



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

COMMERCIAL AND TAX DIVISION

CIVIL CASE NO.600 OF 2015

QUORANDUM LIMITED.....PLAINTIFF

VERSUS

INVESCO ASSURANCE LIMITED.....DEFENDANT

JUDGMENT

1. The plaintiff through a plaintiff dated 2nd December 2015 sued the defendant claiming the following:-

- a) Special Damages of Kshs.8,852,340.00;
- b) General Damages for delay in payment and breach of fiduciary duty;
- c) Interest on (a) and (b) at Court rates;
- d) Costs of this suit;
- e) Any other relief as this Honourable Court shall deem fit and just.

2. The defendant upon service of summons to enter appearance entered appearance on 4th April 2016 and filed a statement of defence dated 20th April 2016 filed on 21st April 2016.

3. This matter commenced hearing before Hon. Justice J. Onguto (*deceased*) who made several orders requiring the defendant to comply with pre-trial procedures as provides under order 11 of Civil Procedure Rules but the defendant failed to do so; consequently the learned late Judge proceeded to strike out the defence statement filed on 21/4/2016, bundle of documents and defence statement pursuant to the provisions of order 11 Rule 3(3) (o) (1) of the Civil Procedure and ordered the matter to proceed as undefended, hence the plaintiff was ordered to proceed with formal proof. The said order was made on 7/4/2017. The defendant on 29/9/2017 attempted to file further documents but the court declined to allow the defendant to file such documents as the same were lodged without the leave of the court and after defence had been struck out.

4. On 29th September 2017 the plaintiff proceed with the formal proof and called one witness who adopted his witness statement as his evidence in chief and was duly cross-examined. The plaintiff closed its case.

5. I took over this matter on 15th October 2018 and on 22/11/2018 after hearing the plaintiff's counsel I gave directions that the matter do proceed from where it had reached as the plaintiff had closed its case and what was pending was putting in written submission. The plaintiff had nevertheless filed submissions on 19th October 2017, which it adopted and sought a judgement date.

Background

6. The parties herein entered into an insurance contract issued on 27th December, 2016 for the indemnity of the Plaintiff against legal liability under the Workmen's Compensation Act Cap 236 Laws of Kenya. The indemnity was to "**apply in respect of judgments which are in the first instance delivered by or obtained from a court of competent jurisdiction in the Republic of Kenya**". (See Insurance contract at page 1-6 of the Plaintiff's List of Documents).

7. On 15th May, 2007 the Plaintiff paid a bill of Kshs.8, 000 as workmen compensation to an employee. The defendant was notified of the

same through a letter of even date, and which letter was received by the defendant on 2nd July, 2017. (See letter at page 7 of the Plaintiff's List of Documents).

8. Subsequently, the employee commenced legal proceedings against the Plaintiff being **CMCC Suit No. 2584 of 2007** whereupon the Defendant appointed the firm of S.W. Ndegwa Advocate to act for the Plaintiff. Judgment was entered against the Plaintiff without its knowledge. The Plaintiff only became aware of the adverse outcome of the proceedings when on or around 14th August, 2012 auctioneers from Daystar Auctioneers took possession of the Plaintiff's movable property which was later auctioned on or around 6th September, 2012 (See list at page 9 of the Plaintiff's List of Documents and Auctioneer's Schedule at page 3 of the Plaintiff's Supplementary List of Documents).

9. The Plaintiff now seeks a full refund of the total value of the auctioned property being Kshs.8, 852,340 in addition to the losses incurred as a consequence of the deprivation of its property.

10. I have very carefully considered the plaint, the plaintiff's witness statement and attached documents produced as exhibit and adopted as **PW1's** evidence in chief, and the issues arising thereto for consideration can be summed up as follows:-

a) Whether the defendant breached its obligations under the insurance contract?

b) Whether the plaintiff is entitled to general and special damages?

A) Whether the defendant breached its obligations under the insurance contract?

11. The obligations of the defendant were specifically set down in this insurance contract which was still in force when the proceedings and judgment were obtained against the plaintiff with regards to **CMCC 2584 OF 2007**. The defendant herein failed to inform the plaintiff of the proceeding commenced against it and subsequent judgment entered thereto; failed the decretal sum as decreed by the court and failed to indemnify the plaintiff of the losses suffered as consequences of the execution of the decree.

12. The defendant had the obligation in terms of the insurance contract to indemnify the plaintiff of the losses suffered as a result of the execution of the decree in terms of the executed contract. The defendant's non-compliance and non-performance of the agreed terms of the contract between the plaintiff and the defendant breached the contract, consequently the defendant is duty bound to perform its part of the bargain and is liable to indemnify the plaintiff.

13. The court faced with a similar situation in the case of **Nakana Trading Co. Ltd vs Coffee Marketing Board 1990 – 1994 EA 448**, the court held that:

"A breach occurs in a contract when one or both parties fail to fulfil the obligations imposed by the terms. Since the contract was in writing the Court's duty was to look at it and determine whether it applies to the facts."

B) Whether the plaintiff is entitled to general and special damages?

14. In view of the facts of this case I am satisfied that the plaintiff has demonstrated the defendant breached clear and unambiguous terms of its obligation under the insurance contract.

15. The plaintiff in its plaint under paragraphs 10, 11 and 15 dated 24th December 2015 has specifically pleaded and has in its evidence through **PW1**, specifically proved the special damages of Kshs.8, 852,340. The plaintiff's case has not been controverted in anyway following the defendant's defence having been struck out and court ordering the matter do proceed to formal proof. **PW1's** evidence supported the value assigned to the goods which were lost was reasonable estimates since the actual documentation which could have been tendered were part of the items that were taken away by the auctioneers. I find the plaintiff has on balance of probability proved the value of the goods as assigned and find the plaintiff is entitled to compensation. I find the plaintiff has proved on balance of the probability that the listed items including vehicles and machines which are essential to the operation of the plaintiff business were taken away during the execution exercise as indicated in the bundle of documents produced in court by the plaintiff.

16. I am on plaintiff's claim for special and general damages guided by a decision in **Patrick Muturi vs Kenindia Associate Co. Ltd (1993) eKLR** where the court address itself thus:-

"The very foundation of every rule which has been promulgated, applied and acted upon by the Courts with regards to insurance law is the fundamental principle of insurance, that the contract of insurance in an insurance policy is a contract of indemnity. It is a contract giving security from damage or loss. It is not that it ensures that no damage or loss shall occur; rather, it is an agreement by an insurer to make goods a loss, to pay compensation for loss or injury which may occur within the terms of the agreement, the insured keeping his part of the bargain. It means that the assured fulfilling his undertaking under the contract, in case of a loss against which the policy has been made, shall be fully indemnified.

In general the liability of the insurers is to make good the loss under the policy by a payment in money."

17. The plaintiff's evidence in this case has not been challenged by the defendant, the plaintiff has called sufficient evidence in support of the claim. The plaintiff specifically pleaded and strictly proved its claim for special damages to the tune of Kshs.8, 852,340. The plaintiff also proved there has been delay in responding to the plaintiff's claim by the defendant as per plaintiff's letter dated 24th October 2012 and 16th July 2015 on pages 8 and 10 of the plaintiff's list of documents. The plaintiff did not however prove that the contract provided for payment

of damages for delay in payment and breach of fiduciary duty. No evidence was called to justify granting of general damages in this suit. The court was not referred to specific provision of the law supporting the plaintiff's claim for general damages.

18. The upshot is that the plaintiff has proved its claim on balance of probability against the defendant. I find the plaintiff is entitled to judgment and proceed to enter judgment as follows:-

a) Special damages Kshs.8,852,000/-;

b) General damages; nil

c) Costs of the suit to the plaintiff;

d) Interest on (a) above from the date of filing the suit till payment in full.

Dated, signed and delivered at Nairobi this 24th day of January, 2019.

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J .A. MAKAU

JUDGE