REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL SUIT NO. 26 OF 2008

DENNIS AWUNYA …..... PLAINTIFF

VERSUS

CRATER AUTOMOBILE (NBI) LTD. …..... DEFENDANT

KENINDIA ASSURANCE COMPANY LTD. …....THIRD PARTY

JUDGMENT

By the Amended Plaint dated 6th November 2015 and filed herein on 31st December 2015 the Plaintiff's claim against the Defendant is for:-

> ***"(1) Special Damages***
>
> ***(a) Loss of business at Kshs.100,000/= net per month from 21st December 2007 till the determination of this suit;***
>
> ***(b) Loss of a motor vehicle valued at Kshs.2.8 Million;***
>
> ***(2) General damages for breach of contract;***
>
> ***(3) Cost of the suit;***
>
> ***(4) Interest".***

Briefly the Plaintiff's case is that on or about 13th September 2006 he purchased a motor vehicle Registration Number KAV 073Z Mitsubishi FE 659HD from the Defendant through his friend Rajoro Luke Sonye who had a good account with the defendant. On 20th December 2007 he delivered the said motor vehicle to the defendant's workshop in Kisumu for minor repairs on the understanding that he would collect it the next day. However when he went to collect the motor vehicle the next day it was not ready. It is his case that on 29th December 2007, while the motor vehicle was still in the Defendant's workshop it caught fire and was burnt to a shell. He contends that this was a result of the Defendant's negligence and breach of contract which he particularizes as follows:-

> ***"(a) Failing to conclude the minor service within the stipulated and agreed one day period;***
>
> ***(b) Failing to provide any or any security or fire fighting equipment;***
>
> ***(c) Exposing the Plaintiff's vehicle to risk of fire and damage".***

He claims that by reason of that negligence he has suffered loss and claims both special and general damages which despite being served with a demand and notice of intention to sue the defendant has not made good.

In its written statement of defence the Defendant disputes the Plaintiff's claim and contends firstly that the Plaintiff has no proprietary rights or interest in the motor vehicle, secondly that the motor vehicle was not delivered to the garage and if it was it was not for service but was conspiratorially stored there without its sanction and even if it was for service the same was duly rendered and it is the Plaintiff who neglected to pay for the same and to collect the vehicle in time. The defendant also avers that vehicles are kept at its workshops at the owner's risk and as such the Plaintiff's claim is precluded by the doctrin of volenti non fit injuria.

The defendant further denies the negligence or breach of agreement attributed to it in the Plaint and avers that the fire that gutted its workshop was a result of acts of third parties for which it cannot in law be held liable. At paragraph 8 of the Defence the particulars of acts of third parties are set out as:-

> ***"(a) Willfully breaking into premises despite ample security and vandalizing the contents thereof;***
>
> ***(b) Willfully setting its workshop on fire and burning the contents thereof;***
>
> ***(c) Chasing its security guards from their workstation and exposing the workshop to acts of vandalism;***
>
> ***(d) Causing mayhem to its business at the workshop".***

The particulars of negligence attributed to the Plaintiff are:-

> ***"(a) Colluding with the defendant's workers to store his motor vehicle in the Plaintiff's workshop outside the scope of their mandate;***
>
> ***(b) Failing or neglecting to pay for service in time;***
>
> ***(c) Refusing or neglecting to collect his vehicle on schedule".***

By an application dated 2nd February 2009 the Defendant instituted Third Party proceedings against its insurer and once the application was granted directions were given that the issue of liability as between the Defendant and the Third Party would be heard and determined at the same time as this suit.

The Defendant's case against the Third Party is based on a Fire and Special Perils (Material Damage) Insurance Policy No. 111/040/11/00652/2002/1. The Defendant's case is that the said policy covered it from risks such as the one in issue in this case and that the same was subsisting and as such it is entitled to indemnity from the Third Party.

The Third Party while admitting that the Defendant took out the Fire and Special Perils (Material Damage) Insurance Policy and that the same protected it from the occurrence of perils such as fire, theft, riots and other risks contends that what occurred in Kisumu and other parts of Kenya on 29th December 2007 was a civil commotion assuming the proportion of a popular uprising which risk was expressly excluded in the policy and as such it is not liable to indemnify the Defendant.

At the hearing it transpired that the Plaintiff had in fact delivered the motor vehicle in issue to the Defendant's garage in Kisumu for minor repairs a fact which the Defendant admitted. The Plaintiff produced a letter by the Defendant's Branch Manager Kisumu dated 23rd January 2008 which he claims is an admission that the vehicle was indeed there and that it caught fire on 29th December 2007. He also tendered an affidavit sworn by Rajore Luke Sonye on 28th August 2006 where it is deposed that Rajore Luke Sonye purchased the said motor vehicle on behalf of the Plaintiff. He also produced a number of

receipts by which he made payment for the vehicle by installments to the NIC Bank. He tendered a receipt for Kshs.700,000/= issued in his own name by the Defendant as well as a delivery note dated 13th September 2006 which he claims was issued to him upon the delivery of the vehicle. Questioned about the work sheet which was issued to him upon delivery of the vehicle to the workshop he stated that he had put it on the vehicle's dashboard as was the practice and that it too was burnt. He reiterated that the agreement between him and the Defendant was for collection of the vehicle the next day but that the defendant had not completed the repairs and so did not release the vehicle to him. When he went back the next day it was still not ready. Then on 24th the workshop closed for the Christmas Holiday. He stated that he had purchased the motor vehicle at Kshs.2,850,000/= and that he was never informed that his vehicle would be stored at the workshop at his own risk and that the reason he was not invoiced was that the repairs had not been done. He further stated that he earned Kshs.150,000/= from the vehicle every month and tendered as proof a statement of his bank account before the vehicle was burnt and another after it was burnt. He contended that his vehicle would not have been burnt in the workshop had it been repaired within the time agreed. He further stated that after the incident he defaulted in the payments but his friend Rajoro Luke Sonye is now repaying the loan following a Court order. He urged this Court to order the Defendant to compensate him for the loss of the vehicle, pay the loan to NIC Bank and award him the costs of this case. He called Rajore Luke Sonye who testified that although the transaction involving the motor vehicle was between him and the NIC Bank the real owner of the motor vehicle was the Plaintiff in this case; that it was the Plaintiff who paid the monthly installments for the vehicle to the Bank. He however stated that after the vehicle was burnt the Plaintiff defaulted and the NIC Bank sued him (Rajoro). He (Rajoro) was then ordered to continue paying for the vehicle and he has been doing so.

The Defendant and the Third Party also called a witness each in support of their cases. For the Defendant Mr. Joel Ikugo Karanja testified that the motor vehicle in issue was purchased from them by Luke Akok and NIC Bank. While admitting that the vehicle was on 20th December taken to their workshop in Kisumu for repairs by the Plaintiff he denied that there was an agreement that the vehicle would be repaired in a day; He stated that repairs were done on a first come first served and it was not therefore possible to do it in a day. He stated that 21st December was a Saturday and on 23rd there was a skeleton staff and following that on 24th the workshop was closed for Christmas. Thereafter there was anxiety due to the election results and the workshop remained closed. On 29th December the workshop was broken into by people he described as a group of bandits who burnt the workshop together with all the vehicles, furniture, cash and equipment therein. He stated that previously they had not experienced such insecurity and stated that the premises were well secured and had CCTV Cameras as well as guards from Robinson Security. He added that the security doors and grill were locked. He blamed the Plaintiff for not collecting the vehicle while they were open and stated that their copy of the worksheet also got destroyed in the fire. He contended that they did not expect the vehicle to be burnt and further stated that all their premises have fire fighting equipment mounted. He urged this Court to find the defendant not liable.

Regarding the Insurance Policy it was his evidence that the Third Party had admitted liability and agreed to pay. However their proposed sum of Kshs.1,912,500/= was not acceptable to the defendant who refused to execute the discharge summons. He contended that was occurred on 28th December 2007 was looting following riots and the Third Party having admitted that much ought to indemnify the Defendant. He also contended that the reason the Third Party appointed Loss Adjusters visited their premises many times was because they acknowledged there were riots but not political uprising.

Francis Oginga Saulo the then Manager in-charge of the Third Party's Branch One was categorical that the peril in this case was not covered by the insurance policy between the Defendant and the Third Party. Referring to what occurred on 29th December 2007 as civil commotion he contended that even the Defendant admitted that much in their claim form (EXBD2). He contended that the peril was excluded by Clause 1(b) of the policy. He explained that the general practice by the insurance industry was that no cover was issued for that kind of peril at the time. He stated that what was offered to the Defendant but which was not accepted was an ex gratia payment which should not be interpreted as an admission of liability. He further stated that there were no documents to show that the motor vehicle in issue belonged to the Plaintiff or that it was at the Defendant's workshop. That moreover the claim is also not indemnifiable for reason that the Defendant did not comply with the safe and book clause under the policy.

Summing up was by way of written submissions and I must commend counsel for their resourcefulness. They were all well researched.

It is no longer in dispute that on 20th December 2007 the Plaintiff delivered the subject motor vehicle to the Defendant's workshop for repairs. It is also not in dispute that on 29th December 2007 the motor vehicle was burnt in a fire that also destroyed other properties belonging to the Defendant. The issues that remain for determination, as between the Plaintiff and the Defendant therefore are:-

(a) Whether the Plaintiff has any proprietary rights in the motor vehicle;

(b) Whether the damage to the motor vehicle was as a result of negligence and/or breach of contract on the part of the Defendant or whether it was as a result of the Plaintiff's failure to pay for the repairs and to collect the motor vehicle while the garage remained open;

(c) Is the Defendant liable to compensate the Plaintiff;

(d) Who should bear the costs of this suit.

As between the Defendant and the Third Party the issue for determination, is in my view whether the loss suffered on 29th December 2007 was covered by the insurance policy issued to the Defendant by the Third Party or whether it was excluded. The Court shall also determine the issue of costs as between the Defendant and the Third Party.

On the first issue I am satisfied that there is proof on a balance of probabilities that the Plaintiff has proprietary rights in the motor vehicle. The affidavit sworn by Rajoro Luke Sonye and himself on 28th August 2006 and which is in the nature of an agreement, the said Rajoro's testimony in Court together with the receipts exhibited demonstrate on a balance of probabilities that it was him who paid the deposit and subsequent installments for the vehicle. It is also not in contention that it was him who delivered the vehicle to the defendant's workshop for repairs.

On whether the damage occasioned to the vehicle occurred as a result of negligence and/or breach of contract on the part of the defendant or whether it was as a result of his failure to pay for the repairs and to collect the vehicle my finding is that it is neither.

It is clear from the evidence that the real reason the Plaintiff blames the defendant is that it did not have the vehicle ready for collection the next day. Whether there was such an agreement is a matter of fact. The Plaintiff did not adduce evidence to prove this fact and neither did the Defendant disprove it. None of them adduced evidence on when the vehicle was to be collected as both claimed their work sheets were destroyed in the fire. This therefore is a fact that was neither proved nor disproved and under Section 3(4) of the Evidence Act the result is that it was not proved.

Having found that there is no proof of the fact that the agreement was for the Plaintiff to collect the vehicle the next day and this being the main basis of his claim this Court can safely conclude that blameworthiness has not been proved. Moreover, and the Defendant did state this, the occurrences of 29th December 2008 were not foreseeable. The Defendant's witness testified that it had secured its premises and that there was fire fighting equipment. Previously no such occurrence had taken place. To prove negligence it must be shown that the loss was reasonably foreseeable. The Plaintiff did not prove that the Defendant could have reasonably foreseen there would be a delay in the announcement of results which in turn would result in the acts complained of. Counsel for the Plaintiff has submitted that the Defendant's omission to call witnesses from Robinson or G4S reduces their evidence to mere denials. With due respect, Sections 107, 108 and 109 places the burden of proof on the Plaintiff. It is him who wishes this Court to believe that the premises were not secured and that they did not have fire fighting equipment. The onus was therefore upon him to prove those facts. In the end I find that the Plaintiff has not proved that his loss arose because of either negligence or breach of contract on the part of the Defendant. Indeed the particulars of negligence attributed to the Defendant in the Plaint were not proved. The Defendant is therefore not liable to compensate the Plaintiff.

As between the Defendant and the Third Party it is admitted that the Defendant had a Fire and Perils Insurance policy covering the period in issue. The cover was for loss of damage caused by fire, lightning, riot, strike and any other peril indicated in the policy. The issue between them is one of construing the terms of that policy. It is the Third Party's case that the acts of 29th December 2008 amounted to a civil commotion assuming the proportions or amounting to a popular rising and were therefore not covered by this policy. That the same were expressly excluded by Clause 1(b). It was their evidence that indeed in the claim form the Defendant admits that the damage arose as a result of a civil commotion. On its part the Defendant contends that what occurred were riots and that the Third Party admitted that much and agreed to pay only that the amount paid was not acceptable to the defendant. I have considered the submissions by counsel very carefully. To determine this issue I can look no further than the policy itself. Clause 1 (b) states:-

"Excluding

(b) Civil commotion assuming the proportions of or amounting to a popular rising".

It is therefore clear from the above clause that where damage was as a result of a civil commotion it was not covered by the policy. It is now common knowledge, and this is admitted in the Defendant's claim form, that what occurred was not confined to the Defendant's premises: There was civil unrest because of delay in announcing the results of the election. As was held in **Spinney's (1948) Ltd. V. Royal Insurance Co. Ltd. (1986) 1 Llyod's Rep 406** a civil commotion need not involve a revolt against the government and it is sufficient that it assume the proportion of a popular rising. The Defendant in its claim form, itself, describes the acts of that day as a civil commotion meaning that it recognized them as such. Clearly the occurrences which were acts of violence in pursuit of a political cause fit this bill and were therefore excluded. The Third Party did make it clear that the amount that it proposed to pay to the Defendant was an ex gratia payment but was not an admission of liability. That may well be so as the loss in this case was clearly excluded by Clause 1(b) of the policy. Accordingly I find that the Third Party is not liable.

Accordingly I make orders as follows:-

1. ***That the Plaintiff's case against the Defendant is dismissed with costs to the Defendant.***

2. ***That the Defendant's case against the Third Party is dismissed with costs to the Third Party.***

That is the judgment of the Court.

Signed, dated and delivered at Kisumu this 22nd day of September 2016

E. N. MAINA

JUDGE

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

Miss Omboto for the Plaintiff

N/A for the Defendant

N/A for Third Party

CC: Serah