



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 374 OF 2003

CANNON ASSURANCE (KENYA) LIMITED.....PLAINTIFF

VERSUS

KANDHARI BROTHERS LIMITEDDEFENDANT

JUDGMENT

1. The Plaintiff herein, one Cannon Assurance (Kenya) Limited filed Plaintiff in this Cause dated 23rd day of June 2003. The Plaintiff has sued Kandhari Brothers Limited for a claim of Kshs. 4,194,392 which amount is said to be outstanding insurance premia, due and owing from the Defendant as at 31st August 2000. The full particulars of the same are reproduced in a tabulated form under Paragraph 3 of the Plaintiff. The Plaintiff made a demand for the same but it was not honoured, hence the suit herein.

2. The Plaintiff is seeking for prayers that Judgment be entered against the Defendants for;

a) **Kshs. 4,194,932**

b) **Interest on (a) above at Bank's rate from 22nd July 2002 to the date of filing this suit.**

c) **Costs of this suit**

d) **Interest on (a), (b), (c) above at Court's rate from date of filing this suit until payment in full.**

e) **Any other relief that the Honourable Court may deem fit and just to grant.**

3. The Defendant filed a defence herein, dated 29th July 2003, which was later amended and filed in Court on 30th September 2003. The Defendant denied the claim by the Plaintiff. They averred that the Plaintiff claims in relation to Delivery Note, (hereinafter DN), DN 64249, 64253, 64342, 65123, 65121 and 65193 is time barred under Section 4(2) of the Limitations of Action Act.

4. The defendant also specifically denied that there was any agreement by the Parties for payment of interest on sum claimed and at Bank rates. The Defendant further denied that the Plaintiff received any proposal from the Defendant to issue any Policy of the Insurance in respect of the alleged Claims made or that any Policy of Insurance was, indeed issued. Further and/or, in the alternative, the Defendant averred that the Plaintiff's attempt to enforce payment of the alleged Contracts of Insurance is manifestly illegal and therefore unenforceable by virtue of the provisions of Section 156 of the Insurance Act.

5. The Plaintiff filed a reply to the amended defence in which he reiterated that, the claim is for moneys owed by the Defendant for insurance cover given to the Defendant, and which the Defendant did enjoy, and further averred that section 77 of the Insurance Act, does not nullify any debt owed by the defendant to the Plaintiff.

6. The parties filed a statement of agreed issues for determination as follows;

- **Did the Plaintiff issue in favour of the Defendant the policies referred to in the particulars of the claim stated in paragraph 3 of the Plaintiff?**
- **Is the Defendant obliged to pay the sums debited by the Plaintiff on account of such policies (if any)?**
- **Are the Plaintiff's Claim for DN No's 64249, 64253,64342 65123,65121, and 65193 time barred under the Limitation of Actions Act?**
- **What amount (if any) is due and owing by the Defendant to the Plaintiff?**
- **Is the Plaintiff entitled to interest (if any) at Bank rates?**
- **Costs of this Suit.**

7. On the 18th April 2016, by consent of the parties the suit was set down for hearing on the 14th June 2016 and in the presence of Mr. Makori holding brief for Midu for the Plaintiff and Ms Ndonga holding brief for Sanjir for the Defendant. However, on 14th June 2016, when the matter was called out, the Defendant and /or its Counsel were not present in Court and the case proceeded.

8. The Plaintiff called two witnesses, PW1 – Raphael Ochieng and PW2 Gerald Omulo. In a nutshell PW1 Raphael Ochieng, an Underwriter Supervisor at the Plaintiff's company since 2002, fully relied on the statement he wrote and filed in court on 3rd October 2012, and testified that the relationship between the Plaintiff and the Defendant was based on Insurance Business. That Mr. Kandhari was a common Director in both the Plaintiff and the Defendant's Companies. He produced a bundle of documents marked pages 1 to 18 in support of the Plaintiff's case. These identified the documents produced include, Certificates of Insurance for Motor-vehicles, Fire and Burglary and Workman's Liabilities, and also made reference to Debit Notes. He further testified that, upon issuance of the Debits notes, some payments were made, but the others remained outstanding giving rise to a claim of Kshs. 4,194,392.00.

9. PW2 Gerald Omulo, the Finance Manager of the Plaintiff's company for over 19 years, told the Court that, the debit notes were raised and sent to the Defendant, where upon some were settled, and others were not, hence the suit herein.

10. At the close of the Plaintiff's case, the matter was set down Judgment, as the Defendants were absent to prosecute their defence.

11. I have considered the pleadings herein in total, including the amended statement of defence, and the Defendant's witness statement of Sandeep Singh Kandhari, Manager with the Defendant's Company. I am aware of the fact that, the Defendant witness did not come to Court to adduce oral evidence to support their defence, however, the said statement, is on record and states inter alia, that it was agreed based on a business relation between his father Jaspaul Singh Kandhari and Mr. I.J. Tawler, that premiums in respect of policies taken by his father's other companies would not be payable in lieu of and on account of his directorship at the Plaintiff Company. This was equally applicable to Mr. Talwar. However, in the late 1999, his father fell out with the said Mr. I.J. Talwar, and the Plaintiff made demands for payment, which as discussed between his father and Mr. Talwar, was subject to inter-Company balances being reconciled.

12. He denied the allegation that, the Defendant Company ever accepted owing the amount of Kenya Shillings Four Million, One Hundred and Ninety Thousand, Three Hundred and Ninety Two (Kshs. 4,194,392.00) claimed herein, and argued that, the Plaintiff did not provide supporting evidence thereof, until the filing of the certified bundle of documents dated 22nd February 2012. He further stated that, no formal policy documents have been properly issued for the alleged covers and that, the debit notes produced to support the claim are not against the Defendant herein.

13. He further stated that, the Plaintiff is prohibited in law from insuring risks without first collecting premiums, and in the circumstances, the alleged agreement/contract for insurance to recover premium due hereunder is illegal. That, it is evident from the documents in Court, that the Plaintiff repudiated the Motor claims policy by refusing to allow payment of a claim for non-payment of premiums. Accordingly the Plaintiff is stopped from now claiming the alleged premium outstanding under the policy stated. Finally, he stated that, that at no time was an agreement reached that interest, (if any), would be payable on an outstanding premium.

14. In considering the evidence adduced in Court, the filed witness statements, the oral evidence and/or the bundle of documents filed, I find the issues that require determination as basically as agreed on by the parties and filed in court. Thus, the first issue is whether the Plaintiff issued the policies referred to, in particular in relation to the claim under paragraph 3 of the Plaintiff.

15. In answer to this question, I have considered the Plaintiff's bundle of documents, which includes Renewal endorsements, assorted forms of policies, Certificate of Insurance, and Policy Numbers for Burglary, Commercial vehicle, fire Insurance, and Employers Liability (Common Law) I have also considered the Statement of Mr. Gerald Omulo that, to the effect that one of the Directors in the Defendant Company is alleged to be in fact a Director in the Plaintiff Company. As a result of which it is alleged, the instructions acted on to issue or renew covers were on phone and paper work and would be finalized at a later stage and in some instances, the paper work was not completed in full, but the insurance remained in force over the period of the cover.

16. That, although some of the Debit notes and Policy endorsements are in the names of the Defendant Directors as individual, all the transactions were done through the Defendant's account number 101459, (evidenced by letters on page 1A to 1C of the bundle of documents). That, by a letter dated 13th September 2000(at page 11) of the bundle of documents Mahansons Food Distributors Ltd, made a request for a detailed analysis of the outstanding accounts of their Company, Mahansons (K) Limited and Kandhari Brothers Limited, and the Defendant provided the outstanding accounts by its letter dated 6th march 2001 as Kshs. 4,194,392. As such all the documents may not have been issued initially as expected.

17. In relation to the disputed Debit Notes, Mr. Raphael Ochieng gave a detailed explanation in his written statement, in relation to the following disputed Debit Notes:

- Debit Note 64249 for Kshs. 226,672 for comprehensive private car policy was issued for the period between 1st January 1997 to 31st December 1997 and a subsequent Renewal Endorsement issued to the Defendant.
- Debit Note 64253 for Kshs. 6,012 for comprehensive motor cycle policy was issued for the period 1st January 1997 to 31st December 1997 and a subsequent Renewal Endorsement issued to the Defendant.
- Debit Note 64342 for Kshs. 74,148 for comprehensive car policy was issued for the period 23rd January 1997 to 22nd January 1998 and a subsequent Renewal Endorsement issued to the Defendant.
- Debit Note 65123 for Kshs. 3,691 for employer's liability was issued for the period 20th January 1997 to 19th January 1998 and a subsequent Renewal Endorsement issued to the Defendant.
- Debit Note No. 65121 for Kshs. 5,504 for workmen's compensation was issued for the periods 20th January 1997 to 19th January 1998 and a subsequent Renewal Endorsement issued to the Defendant.

18. However, I did not find any explanation offered for the Debit Note No. 65193, although a copy of the same is included in the Plaintiff's bundle of documents as item No. 25, and described as a Debit Note No. 65193 dated 16th April 1997 for Fire Policy.

19. Therefore, based on the evidence above, I find that, the Plaintiff and Defendant had Insurance

Business Relationship. In the course of that relationship, Insurance policies were issued and or renewed. As stated, Debit Notes were subsequently issued, some were paid and others remained unsettled. Apart from claims arising from Debit Notes Nos. 64249, 64253, 64342, 65123, 65121 and 65193 disputed as being statutebarred, I find that all others are not to be in dispute.

20. Be it as it may, I find that the total sum of the disputed debit notes, amount to Kenya Shillings Three Hundred and Thirty One Thousand, Four Hundred and Seventy Three (Kshs. 331,473.00) and that leaves an amount of Kenya Shillings Three Million, Eight Hundred and Sixty Thousand, Nine Hundred and Nineteen (Kshs. 3,862,919.00) out of the total claim. Therefore, it is generally acceptable that sum of Kenya Shillings Three Million, Eight Hundred and Sixty Two Thousand, Nine Hundred and Nineteen (Kshs. 3,862,919.00) is undisputed and owing. Inthe absence of any oral evidence from the Defendants in support of their witness written statement to rebut the Plaintiff's evidence, I find the claim by the Plaintiff is well supported. That deals with the first and second issues herein.

21. I now turn to the 3rd issue, whether the listed Debit Notes are time barred under the Limitation of Action Act. Analysis thereof reveals that the said invoices were issued on the following dates:

- DN 64249 on 24th January 1997
- DN 64253 on 24th January 1997
- DN 64342 on 29th January 1997
- DN 65123 on 7th April 1997
- DN 65121 on 16th April 1997
- DN 65193 on 16th April 1997

22. The Complaint was filed on 23rd June 2003. The first demand letter was written on 4th March 1997. The demand letter was initially issued on the 6th March 2001. That is a period of about six years. However, correspondence by the Plaintiff shows there were several demands for payment as the business progressed. Thus it was sort of a running account and not an isolated item payable at a fixed determinable time. Similarly, as per the documents availed the Defendants sought for details of the sum owing even after six years that revived the claim afresh, as a written acknowledgement of a debt revives a statute barred debt. Equally I therefore find that there is no evidence to support the claim of time barred claims. The alleged time barred debts were not supported by any evidence.

23. As regards the fourth issue I find that the amount claimed is supported by the documentary and oral evidence adduced as outlined above. I now turn to the issue of interest chargeable on the amount claimed and I find that there is no evidence that the parties agreed on the same. Neither is there justification for the same as the claimant is not a Bank or a Financial Institution. Finally, on the issue of costs they will follow the cause.

24. In conclusion I find the Plaintiff has proved its claim and I enter judgment in favour of the Plaintiff as against the Defendant as follows:

a) A sum of Kshs 4, 194,392.00

b) Costs on the Suit

c) Interest on (a) and (b) above at Court rates from the time of filing the suit to payments in full

It is so ordered.

DATED AND DELIVERED ON THIS 18th DAY OF AUGUST 2016 AT NAIROBI.

G. L. NZIOKA

JUDGE

In the Presence of:

Mr. Tugee for Miss Kirimi for the Plaintiff

Non Appearance for the Respondent

Teresia - Court Clerk