REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 294 OF 2009

INSURANCE COMPANY OF EAST AFRICA…..APPELLANT

VERSUS

PAN AFRICA SYNDICATE LIMITED..... RESPONDENT

***(Being an appeal from the Judgment delivered by Hon. E.N. Maina, Senior Principal Magistrate on 22nd May 2009*)**

JUDGMENT

On 15th June 2009, the appellants filed memorandum of appeal, challenging the judgment of the Chief Magistrates Court at Nairobi, in civil Case No. 1681 of 2004. The grounds appearing can be rephrased as –

i. **The learned Magistrate erred in not taking into consideration the expert opinion presented on behalf of**
ii. **The learned Magistrate failed to appreciate that the Respondent had failed to quantify his claim as he had not supplied relevant documentation.**
iii. **The learned Magistrate erred in fact in awarding Kshs. 1,005,852/60 in absence of evidence to support the same given that special damages must be strictly proved.**
iv. **The learned Magistrate erred in awarding the above amount yet no receipts were produced to show the goods were ever bought by the Respondent or that they had been delivered in its premises.**
v. **The learned Magistrate erred in finding that the Respondent had given sufficient explanation for reporting the burglary way after the incident had occurred.**
vi. **The Learned Magistrate erred in law in wrongly interpreting the terms and conditions of Insurance substituting between the Appellant and the Respondent.**
vii. **The Learned Magistrate erred in law and fact in failing to acknowledge that the Respondent was not entitled to compensation as it had breached the terms of the policy of Insurance.**

Wherefore the Appellant prayed that the appeal be allowed with costs and the judgment of the lower Court set aside.

Facts that are not disputed are that the Appellant and Respondent entered into a contract of insurance against burglary in the Respondent's premises; the policy of insurance was valid at the time goods were stolen from the Respondent's premises; burglary was one of the risks covered by the policy.

Despite filling the requisite claim form and demand, the appellant failed and, or neglected to pay, his defence being that the theft occurred in collusion with the Respondent's employees and could not have occurred in one night as claimed. This according to the appellant, was inconsistent with the terms and conditions of the policy.

When it came to the investigation Reports produced by the Appellant during the trial (Exhibit D1 and D2), having not been produced or submitted by the investigator who prepared them, they had little or no significance to the case. On that basis, the Appellant's witness was not competent to answer any questions on the Investigation Report, which was not authored by him. Only the author-the maker of the Report could submit it and be cross-examined on it. DW2, a private investigator also testified that he visited the premises six months after the burglary had occurred. This casts doubt on how effective his investigation was, having been carried out way after the burglary had taken place. DW2 testified that he investigated the matter six months after the burglary when repairs on the warehouse had already been undertaken. Still, his report confirmed there had been a burglary at the Respondent's premises.

While agreeing with the learned counsel for the appellant on the general principle that loss must be pleaded, particularized and proved, the principles applicable in tort with respect to damages should not be confused with damages in the area of breach of contracts. Generally, the phrases general and special damages are applicable to claims in torts, not in contracts. This is because in contracts, damages for breach are easily quantifiable and awardable where they are the natural flow or anticipated by the parties as natural flow from a breach of the contract. If such damages are held to be within the reasonable anticipation of the parties if there is a breach, then they are special and must be pleaded and proved before the court can award the same. An insurance policy is a contract between the insured and the insurer.

There was no evidence in support of the alleged collusion by the Respondent's employees at material time of theft. Indeed, the Respondent's evidence that it sought compensation from the appellant as per the policy terms and conditions was not challenged by the appellant/insurer. A firm of guards was hired as per the policy and an alarm was in place. Accordingly, the Reports of the theft were made immediately to the police and the broker. Even without the reporting the issue whether burglary took place is not disputed. The Respondent had fulfilled its part of the bargain.

Accordingly, there is no merit in the Ground of Appeal that the lower Court erred in awarding the value of the insured property stolen from the Respondent's premises as there was no evidence adduced to the contrary.

All in all therefore, and for reasons given above, the appeal herein is dismissed with costs to the Respondent.

Dated and delivered at Nairobi this 22th Day of April, 2015.

A.MBOGHOLI MSAGHA

JUDGE