REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL SUIT NO. 29 OF 2011

PETRO OIL KENYA LIMTED ….....PLAITIFF

VERSUS

THE JUBILLEE INUSRANCE COMPANY

OF KENYA LIMITED ……. ……DEFENDANT

J U D G M E N T

PRELIMINARY

1. This case was fully heard by Mwera J (as he then was, now a Judge of the Court of Appeal). Because the said judge is no longer at the Mombasa law courts the responsibility of writing the judgment fell upon me. There has been a delay in delivering this judgment which delay was compounded by the fact that I was invited to attend a training course at the Judicial Training Institute, thereafter I proceeded on my annual leave. On my return to the Mombasa law courts I found that my secretary and court assistant were on transfer from Mombasa law courts. The delay is indeed regreted.

2. The plaintiff PETROL OIL KENYA LIMITED is in the business of running petrol station. It has filed this case against THE JUBILEE INSURANCE COMPANY OF KENYA LIMITED, the defendant, seeking judgment that the defendant do indemnify it for the loss of Ksh 4,163,612.26, which loss it incurred as a result of fraud or dishonesty committed by its employees. The plaintiff had a fidelity guarantee insurance policy with the defendant which policy was in force at the material time that it suffered the loss. That insurance policy commenced on 1st April, 2004 and was renewed from year to year. In consideration of the plaintiff paying the premium under that policy the defendant agreed to indemnify the plaintiff against loss incurred by any act of fraud and dishonesty committed by plaintiff's employees.

3.On or about 25th December, 2008 an employee of the plaintiff stole Ksh 1,199,419 from the plaintiff's Siaya petrol station. On or about 3rd to 6th April 2009 another of plaintiff's employee stole fuel stock and cash to the value of Ksh 1,160,382 from plaintiff's Othaya's petrol station. On or about 20th August 2009 plaintiff suffered a theft by its employee of its fuel stock and cash to the value of Ksh 2,266,437.84 from plaintiff's Meru petrol station. The plaintiff made a claim for those losses which the defendant repudiated.

4. Although by its defence defendant denied the value of the loss, the plaintiff claims that denial was not supported by the evidence offered before court and that defence therefore remains an allegation.

5. Defendant pleaded that the plaintiff's claims were repudiated due to plaintiff's failure to abide by the policies terms and conditions. The condition defendant relied upon in repudiating were firstly; that the

plaintiff had failed to comply with terms contained in the defendant's letter dated 30th March 2007, and secondly that the plaintiff's claim was time barred by the provisions in the policy requiring any claim rejected by defendant to be filed within 12 months of the date of rejection.

6. The defendant also raised two issues in its defence that is; that the plaintiff's case should fail for misjoinder of cause of action, and that the plaintiff should have referred the dispute to an arbitrator as provided in the policy.

7. The issues that present themselves for consideration are five. They are:

1. ***Did the endorsement by the letter of 30th March, 2007 alter the policy of insurance for;(i) Siaya claim; (ii) Othaya claim; and (iii) Meru claim?***
2. ***Is the plaintiff's claim time barred?***
3. ***Is the plaintiff's claim defeated by misjoinder?***
4. ***Is the plaintiff's claim in court defeated by the arbitration clause in the insurance policy?***
5. ***What is the effect of relying on without prejudice correspondence?***

FIRST ISSUE.

8. In order to interrogate this issue I will begin by reproducing the letter of 30th March, 2007 which the defendant relies upon in its claim that the endorsement therein permitted it to repudiate. The letter which was sent to plaintiff's insurance broker is as follows;

"30th March 2007

SD/BM/C/0150

Att: Mr Tom Kilei

Starlit Insurance Brokers Ltd

MOMBASA

Dear Sir

FIDELITY GUARANTEE POLICY NO:P.MSA/2505/2005/1004

PETROL OIL KENYA LIMITED

We refer to the above policy coming up for renewal on 1st April 2007.

We bring to your attention the fact that the three year loss ratio under the policy as at 28th February 2007 stands at 123,95.

We did indicate to the previous broker vide our letter dated 4th November 2006 that notable risk improvement recommendations have been made by our loss adjuster among them:-

I. **of about two weeks to ensure that employees at the stations properly account for supervisor's/Managers in the regional offices undertake regular checks at intervals sales proceed to minimize losses.**
II. **supervisor's /Manager's salaries should commensurate their positions. Please let us know the action taken by the insured.**

Because the frequency of loss incidents coming in has increased, we are proceeding to invite renewal on the following terms:-

a) Excess of 10% of loss amount minimum of Ksh 50,000/= is imposed.

b) All safes to have combination locks such that at least two authorized personnel (manager and Supervisor) can open the safes at anyone time.

c) Petrol attendants to carry not more than Ksh 3,000 with them as per the insured's procedure. Ksh 3,000/= is slotted into the safe through a hole on the wall.

d) The insured to provide to us the names ,position and amount of guarantee for each person covered by the policy.

e) Cover excludes casual employees.

f) Basic renewal premium Ksh 1,225,000/=

Renewal documents to follow in due course.

Yours faithfully

S.DOLA

UNDERWRTING MANAGER

MOMBASA"

9. The defendant by its testimony through its officer and by its submissions before court maintained that the letter reproduced above "amounted' to an offer to vary the policy in extending relationship with plaintiff for a further twelve months. Defendant therefore argued that the plaintiff's policy was altered by mutual consent since the plaintiff did extend its policy after 30th March 2007. Defendant relied on extract of the book General Principles of insurance law by E.R Hardy Iramy in the following excerpt:

> ***"After the completion of the contract, no material alteration can be made in its terms except by mutual consent. Any such alterations must also, since the policy is a written instrument, be made in writing. It is usually made by an endorsement upon the policy but may be contained in a separate memorandum. The consent to the alteration need not be in writing. A verbal consent is sufficient."***

10. The plaintiff on this issue stated that neither itself nor its broker responded directly to the letter of 30th March 2007. The plaintiff's insurance broker, who testified on behalf of plaintiff stated in evidence that on receipt of that letter he made a counter offer by issuing a Risk Note to defendant for the renewal of the policy for the period 1st April, 2007 to 1st April, 2008 which note did not cover the alterations proposed by the defendant in the letter of 30th March 2007. He referred to the renewal confirmation by defendant as per his risk Note and stated that as consequence the endorsement in that letter were not part of that renewal. He repeated by saying that the terms of the plaintiff's policy were not changed as proposed in the letter of 30th March 2007.

11. PW 2, Philip Chirima, plaintiff's human resource officer stated that plaintiff was not agreeable to the changes proposed in the letter of 30th March 2007 and therefore instructed its broker to renew the policy on the same terms as before. He also referred to the meeting held on 8th August 2007 between the plaintiff's employees, its broker and the defendant's employees. In that meeting plaintiff's raised its objection to the new clauses in the letter of 30th March 2007. The minutes of that day reflected the defendant's employee giving an undertaking to look at plaintiff plea on the changes contained in the letter. The parties again met on 5th October, 2007 and the minutes of that day reflect defendant's employee promising to look into plaintiff's concern on the content of the letter.

COURT'S ANALYSIS ON FIRST ISSUE.

12. I wish to refer to the letter reproduced above and wish to make emphasis on the wording on the last paragraph. In that paragraph defendant stated:

"renewal documents to follow in due course."

The defendant did not give evidence to show that those documents "followed". That being so, it follows that the policy was not altered, as proposed in the letter, since the renewal documents, whatever they were, did not follow. What is clear from the evidence is that the plaintiff through its broker sent to defendant "Risk Note" containing the terms that were there previously and the defendant, on the basis of that Note, proceeded to renew Plaintiff's policy. It is rudimentary requirement that for a contract to have binding force parties ought to agree. Such agreement is reached when a party accepts an offer made by the other. Acceptance is defined in the book the law of contract by Treitel as : ***"An acceptance is final and unqualified expression of assent to the terms of an offer.... a mere knowledge of an offer would not be acceptance...."*** The defendant here, made an offer by its letter of 30th March 2007. The plaintiff did not accept that offer but proceeded to make a counter offer which the defendant accepted when it renewed the policy.

13. To further confirm that the parties did not reach an agreement, parties engaged in meetings where the issue of the new clauses arose and with the defendant undertaking to consider the issue. The defendant did not renew its call for terms of the policy to be changed after accepting plaintiff's counter offer. It follows that those terms are unenforceable against plaintiff. See the book Sweet & Maxwell Chitty on contract, where the learned authors stated:

"A rejection terminates an offer, so that it can no longer be accepted. For this purpose, an attempt to accept an offer on new terms (not contained in the offer) may be a rejection accompanied by a counter-offer. Thus in Hyde v. Wrench the defendant offered to sell a farm to the plaintiff for $ 1,000. The plaintiff replied offering to buy for $950, and when that counter-offer was rejected, purported to accept the defendant's original offer to sell for $ 1,000. It was held that there was no contract as the plaintiff had, by making a counter-offer of $950, rejected, and so terminated, the original offer.

14. My response to the first issue is that the endorsement in the letter of 30th Mach 2007 did not alter the parties policy on any of the claims subject to this suit.

SECOND ISSUE

15. The policy of insurance had a limitation clause, limiting the period within which plaintiff could file an action. That clause provides.

" If a claim is made under this policy and the company rejects such claim, no suit or action of any kind against the company for the recovery of such claim shall be sustainable in any court unless such suit or action shall be commenced within 12 months from the date of such rejection."

16. The theft by employee at plaintiff's Siaya petrol station of 25th December, 2008 on being reported to the defendant, the defendant repudiated that claim by its letter dated 19th August 2009. The repudiation was on the basis that the plaintiff had failed to follow the renewal terms of the policy as contained in the letter of 30th March 2007.

17. Similarly the claim of Othaya theft was repudiated by defendant by their letter of 11th August 2009 on the ground of the alleged non compliance with the terms of the letter of 30th March 2007.

18. The Meru theft was repudiation by defendant's letter dated 14th November 2010. Repudiation was on the ground that plaintiff had not followed the terms recommended by defendant's loss adjustors which was mentioned in the letter of 30th March 2007. Again the repudiation of Meru claim was not on the ground that plaintiff failed to abide by the renewal terms in the letter but rather that the plaintiff failed to

abide by the recommendations of the defendant's loss adjustor. I will come come back to this later.

19. The Siaya and Othaya claims were repudiated by the defendant on the ground that they were caught by the clause that limited time for filing a claim. However the Meru claim was filed well within the 12 months period provided in the policy of insurance as stated above and ought not to have been repudiated on the basis of that clause.

20. The defendant submitted that the repudiation of the claims was "unequivocal and unambiguous" and that the plaintiff claim, and more particularly, Siaya and Othaya claims were time barred.

21. Plaintiff in response to this issue and referring to Siaya and Othaya claims contended that the defendant's engagement of the plaintiff in negotiations after repudiation was tantamount to waiver of the limitation condition in the insurance policy.

22. The plaintiff relied on the case **SITA STELL MILLS LTD-VS-JUBILEE INSURANCE CO. LIMITED (2007) eKLR.** This is a decision by Maraga J. (as he then was, now Court of Appeal Judge). It is indeed a very well reasoned judgment which I beg to be excused if I rely on it extensively. In doing so I reject the submissions by the defendant, that the decision is not binding on this court since it is a High court decision. In any case the plaintiff subsequently supplied to this court the decision of the court of appeal whereby the decision of Maraga J. was upheld.

23. I do not reject the defendant's submissions that the validity of the meetings to act as waiver were affected by the fact they were without prejudice meetings.

24. The basis upon which plaintiff sought to rely on the doctrine of waiver is that the defendant engaged the plaintiff in a meeting on 15th July 2010 in which the repudiated claims of Siaya and Othaya were discussed. The conditions of that meeting as reflected in the minutes was thus:

> ***"The client (plaintiff) requested that the group claim manger (of defendant) Mr Mbugua Gathige comes to see them so that the issues on claims can be sorted out once and for all."***

25. The issue of repudiation was also the subject of series of Emails and to mention one such Email is the one dated 23rd July 2010 where the defendant stated in the email:

> ***"This matter of Petro oil has not come to an end."***

In that email the writer seemed to request defendant's officers to advise the way. That writer wrote:

> ***"A management decision needs to be made as the client has refused to accept exgratia settlement."***

26. In the light of those engagement plaintiff learned counsel submitted thus :

> ***"In these circumstances we respectfully submit that by their conduct, the defendants waived the limitation condition and therefore can not rely on it any longer."***

27. The Judge in the SITA case (supra) categorized waiver as express or implied. He stated thereof:

> ***"Waiver can be express or implied. Disputes hardly arise where it is express. They however do where it is implied. An implied waiver may arise where a person has pursued such a course of conduct as to evidence an intention to waive his right or where his conduct is inconsistent with any other intension than to waive it. It may be inferred from conduct or acts putting one off one's guard and leading one to believe that the other has waived his right."***

28. The learned Judge in applying that doctrine to insurance claims stated:

"waiver is a form of election. In insurance claims, an insurer which has a right to avoid liability may elect not to do so or may be deemed to have so elected, provided that it has knowledge of the breach and either expressly so elects or acts in such a way as would induce a reasonable insured to believe that it is not going to insist upon its legal rights. This kind of waiver requires a conscious act by the insurer or its agent, but it does not require the insured to act in response in any way."

29. The learned Judge also made reference to the celebrated case which every law student will recall as HIGH TREE CASE Viz:

"Expounding on the doctrine of equitable estoppel which he had developed in the famous case of Central London Property Trust -vs High Tree House Ltd (1947) KB 130 this is how Lord Denning put it in his book"The Disciple of Law" at page 206:-

"If the defendant led the plaintiff to believe that he would not insist on the stipulation as to time and that if they carried out the work he would accept it, and they did it, he would not afterwards set up the stipulation as to time, against them. Whether it be called waiver or performance on his part it is a kind of estoppel. By his conduct he evinced an intention to affect their legal relations."

And at P.217 he further stated:-

"where a man has led another to believe in a particular state of affairs he will not be allowed to go back on it when it would be unjust or inequitable for him to do so."

30. I have considered the minutes of the meeting of 15th July 2010 and find that defendant did waive the limitation period. Particularly when one considers that plaintiff in that meeting did threaten to take away its insurance business from the defendant if the defendant did not settle the claim. On hearing that threat defendant officer Mbugua Gathige promised to check if the issue of plaintiff claims could be sorted out. Indeed the defendant kept "dangling the carrot" so to speak, to the plaintiff through its series of emails where one officer of defendant seems to seek instructions on the plaintiff's claim. It is without a doubt that the plaintiff was left with the view that defendant waived the limitation and were intending to look into settling plaintiff's claim. To echo the finding in SITA case (supra) :

"After they had first intimated their repudiation of their liability they nonetheless led the plaintiff to believe that the claim could still be negotiated and settled."

31. Indeed it was not until 3rd November 2010 when the period of limitation would begin to run, when the defendant communicated to plaintiff's broker that if their ex grantia offer was not accepted within 14 days, their offer to settle would be withdrawn.

32. I therefore make a finding that the defendant waived their limitation period and accordingly the limitation period began to run on 3rd November 2010. The plaintiff's claim, herein, having been filed on 19th October 2011 fell well within the twelve months limitation period.

THIRD ISSUE

Defendant submitted that plaintiff's claim failed because of misjoinder of claims . The defendant did not cite any law in support of its submission but stated that it was prejudiced by dealing with the three claims in the same suit where in two of them its defence was limitation period and one of them was that plaintiff had failed to abide by the terms of the policy.

33. The plaintiff had one policy of fidelity guarantee insurance covering all its petrol stations. It has suffered theft by employees in three of such petrol stations. The thefts took place on different dates. Can it then be said there was misjoinder of causes of actions? In my view the defendant is wrong in its submissions. The plaintiff was right to have in one action all the three different claims and in so doing the

plaintiff was complying with the provisions of Order 3 Rule 5(1) of the Civil Procedure Rules which provides.

> ***"5.(1) Save as otherwise provided, a plaintiff may unite in the same suit several causes of action against the same defendant or the same defendants jointly; and any plaintiffs having causes of action in which they are jointly interested against the same defendant or the same defendants jointly may unite such causes of action in the same suit."***

34. Moreover, the plaintiff in filing one suit for all the claims was being obedient to the overriding objective of the Civil Procedure Act, Cap 21 by ensuring the expeditious, proportionate and affordable resolution of the disputes with the defendant. The defendant submission on this issue is rejected.

FOURTH ISSUE

35. The defendant's submission is that the plaintiff's suit should be disallowed because the plaintiff had not exhausted all the avenues of settlement of this claim. Defendant was referring to the arbitration clause set in the policy Viz;

> ***"If any difference arises as to the amount of any loss such difference shall independently of all other questions be referred to the decision of an Arbitrator, to be appointed in writing by the parties, or, if they cannot agree upon a single Arbitrator, to the decision of two disinterested persons as Arbitrators , of whom one shall be appointed in writing by each of the parties within two calendar months after having been required so to do in writing by the other party."***

36. I formed the view that the issue on arbitration was not one the defence considered with any seriousness since even the sole witness of defendant stated in examination in chief that arbitration was only applicable if the defendant admitted the claim, but since it did not arbitration was not appropriate. Indeed a careful reading of the clause reproduced above will show the only issue that was required to be referred to an arbitrator was "any difference that arises as to the amount of any loss". The difference between the parties here was not on the amount of loss as will be appreciated from the discussions above.

37. Additionally defendant would be forbidden to raise the issue of arbitration by virtue of Section 6(1) of the Arbitration Act, Cap 49 where a defendant is required to seek stay of a suit pending referral to an arbitrator not later than the time such a party enters an appearance. In this case defendant filed an appearance and defence and did not seek stay of this suit pending referral to arbitrator. Defendant therefore submitted to this court's jurisdiction and cannot be heard to say otherwise.

FIFTH ISSUE

38. Defendant objected to plaintiff's reliance to without prejudice correspondence. That objection however was only raised in defendant's submissions. Indeed the plaintiff's documents were all submitted by consent of the parties. To that extent that submission is rejected.

35. Section 23 (1) of the Evidence Act Cap 80 provides how the court can receive documents written on without prejudice basis. That section provides.

> ***"(1) In civil cases no admission may be proved if it is made either upon an express condition that evidence of it is not to be given or in circumstances from which the court can infer that the parties agreed together that evidence of it should not be given."***

As stated before, the defendant consented, at the hearing of this case, to the production of plaintiff's bundle of documents which bundle contained correspondence written on without prejudice basis. The defendant is estopped, in my view, from raising an objection at this late stage.

39. The rationale of not admitting documents which are written on without prejudice basis is that parties who enter into negotiations, on that basis, conduct themselves with the knowledge that if those

negotiations do not result in an agreement, the offers or counter offers thereof would not be admissible in court. See **Principles of Evidence** by AlanTaykos. The learned author in that book referred to the case of of OLIVER LJ in CUTTS -VS-HEAD (1984) thus;

> ***"....Parties should be encouraged as far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations(and that includes, of course, as much the failure to reply to an offer as an actual reply) may be used to their prejudice in the course of the proceedings...The public policy justification, in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as admissions on the question of liability."***

The learned author further stated.

> ***"It is worth stressing that if the negotiations lead to agreement, an enforceable contract is established. If one party then wishes to deny or resile from what has been agreed, the communications can be relied upon to prove the contract and it's terms, because in such a situation, the question is whether there has been a concluded agreement, and it would be impossible to decide it without looking at the correspondence, In*** Tomlin v Standard Telephones and cables Ltd (1969), ***the defendant sought to argue that their "without prejudice" agreement to settle on a 50/50 basis was merely a step in an eventual settlement to be reached, but it was held that the plaintiff was entitled to hold on to theagreement as to liability, which was severable from the negotiations in relation to quantum."***

40. The only pertinent document to which the defendants without prejudice communication could be objected to is the email of defendant of 3rd November 2010. However looking at the content to which the privilege of without prejudice could apply it is the offer of ex gratia payment. The ex gratia payment was not in issue in the case. That being so, even if the defendant had not consented to plaintiff's document, that email could still have been validly produced to prove the content not protected by that privilege. It follows that the defendant's objection in this issue is over ruled and rejected.

41. Having considered the above issues it follows that the renewal terms of the letter of 30th March 2007 were not applicable to all the claims of the plaintiff. Additionally in regard to the claim of Meru, being revisited as stated before in this judgment, the defendant rejected that claim on terms that were not even referred to in the letter of 30th March 2007. Since that is this court's findings and because this claim was not at all caught by the twelve months limitation period the defendant wrongfully repudiated these claims.

CONCLUSION

The plaintiff's does succeed and there shall be a declaration that the defendant is liable to indemnify the plaintiff as prayed. The judgment of the court is:

(a) A declaration is hereby made that the defendant is liable to indemnify the plaintiff for the sum of Ksh 4,163.612.26

(b) There shall be interest at court rate from the date of suit until payment in full.(c)Plaintiff is awarded costs of this suit.

Dated and delivered at Mombasa this 25th day of June 2015.

MARY KASANGO

JUDGE

25.6.2015

Coram

Before Justice Mary Kasango

C/assistant – Kavuku

For Plaintiff:

For Defendant:

Court

The judgment delivered in their presence/absence.

MARY KASANGO

JUDGE