



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO. 91 OF 2007

CRYSTAL MOTORS (K) LIMITED.....PLAINTIFF

VERSUS

OCCIDENTAL INSURANCE CO. LIMITED.....DEFENDANT

JUDGEMENT

1. This Decision is in respect to a claim by Crystal Motors (k) Ltd (the Plaintiff) against Occidental Insurance Company Ltd(the Defendant) for the sum of Kshs.6,139,194.00/= said to be owing on account of repairs to various Motor Vehicles between March 2001 to March 2003 allegedly at the request of the Defendant.
2. That claim is contained in the Amended Plaintiff dated 3rd April 2008 and filed herein on 15th April 2008.
3. Prior to the said Amendment, which was made pursuant to an order of Court dated 3rd April, 2008, the Defendant had filed a Defence denying the claim. In the alternative the Defendant set up a Counter-claim and set-off in which it enjoined Kingsgate Insurance Brokers Limited (hereinafter Kingsgate) who it averred owed it the sum of Kshs.22,767,634/= on account of outstanding and unremitted premiums against which the claim by the Plaintiff is to be offset. It is alleged that the Plaintiff and Kingsgate are sister Companies.
4. At the hearing, the Plaintiff called two witnesses. Eric Mwenda Kanyuuru (PW1) is the Managing Director of the Plaintiff Company. He stated that he repaired Motor Vehicles whose details appeared in Documents produced in Court (p Exhibit 1 & 2) and which repairs were carried out with the express authority of the Defendant through its Assessors who he claimed were the Defendants authorized agents.
5. He further testified that the vehicles which belonged to the Defendant's Insured were collected by the Insured Persons upon paying excess charges directly to the Defendant Company. He is not aware that any of the Insured persons have sued the Plaintiff Company for failing to carry out repairs to their vehicles.
6. At the hearing he admitted that one of the Invoices sought had been paid off. That amounted to Kshs.112,606/= which the Plaintiff conceded should be credited to the Defendant and deducted from the claim.
7. His evidence was that the Defendant would issue instructions to their Assessors to carry out assessment

of damaged Motor Vehicles and upon carrying out an assessment, the Assessor would issue Instructions to the Plaintiff to carry out repairs. The Instructions of the Assessor would be deemed to be those of the Defendant. The witness stated that the instructing Insurer would be named in the Estimate and Assessment form (Eg. P Exhibit 1 page 11).

8. Under cross-examination PW1 conceded that in respect of each repair carried out, they ought to have a Release Letter (for example P Exhibit 2 pages 8). This is a letter from the Insurer asking the Garage to release a vehicle after repairs and to send the bill (together with a satisfaction note duly signed by the Insured) for settlement. Other than the invoice in respect to an Insured by the name Peter Mburu, the witness accepted that the other invoices were not supported by release letters from the Defendant.

9. PW1 also confirmed that all outstanding invoices were those in which the Broker was Kingsgate. This was in respect to work done on vehicles brought to the Garage by Kingsgate. It was also his evidence that the Defendant was unwilling to pay the Plaintiff because of Kingsgate's debt to the Defendant.

10. The witness told Court that he bought the Plaintiff Company as a going concern from one Esther Wachira (PW2) and Rita Waithera Waithaka. But that he was not aware of any association between the former owners and Kingsgate.

11. On another front, the witness conceded disparities between certain invoices and the amount demanded. Three examples will suffice. For invoice No. 712, (P Exhibit 15 c) the amount invoiced is Kshs.202,867/= yet the amount demanded is Kshs.282,641/= similarly for (P Exhibit 15 C) invoice was for Kshs.121,048/= yet the amount demanded is Kshs.138,600/=. Also invoice NO.709 C of 18th February 2002, the amount invoiced is Kshs.75,815/=yet on this a demand of Kshs.155,972/= was made. The witness suggested that any disparities be duly accounted for and credited to the Defendant.

12. The second Plaintiff witness was Esther Kagure Wachira (PW2). She is familiar with the facts of the dispute before Court as she was one of the Directors of the Plaintiff Company when the claim arose. She supported the evidence of PW1 that the repair works was done with the express authority of the Defendant Company through its Assessors and that the vehicles were repaired and charges raised in line with the estimate and assessment made by the Assessors.

13. It was her further evidence that one Mr. Lakshiminarayan the then General Manager of the Defendant Company had in many meetings promised to pay the debt.

14. It was her testimony that the outstanding payments were in respect to vehicles that came in through Kingsgate. The people associated with Kingsgate were here friends. She named two of them as Mwakina and Mwamburi. She however denied that she was aware that Mwamburi was the Principal Officer of Kingsgate.

15. She gave some details of the modus operandi. That a vehicle was sent for repair to the Garage by Kingsgate. The Garage would then notify the Defendant and the Defendant would send an Assessor to carry out an assessment. Once this was done, the Assessors would authorize for repairs to proceed. She, however, stated that the mere reference of a vehicle to a Garage was not authority to repair.

16. Upon completion of the repairs, the insured would sign a satisfaction note and then the Garage would invoice the Defendant for payment. Nevertheless no vehicle would be released to an insured until a Release was given by the Defendant. Although the Release would invariably be by way of letter it could sometimes be verbal communication from a person from the Defendant's Claims Department.

17. That while one Lakshiminarayan had asked for time to enable him sort out issues with Kingsgate, PW7 was not aware that the Defendant Company had sued Kingsgate for a debt.

18. Occidental called one witness. He is Richard Mambo (DW 1), an Assistant Claims Manager. He explained that once an accident is reported the Defendant would send an independent Assessor to assess the extent of damage to the Insured vehicle. An assessment Report would then be sent back and then

after checking whether premium and Excess had been paid then the Defendant would give authority to a Garage by way of letter to repair. In respect to the Claims before the Court, the witness stated that the Defendant never gave authority Letters because procedure was not followed.

19. DW1 testified that the authorization was given by Directors of Kingsgate but that the Defendant had issues with Kingsgate in respect to unremitted premiums.

20. The angle of Kingsgate was explained a little more. The testimony of DW1 was that Kingsgate never sought any express permission from the Defendant Company to give out the Motor Vehicles to the Plaintiff for repair. That it emerged that Kingsgate and the Plaintiff were sister Companies who shared some Directors and Officers who were involved in day to day management of both companies.

21. That Kingsgate had deliberately, intentionally and in bad faith failed to remit premiums and excess amounting to Kshs.22,767,634/= which the Defendant sued for in Nrd HCC No.20/2003. The Defendant has a Decree in respect thereof. That because of the relationship between Kingsgate and the Plaintiff, the Defendant raised a Counterclaim and set off against the Plaintiff and enjoined Kingsgate to it.

22. The witness also stated that the Defendant could not dispute or refute that there were any repairs carried out as claimed because it had no knowledge whatsoever of any existence of an arrangement between Kingsgate and the Plaintiff until it was sued.

23. While maintaining that repairs of the vehicles in respect to which the claim relates were never authorized by the Defendant, DW1 admitted dealing with allied Assessors. And accepted that it instructed the said Assessors to carry out assessments of the vehicles.

24. Shown the Defendants own Documents (P Exhibit 1 page 7 & 8), the witness confirmed that the Directors of the Plaintiff Company are not those of Kingsgate.

25. DW1 stated that the contest was on the issue of premium and that payment of premium is the consideration for settlement of a claim.

26. Upon considering the pleadings, evidence and submissions filed herein, the Court sees the following as issues for determination.

(i) Is there a statement of Defence to the Amended Plaintiff?

(ii) Has the Plaintiff proved on a balance of probabilities that it was authorized by the Defendant to carry out the repairs?

(iii) If not has the plaintiff proved that it is otherwise entitled to the claim?

(iv) If the answer to (ii) or (iii) above is in the affirmative should the Plaintiff claim be set off against the Decree held by the Defendant against the Kingsgate in HCC 20/1003?

27. On 3rd April 2008, the Court granted Leave to the Plaintiff to amend its Plaintiff and on 3rd June 2008, the following consent was filed:-

“1. THAT the time for filling the Amended Plaintiff by the Plaintiff be enlarged.

2. THAT the amended Plaintiff filed out of time by one day on 15th April 2005 be deemed to be fully filed and served on the Defendant.

3. THAT the Defendant be at liberty to file its amended defence if any 7 days after the filling of this Consent”.

28. On 15th April 2008 the Plaintiff filed an Amended Plaintiff which did two things:-

- a) The Claim was amended from Ksh.5,712,980/= to Ksh.6,139,194/=.
- b) A prayer for interest on the claim from March 2001 was added.

One effect of the Consent of 3rd June 2008 was to validate the filing of the Amended Plaintiff.

29. It is not in dispute that the Defendant did not file a statement of Defence specifically in answer to the Amended Pleading. The Pleading filed on behalf of the Defendant is the Defence and Counterclaim and set-off dated 7th June 2007 and filed on 8th June 2007.

30. Limb 3 of the Consent of 3rd June 2008 reads as follows,

“That, the Defendant be at liberty to file its amended Defence, if any, within 7 days after the filing of this Consent”. (*my emphasis*)

The wording of the Consent contemplated that the Defendant would be at liberty to file an Amended Defence if necessary. It would seem to me that the Defendant need not have filed an Amended Defence if it thought that the Pleadings already filed sufficiently answered the Amended Plaintiff. There is a sense in which, given the wording of the Consent, the circumstances here should be dealt with in the same way as under the Provisions of Order 8 Rule 1(6)(where Amendment is without leave) which reads:-

“(6) Where a party has pleaded to a pleading which is subsequently amended and served on him under subrule (1), then, if that party does not amend his pleading under the foregoing provisions of this rule, he shall be taken to rely on it in answer to the amended pleading, and Order 2 rule 12 (2) shall have effect at the expiry of the period within which the pleading could have been amended”.

31. This Court prefers to reach a decision that the Statement of Defence and Counterclaim and set-off of 7th June 2007 and filed on the next day is the answer to the Amended Plaintiff. Whether or not it sufficiently answers the Plaintiff’s claim is a matter of merit to which this Court now turns to.

32. The evidence that emerges time and time again is that in respect to the repairs which form the basis of the claim there are no direct written instructions from the Defendant to the Plaintiff to carry out the repairs.

33. Common ground was that the procedure would be that damaged vehicles insured by the Defendant would be taken to the Plaintiff’s Garage for repair. An Assessor would be appointed to make an assessment of the damage and estimate the cost of repair.

34. But there was no agreement between the parties as to the next step. The Plaintiff’s position is that the instructions to commence repairs would be given by the Assessor on behalf of the Defendant and this authority would confirmed by the Defendant either in writing or orally.

35. The Defendant was of the firm position that the instructions to repair would be given by the Defendant in writing. That for the repairs in question there was no written authorities from the Defendant and that it has come to light that it was Kingsgate who gave the instructions. In light of the above evidence the answer to the second issue for determination is straightforward, there is no evidence that the Defendant either verbally or in writing directly instructed the Plaintiff to carry out the repairs.

36. What is agreed however is that the Plaintiff’s claim revolved around repairs to vehicles which were insured through Kingsgate. A telling aspect to this dispute then emerged. PW1 stated as follows in cross-examination,

“The reason the defendant is unwilling to pay is because of amount owed by (sic) them by

Kingsgate”

PW2 then gave the following evidence,

“The issue of discrepancies of invoices etc never arose with Lakshmirayan. He proposed to do a proposal on the payment. He told me to give him time to sort out the issues with Kingsgate”.

37. That this is not an inconsequential issue in reinforced by the evidence of the Defence witness. DW1 stated,

“The authorities were given by Directors of Kingsgate. All vehicles were insured through Kingsgate Insurance Brokers. We had issues with them in a case for remittance of premiums”.

Later, the same witness says,

“The defendant refuses/declined to pay because authority was not given. The underlying issue was premiums”.

Finally on this matter, he closed,

“The contest on this issue is the premium”.

38. This evidence reveals that at the core of the reluctance by the Defendant to pay the Plaintiff’s claim is that Kingsgate owes the Defendant a sum of Ksh.22,767,634/=. And for this amount the Defendant has sued and obtained a Decree against Kingsgate in Nrb HCC No.20 of 2003, **(OCCIDENTAL INSURANCE CO LTD VS. KINGSGATE INSURANCE BROKERS LTD)**. In paragraph 5 of the Plaintiff the amount of Ksh.22,767,634/= comprises the following,

- a) Unpaid premiums on Account.....Kshs. 19,433,874/=.
- b) Refund of financed premiums to Tripe A AccountKshs.2,167,760/=.

39. That this outstanding debt pervades the Defendant’s defence is revealed further by the Counter-claim and set-off it filed in the matter before Court. In paragraphs 12 and 13 of the Counterclaim and set off, the Defendant avers:-

12. “During the said period, Kingsgate Insurance Brokers whose Directors were common with Crystal Motors (K) Limited entered an arrangement with Occidental Insurance Company in which Kingsgate was conducting Insurance Brokerage for Occidental, collecting premiums and remitting the same less their Commissions and in turn any accident repair business would be given to Crystal Motors who had to ensure that for every damage claim, full Premiums had been paid, excess on the damage claim paid and then they would be paid their repair charges.

13. The Broker (Kingsgate) noticed that they had not remitted Premiums together with financed policies in the sum of Kshs.22,767,634/= and their Garage (Crystal) had repair claims totaling Kshs.4,528,384/= as at October 2002, whereupon they stopped pursuing the claim.

40. In these averments is an express admission by the Defendant that it had entered an arrangement with Kingsgate that any accident repair for cars which had been insured through Kingsgate would be undertaken by the Plaintiff. It matters not that the evidence is that instructions to repair came from Kingsgate because there is an admission by the Defendant that it had agreed with Kingsgate that the Plaintiff would carry out repairs and then the Defendant would pay for the repair charges. To allow the Defendant’s assertion that it should not meet the Plaintiffs’ claim because it did not issue direct instructions to the Plaintiff would be to allow the Defendant to renege from this arrangement. Something this Court is unwilling to do.

41. Should Kingsgate answer to the Plaintiffs' claim? The stance of the Defendant is that the Plaintiff and Kingsgate are sister Companies and that the Plaintiffs' claim should be satisfied from the Decree the Defendant has against Kingsgate in HCC 20/2003. However, from the evidence before Court, the Defendant was unable to establish that at the material time to the claim the two companies shared common Directors or Shareholders. Nor can the evidence that there was a friendship between one Mwamburi (who was a Principal officer of Kingsgate) and PW2 (who at the material time was a Director of the Company) be a basis for holding that the Plaintiff should answer to a debt of Kingsgate.

42. At any rate even sister Companies are treated as separate and distinct legal entities.

43. The Decision of this Court is that the Plaintiff has proved its case against the Defendant on a balance of probabilities. However the Plaintiff is not entitled to the full claim. The following amounts are must be credited to the Defendant.

(i) Already paidKshs.112,606

(ii) Differences in Invoice Nos.707,577,610,712,709,710.....Kshs.334,432

Kshs. 447,038/=

44. As to when interest should accrue the Plaintiff, seeks interest from March 2001, but failed to lay a basis why antecedent interest was deserved (see the Court of Appeal Decision in **HIGHWAY FURNITURE MART LIMITED VS. PERMANENT SECRETARY OFFICE OF THE PRESIDENT & ANOTHER** [2006]eKLR). The Prayer is declined.

45. Ultimately I enter Judgment in favour of the Plaintiff against the Defendant for Kshs.5,692,156/= and Interest at Court rates from the date of filing of this suit. The Plaintiff shall also have costs. The Counterclaim and set-off is dismissed with costs.

Dated, Signed and Delivered in Court at Nairobi this 19th day of April, 2017.

F. TUIYOTT

JUDGE

PRESENT;

Chege for Plaintiff

K'Opere for Defendant

Alex - Court Clerk