



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL CASE NO. 111 OF 2010

KENOLKOBIL LIMITED:.....1ST PLAINTIFF

KOBIL PETROLEUM LIMITED :.....2ND PLAINTIFF

VERSUS

CHARTIS KENYA INSURANCE COMPANY LIMITED:::DEFENDANT

J U D G E M E N T

INTRODUCTION

1. The Plaintiffs are limited liability companies carrying on business in Kenya and are associate companies jointly managed and carrying on business as oil distributors in Kenya and the East Africa Region. The Defendant on the other hand carries on business as an Insurer and is duly authorized to do so under the provisions of the Insurance Act.
2. The Plaintiffs herein came to this Court by way of the Plaint dated 25th February, 2010 and filed on even date, claiming from the Defendant indemnity in respect of the loss and damage suffered to their properties as particularized in the Plaint, Kshs. 28,493,624.74 as well as interest thereon at thirteen percent (13%) per annum from 1st October, 2009 until payment in full.
3. In response to the Plaintiffs' claim, the Defendant filed its Defence dated 31st May, 2010 on even date.

PLAINTIFFS' CASE

4. The facts of the case are that by a policy of insurance number 060006167 made by the Defendant on 16th June, 2006, the Defendant in consideration of the Plaintiffs paying the first premium mentioned therein and thereafter paying annual renewal premiums of Kshs. 6,052,605/= agreed to indemnify the Plaintiffs to a total amount of Kshs. 3,575,268,474.00 against, *inter-a-lia*, loss or damage by fire, lightning, riot, strike and any other insured perils as endorsed on the said policy to their properties. The said properties are particularized at paragraph 5 of the Plaint.
5. The Plaintiffs aver that on or about 1st February 2007, they paid and the Defendant accepted premium required for the renewal of the insurance for one year from 1st February, 2007 to 1st February, 2008. Between 28th December, 2007 and 31st January, 2008 during the currency of the said policy, a portion of the insured property was destroyed or damaged through acts of persons taking part together with others in disturbance of public peace or riots and the Plaintiffs have

thereby suffered loss in the sum of Kshs. 23,380,179.74. The particulars of the said damage are at paragraph 9 of the Plaintiff.

6. On 18th March, 2008 the Plaintiffs notified the Defendant of the said loss and claimed to be indemnified under the said policy. It is however the Plaintiffs' case that the Defendants have not indemnified them in the manner indicated in the said policy or at all. It is further their case that by reason of the Defendant's said default, they were forced to borrow funds and/or to use part of their own internally generated revenue to repair and/or reinstate the said premises and thereby suffered further loss and damage. The Plaintiffs stated that the cost of finance was at Kshs. 5,113,445.00.
7. The Plaintiffs' case therefore is that the Defendant has failed and/or refused to indemnify them against the insured risks and loss. For the foregoing reasons the Plaintiffs pray for Judgment against the Defendant for:-
 - a. ***A declaration that by virtue of the provisions of the policy No. 060006167 the Plaintiffs are entitled to be indemnified by the Defendant in respect of the loss and damage to their properties as particularized in paragraphs 9 and 11 of the Plaintiff.***
 - b. ***Kshs. 28,493,624.74***
 - c. ***Interest on Kshs. 23,380,179.74 at thirteen percent (13%) per annum from 1st October, 2009 up to the date of payment in full.***
 - d. ***Costs***
 - e. ***Any other or further relief or reliefs that this Honorable Court shall deem just to grant.***

DEFENDANT'S CASE

8. In its Defence dated 31st May, 2010 and filed on even date, the Defendant admitted that Policy No. 060006167 existed between the Plaintiffs and the Defendant for the period from 1st February, 2007 to 1st February, 2008. The Defendant however denied that the Plaintiffs were entitled to be indemnified by the said policy in respect of any alleged loss or damages because of special condition No. 6 (c). The Defendant stated the aforesaid condition as follows.
9. It was the Defendant's position that the acts of destruction and damage as stated by the Plaintiffs at paragraph 9 of their plaint were those covered by special condition No. 6 (c) of the policy as stated above and therefore the Plaintiffs were not covered by the policy. It is therefore the Defendant's case that it declined to indemnify the Plaintiffs as there was no cover by virtue of special condition No. 6 (c) of the policy.
10. In view of the foregoing, the Defendant denies the Plaintiffs' claim as particularized in their Plaintiff and puts them to strict proof thereof.

ANALYSIS

11. I have carefully considered the pleadings herein as well as both Counsel's written submissions on the issue of liability. The main and only issue for determination is whether or not under the insurance policy the Defendant is liable to indemnify the Plaintiffs for the destruction and damage caused to their properties between 28th December, 2007 and 31st January, 2008.
12. The uncontested facts in this case are that the Defendant sold an insurance policy to the Plaintiffs and the Plaintiffs duly paid the premium due as consideration for the said insurance cover. The Defendant admits that the Plaintiffs took out a Fire and Perils Insurance Policy Number 060006167 with them for the period running from 1st February, 2007 to 1st February, 2008. The cover was for loss or damage caused by fire, lightning, riot, strike and any other insured perils as endorsed on the policy.
13. The dispute between the parties herein is with regard to construing some of the express terms therein. The Plaintiffs aver that the said insurance policy covered riots, which fact the Defendant has not denied. The Defendant's contention is that the post-election violence is not part of riots as envisaged in the insurance policy under question.
14. It is the Plaintiffs' submission that during the post-election protests and disturbances that took place in the country in December 2007 and January 2008, there were protests in the area where their property was located, and the said property was damaged by the rioting crowd. The Plaintiffs

- contend that the acts were protests which turned into a riot or riots as defined under the policy, in the sense that they were caused by a person or persons taking part together with others in a protest against the election results as announced, which protests caused a disturbance of peace.
15. They lodged a claim for compensation or indemnity under the policy. It is their case that the Defendant repudiated liability on the ground that condition 6 (c) applied to the circumstances of the loss and by reason thereof, the Defendant was not liable to indemnify them against the loss and damage suffered.
16. On the other hand, the Defendant confirms that on or about 18th March, 2008, the Plaintiffs lodged a claim with them with a view of being indemnified on the ground that during the subsistence of the cover a number of their properties were destroyed. The Defendant avers that its claim department reviewed the circumstances of the Plaintiffs' case and noted that the peril experienced on the Plaintiffs' properties was occasioned, some during post-election violence which engulfed the whole country. It was also the Defendant's case that it did not consider other claims lodged by the Plaintiffs as they were adjudged to be out of scope of the policy and it duly informed the Plaintiffs of this position. It is the Defendant's contention that the post-election violence acts which engulfed most parts of the Country could not by any measure be termed as damage and loss caused by rioters. The scale of the violence could not be equated to mere riots, according to the Defendant this was an act of terror.
17. The Plaintiffs maintain that terrorism or acts of terrorism are of a completely different nature from riots. The Plaintiffs went ahead to define terrorism as provided for in the Prevention of terrorism Act. It is their submission that the element of violence in riots cannot be equated to the scale of violence associated with acts terrorism. It is therefore the Plaintiffs' submission that the loss and damage which they sustained during the protests and disturbances that took place after the 2007 elections results were announced is covered by the insurance policy, and they are entitled to indemnity from the Defendant.
18. The Insurance policy defined the meanings of riot and strike as follows:-

“1. The act of any person taking part together with others in any disturbance of the public peace (whether in connection with a strike or lock-out or not) NOT being an occurrence mentioned in Condition 6 of the Special Conditions hereof;

2. The action of any lawfully constituted authority in suppressing or attempting to suppress any such disturbance or in minimizing the consequence of any such disturbance.

3. The willful act of any striker or locked-out worker done in furtherance of a strike or in resistance to a lock-out. The action of any lawfully constituted authority in preventing or attempting to prevent any such act or both in minimizing the consequences of any such act.”

19. The Defendant relied on special condition 6 mentioned above to repudiate the Plaintiffs' claim. The said clause states as follows:

“This insurance does not cover any loss or damage directly or indirectly caused by or arising from or in consequence of or contributed to by any of the following occurrences, namely;

- a. ***War, invasion, act of foreign enemy, hostilities or warlike operations (whether war be declared or not), civil war.***
- b. ***Mutiny, civil commotion assuming the proportions of or amounting to a popular rising, military rising, insurrection, rebellion, revolution, military or usurped power, martial law or state of siege or any of the events or causes which determine the proclamation or maintenance of martial law or state of siege.***
- c. ***Acts of terrorism, meaning the use of violence for political, social, or religious ends by any person or persons whether or not acting on their own behalf or on behalf of an organization and includes the use of violence for the purpose of putting the public or any section of the public in***

fear.”

20. It is therefore clear from the above clause that there were certain exceptions to the said insurance cover. Special condition 6 (c) is instructive in this matter as the Defendant defined what terror was under the Insurance Policy. Therefore, the definition of terror as provided for under the Prevention of Terrorism Act which the Plaintiffs seeks to rely on is not applicable herein. It is trite law that parties are bound by the terms of the contract they have entered into and therefore the Plaintiffs are stopped from seeking a definition of terror elsewhere other than under the insurance policy.
21. It is plain that the acts of violence committed during the post-election violence were more of political or for political ends. The definition of ‘acts of terrorism’ as seen under clause 6 (c) of the Special conditions above appear to cover the scenario during the post-election violence. Besides, the definition of riots and strike under the said policy does not match the violence that took place during the post-election violence.
22. In essence, this was simply a matter of construing the disputed terms of the Insurance Policy and establishing whether or not the acts of post-election violence leading to the destruction of the Plaintiffs’ property were covered under the said policy. From the foregoing, it is plain that the acts or the magnitude of the post-election violence cannot fit the definition of riots and strike under the said policy. A clear picture of the acts of post-election violence and the magnitude are in the public domain through some reports like “**A Human Rights Account of Kenya's Post 2007 Election Violence**” rendered by the **Kenya Human Rights and Equality Commission** which was previously known as the **National Commission on Human Rights** as well as the report by the Commission of Inquiry into the 2007-2008 post-election violence, commonly referred to as “**the Waki Report**”.
23. It is also clear that the acts of post-election violence were excluded under the said policy by virtue of Special condition 6 (c) which excluded acts of terrorism from the policy. According to the said policy, acts of terrorism means the use of violence for political, social or religious ends.

DISPOSITION

24. In view of the foregoing, it is evident that under the insurance policy herein, the Defendant is not liable for the damage caused to the Plaintiffs’ property during the period between 28th December, 2007 and 31st January, 2008. The consequence of this finding is that the Plaintiff’s suit herein is dismissed with costs to the Defendant.

That is the Judgement of the court.

READ, DELIVERED AND DATED AT NAIROBI THIS 12TH DAY OF NOVEMBER 2015

E. K. O. OGOLA

JUDGE

PRESENT:

Mr. Ohenga for the 1st Plaintiff

Mr. Ohenga for the 2nd Plaintiff

R. Billing for the Defendant

Teresia – Court Clerk