case and the onus is on the Defendant to show on the balance of probabilities that the fire was caused or connived at by the Plaintiff."***

26. The findings in the above cited case notwithstanding, and having regard to the different positions taken by the parties herein regarding the cause of the fire and if it occurred under circumstances that are exempted under the insurance policy, this court still reminds itself of the well-hackneyed general principle that the burden of proof, in civil matters, rests on the claimant to prove its case against the defendant on a balance of probabilities before the burden can shift to the defendant to controvert the plaintiff's case, on a balance of probabilities.

27. **Section 107(1)** of the ***Evidence Act (Chapter 80 Laws of Kenya)*** states that:

> ***"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."***

Likewise, **Section 109** of the **Evidence Act,** is explicit that:

> ***"The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence..."***

28. Balance of probability was defined in the case of ***Kanyungu Njogu v Daniel Kimani Maingi*** **[2000] eKLR** wherein it was held to mean that when the court is faced with two probabilities, it can only decide the case on a balance of probability if there is evidence to show that one probability was more probable than the other.

29. In ***Miller v Minister of Pensions*** **(1947) 2 ALL ER 372** Lord Denning had the following to say on burden of proof**:**

> ***"That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'We think it more probable than not', the burden is discharged, but, if the probabilities are equal, it is not.***
>
> ***Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."***

30. In the present case, the parties held different positions regarding the cause of the fire. Both parties commissioned investigations by their respective loss assessors, whose reports were tendered in court as exhibits during the trial. PW2, the plaintiff's assessor, testified as follows regarding the cause of the fire:

> ***"The cause of charring was direct exposure to flames. The hot hydraulic liquid burst and threw fluid all over the engine, the compressor fans sparked and caused fire."***

31. The defendant's assessment report, on the other hand indicates that:

> ***"The probable cause of the fire may be due to a high temperature hose failure which would have sprayed hot compressor oil to fire ignition……we suspect that the hosepipes, rubber and silicon parts got melted due to heat generated by the hot oil. The failure by the hosepipe could be termed as mechanical breakdown/failure."***

32. It is worthy to note that the investigations, by both assessors, were conducted long after the fire incident. The plaintiff's assessor was appointed on 19th September 2016, 6 months after the fire incident that reportedly occurred on 19th March 2016, while the defendant's report was is dated 11th July 2016. Needless to say, none of the assessors witnessed the fire incident first-hand and in the plaintiff's case, the assessor testified that he interviewed the plaintiff's workers and the dealers where the compressor had been taken for repairs. PW2 testified that as at the time he saw the damaged machine, it was not only not at the scene of the fire incident but that it had already been dismantled and at the dealers. DW2 on the other hand testified that his report was mainly based on the information given to him by the dealers.

33. My finding therefore is that the evidence availed by both parties regarding the cause of the fire was purely secondary if not hearsay evidence from persons who though identified, were not summoned to testify at the hearing. Having regard to the decision in ***Miller v Minister of Pensions*** **(supra) on reasonable degree of probability, I find that in the circumstances of this case, there is a draw as both parties presented different versions on how the incident happened. In this scenario, I find that the court cannot d***ecide one way or the other which evidence to accept, as both parties tendered only secondary evidence of their assessors which I find to be unconvincing for the reasons that I have already alluded to in this judgment.*

34. *My further finding is that the plaintiff bore the burden of proof but that his case did not attain the requisite standard of proof for the following reasons;* Firstly, even though the plaintiff's case was that the machine burst into flames while his employees were drilling a borehole at Malanga Primary School, no evidence was presented from the said employees or the school to confirm this allegation. This court is of the view that the drilling machine cannot operate on its own and that at least the machine operator could have been presented to court to give an account of the circumstances under which the fire broke out on the material day.

35. No explanation was presented by the plaintiff for failure to present even a single eye witness from the scene of the fire in order to shed light on the sequence of events that led to the burning of the machine. PW2 stated as follows in his assessment report regarding the circumstances of the incident:

> ***We interviewed the principal's site driller Mr. Moses Wanyama on circumstances of the incident ….. on 19th March 2016, he commenced exercise at the drilling site at Malanga Primary School, Busia. His team comprised of Sammy Obando (Mechanic), Linus (welder), Sirwe and Otepa (general purpose workers) and Mureithi (site manager).***

36. From the above extract of the assessment report, it is clear that the plaintiff's employees were identifiable. None of the said employees testified at the hearing. My finding is that in a weighty and contested matter such as this, the plaintiff had a duty to avail the eyewitnesses,

who were his own employees, to shed light on the circumstances of the fire. To my mind, the failure the present the witnesses can be interpreted to mean that their evidence would have been adverse to the plaintiff. I am guided by the decisions in ***Linus Nganga Kiongo & 3 Others v Town Council of Kikuyu*** **[2012] eKLR,** ***Trust Bank Limited v Paramount Universal Bank Limited & 2 Others*** **Nairobi (Milimani) HCCC No. 1243 of 200l and** ***Kenya Akiba Micro Financing Limited v Ezekiel Chebii & 14 Others*** **[2012] eKLR** wherein the courts held that where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the Court is entitled to make an adverse inference that if such evidence was produced, it would be adverse to such a party.

37. Secondly, no evidence was presented to show that the machine was regularly serviced and was in good working condition before the fateful day so as to dispel the defendant's theory that the fire broke out due to a mechanical defect. According to the log on the PRD Rigs contained in the plaintiffs bundle of documents, the last time that the machine was serviced, was on 17th February 2015, almost 1 year before the incident. According to the same PRD Rigs log, as at 21st May 2015, it was noted that the machine compressor would overheat on and off. No evidence was presented to show that the overheating problem was repaired or that the same compressor was replaced. I find that the plaintiff's own documents lend credence to the defendant's claim that the machine had a mechanical defects that could have led to the fire. Exclusion clauses (n) and (o) of the Policy document provide that:

> ***The company shall not be liable for:***
>
> ***n) loss or damage due to any faults or defects existing at the time of commencement of this policy within the knowledge of the insured or his representatives, whether such faults or defects were known to the Company or not;***
>
> ***o) loss or damage directly or indirectly caused by or arising out of aggravated by willful act or willful negligence of the insured or his representative;***

38. Lastly, even though the plaintiff alleged that the accident took place during a borehole drilling exercise at Malanga School, there was no shred of evidence, from the said school, to confirm that any such drilling was going on at the time of fire as was alleged by the plaintiff. The police abstract report on the incident shows that the incident was reported to the police on 22nd March 2016, 3 days after the incident but does not indicate who made the report. My take is that if indeed the plaintiff had a contract to drill a borehole in the said institution, nothing would have been easier than for the plaintiff to produce documentary proof of such an undertaking. It is however curious to note that the plaintiff was able to produce copies of 4 drilling contracts, allegedly secured after the loss of the machine in the fire incident, in support of his claim for loss of business. No similar contract was presented in respect to the claim that he had a contract to drill a borehole at Malanga Primary School where the incident allegedly occurred.

39. Having regard to the findings and observations that I have made in this judgment, I find that the plaintiff's case fell short of the requisite threshold of proof in view of the glaring gaps in the case. The order that commends itself to me is the order to dismiss the suit with costs to the defendant.

Dated, signed and delivered in open court at Nairobi this 23rd day of January 2020.

W. A. OKWANY

JUDGE

<u>In the presence of:</u>

Miss Odunga for the plaintiff.

Miss Nduta for Obara for the defendant

Court Assistant – Sylvia.