REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 469 OF 2010

CYCLE IMPORTERS LIMITED ……..……. PLAINTIFF

VERSUS

TAUSI ASSURANCE COMPANY LIMITED ……. DEFENDANT

R U L I N G

1. Unfortunately there has been considerable delay of this Court in delivering its Ruling as regards the Plaintiff's Application for Summary Judgement by way of Notice of Motion dated 18th November 2010. Such was occasioned by the disappearance of the original Court file necessitating an application for reconstruction filed herein on 26th July 2012. The said Notice of Motion is brought before Court under the provisions of the old **Order XXXV rule 1** of the *Civil Procedure Rules* as well as under **sections 1A, 3 and 3A** of the *Civil Procedure Act*. The grounds in support of the Application were that the Plaintiff had maintained in force an insurance policy with the Defendant against burglary for an insured sum of Shs. 26,800,000/-. On the 28th February 2009 the Plaintiff experienced a burglary, theft and vandalism of its premises in Monrovia Street, Nairobi in which it maintained that it lost property valued at over Shs. 20,500,000/-. The incident had been reported to the police and the appropriate claim form lodged with the Defendant. However, the Plaintiff maintained that, in breach of the insurance policy, the Defendant had defaulted in compensating it for the damages suffered.
2. The Application was supported by the Affidavit of the Managing Director of the Plaintiff one **Nadia Karia**. The deponent recounted the circumstances as regards the burglary to the Plaintiff's said premises on 28th February 2009. She maintained that the stock stolen amounted to Shs. 21,236,269/-. The Defendant had appointed loss adjusters, risk surveyors, risk managers and investigators – Protectors Ltd who had taken a statement from the deponent dated 14th May 2009, which she attached to her said Affidavit. She had also attached copies of the Theft Insurance Policy issued by the Defendant being No. POL/1138/102/2003 as well as the Policy schedule, the Kenya Police Abstract dated 28th February 2009 as well as the Claim form for the loss of the Plaintiff's property. The deponent went on to confirm that this Court in *HCCC No 94 of 2009* had ruled that the Plaintiff's said property had been taken away without permission and illegally. Ms Karia noted that it was the Defendant's Defence that the occurrence as related in the said High Court suit was not covered under the Policy and could not apply in the circumstances. Thereafter, the deponent for reasons unclear to this Court, annexed to her said Affidavit a copy of the Marine Policy that the Plaintiff had with the Defendant. She maintained that the Defendant was in a better position to know the volumes and quantities of stock that the Plaintiff dealt with than itself, presumably as the Defendant required the Plaintiff to make stock returns as regards importation of goods covered under the Marine Policy?
3. The Chief Executive Officer and General Manager of the Defendant insurance company, **Rita**

Thatthi swore a Replying Affidavit to the Plaintiff's said Application dated 11th January 2011. The deponent commenced her Affidavit by attaching thereto a copy of the Memorandum of Appearance and the Defence filed herein on 9th August 2010 and 20th August 2010 respectively. Thereafter, she contradicted the contents of paragraph 2 of the Affidavit in Support of the Plaintiff's Application. The deponent recounted the salient features as regards the Burglary Policy No. POL/102/2003. That policy had first been issued to cover the period of insurance from 1st December 2002 to 30th November 2003. The original sum insured had been Shs. 12,600,000/-. Over the years, the amount of the sum insured had been increased to a total of Shs. 26,800,000/- but with a First Loss Amount of Shs. 5,400,000/-with effect from the 17th December 2007. As regards the incident that took place on 28th February 2009, the Defendant had denied that such was a Burglary involving theft or vandalism. The deponent recorded that the Plaintiff had been involved in a tenancy dispute with its landlord. The said incident, to the knowledge of the Defendant herein, was in fact the process of levying distress by the landlord's duly licensed auctioneers – Auckland Agencies. The Defendant was aware that, as a result of the incident, the Plaintiff had filed a High Court suit being *HCCC No. 94 of 2009* as against the landlord and its said auctioneers. In that suit, the Plaintiff had sought injunctive Orders as well as special and general damages resulting from the said incident of 28th February 2009. The deponent annexed a copy of the Plaint in the said suit, to her Replying Affidavit.

4. Ms. Thatthi deponent went on to note that the Plaintiff had filed an application in that suit seeking injunctive Orders as against its landlord and the said auctioneers which Lady Justice Sitati had ruled upon, ordering the Defendant to return the goods that had been distressed, under the supervision of the OCS of Central Police Station, Nairobi. The deponent attached a copy of the said Ruling to her Replying Affidavit. She submitted that the Plaintiff had not suffered any loss in respect of the said goods as the same were ordered to be returned under the supervision of the Police. In any event, the deponent maintained that the process of distress and entry to the Plaintiff's premises fell outside the scope of the said Burglary Policy. As a result of which, the Defendant had repudiated its liability thereunder by addressing the Plaintiff with an appropriate letter to that end dated 14th September 2009. She went on to deny that the Plaintiff had lodged a valid valuation Claim Form with the Defendant. She emphasised that under condition No. 4 of the Theft Policy, in the event of suffering damage, the insured (the Plaintiff) would deliver a claim form within 7 days of the incident complained about. The Plaintiff had only lodged its written claim form dated 10th May 2009 on the 26th May 2009 approximately 3 months after the incident. Such amounted to a breach of condition. The deponent went on to admit to the Defendant's appointment of Protectors Ltd to carry out an independent investigation of the incident and to collect documents, statements and records as necessary from the Plaintiff.
5. As regards the statement in the Affidavit in support of the Application that the Judge in *HCCC No. 94 of 2009* had confirmed that the goods were taken away without permission and illegally, Ms. Thatthi denied that was the case and emphasised that the learned Judge had in fact made reference to the attachment. As regards the Protectors Ltd report, the deponent of the Replying Affidavit stated that she had been advised by the investigators that:

i. the goods had been removed from the Plaintiff's premises on 28th February 2009 by Messrs. Auckland Agencies, the duly authorised and licensed Auctioneers in the process levying distress.
ii. the Plaintiff's claim under the said Theft Policy was not admissible since the incident did not occur from an incident of burglary or theft.
iii. the Plaintiff was also in breach of the Books Clause and the Safe and Books Clause stipulated in the said Policy and
iv. that on the basis of the information provided by the Plaintiff it had not been possible to determine the value and quality of the stock at the premises at the time of the incident and that the figures given by the Plaintiff in that regard were erroneous.

The Replying Affidavit concluded that the Plaintiff's claim was fraudulent and that the Plaint in this matter was based on material mis-statements and had failed to disclose material information. As a result, the Defendant had a meritorious Defence raising a multiplicity of triable issues which could only be aired at a full trial.

6. As this Court has indicated in its Ruling dated 16th March 2012, the Plaintiff on 17th January 2011 applied for and was granted leave to file a Further Affidavit in response to the Replying Affidavit, as above, dated 11th January 2011. Such leave was granted for the Plaintiff to file such Affidavit within the 14 days. Such period would have expired on 1st February 2011 but, in fact, the Further Affidavit again sworn by the said Nadia Karia was dated 24th February 2011 and filed on the same day. On the Plaintiff's application dated 11th March 2011 seeking leave for the Further Affidavit to be filed out of time, this Court allowed the same as per its Ruling dated 16th March 2012 save for striking out paragraphs 3, 4 and 5 thereof. The said Nadia Karia at paragraph 6 of the Further Affidavit sworn on 24th February 2011 basically denied that the principle of First Loss applied to the Theft Policy which covered goods up to the value of Shs. 26,800,000/-. According to her, this was the true and correct value of goods covered under the Policy as at the time of the incident on 28th February 2009. In that regard, the deponent had been advised by her advocates on record for the Plaintiff that it having lost property to the value of Shs. 20,500,000/-, such was pure theft, burglary and vandalism within the strict meaning of the words of the Policy and as such the said property was covered. She maintained that the claim was properly lodged with the Defendant, and as it had appointed its loss adjusters/investigators to liaise with the Plaintiff to process the claim, it was obvious that the same had been admitted. As a result, the Plaintiff's said Application before this Court had merit and the deponent maintained that the Defence filed herein does not raise any triable issues hence the Plaintiff was entitled to summary judgement.
7. The Plaintiff's Submissions as regards its Application dated 18th November 2010 were filed herein on 18th February 2013. They opened by quoting the terms of clauses (a) and (b) of the theft insurance Policy as follows:

"(a) The Property in the Schedule hereto or any part thereof shall be lost destroyed or damaged by Theft following upon an actual forcible and violent entry of the Premises by the person or persons committing such theft; or

(b) Any damage falling to be borne by the Insured shall be done to the Premises described in the Schedule hereto following upon or occasioned by an actual forcible and violent entry of the Premises or any attempt thereat by the person or persons committing or attempting to commit such theft."

The Plaintiff maintained that the incident on 28th February 2009 followed actual forcible and violent entry to the Plaintiff's premises by persons under the guise of levying distress for rent arrears. Such persons had taken away, vandalised and destroyed the stock from the Plaintiff's said premises. The Plaintiff had reported the matter to the Police and obtained an Abstract detailing that the loss it had suffered was in excess of Shs. 21,236,269/-. The Plaintiff, in line with the clauses 8 and 10 of the Theft Policy, commenced court proceedings as against the perpetrators of the incident on 28th February 2009 and it quoted extensively from paragraph 21 of Lady Justice Sitati's Ruling in that suit delivered on 27th August 2009 emphasising that the Judge had found that the second Defendant therein (the landlord) through the third Defendant therein (the auctioneers) had broken into the suit premises, caused wanton destruction and had taken away the Plaintiff's tools of trade. The purported distress for rent was done at a time when the Plaintiff was not in any arrears of rent. The Court had ordered the Defendants to return the Plaintiff's goods removed from the premises. The Plaintiff submitted that the return of the goods had never happened.

8. Then, having detailed the relevant portions of the Defendant's Defence, the Plaintiff defined what constituted theft as per the Farlec online dictionary which detailed:

"A criminal act in which the property belonging to another is taken without that person's consent."

Further, the Plaintiff then quoted from section 268 of the Penal Code which defines theft as:

"a. A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special

owner thereof, any property, is said to steal that thing or property.

b. A person who takes anything capable of being stolen or who converts any property is deemed to do so fraudulently if he does so with any of the following intents, that is to say –

a. **An intent permanently to deprive the general or special owner of the thing of it;**

b. **An intent to use the thing as a pledge or security;**

c. **An intent to deal with it in such a manner that it cannot be returned in the condition in which it was at the time of the taking or conversion;**

d. **In the case of money, an intent to use it at the will of the person who takes or converts it, although he may intend afterwards to repay the amount to the owner;**

c. And "special owner" includes any person who has any charge or lien upon the thing in question, or any right arising from or dependent upon holding possession of the thing in question.

d. (3) when a thing stolen is converted, it is immaterial whether it is taken for the purpose of conversion, or whether it is at the time of the conversion in the possession of the person who converts it; and it is also immaterial that the person who converts the thing in question is the holder of a power of attorney for the disposition of it, or is otherwise authorized to dispose of it.

e. (4) when a thing converted has been lost by the owner and found by the person who converts it, the conversion is not deemed to be fraudulent if at the time of the conversion the person taking or converting the thing does not know who is the owner, and believes on reasonable grounds that the owner cannot be discovered.

f. (5) A person shall not be deemed to take a thing unless he moves the thing or causes it to move".

The Plaintiff then submitted that there was no doubt that the Policy applied. It noted that the Defendant had claimed that the goods were returned to the Plaintiff but there was no evidence of this. The Plaintiff then went on to comment upon the provisions of the Policy in terms of the First Loss amount of Shs. 5,400,000/- as well as commenting on the Defendant's allegations that no report had been made to the police and no valid valuation claim form has been lodged with it. Similarly, the Plaintiff commented upon the alleged breach of the Books clause and the Safe and Books clause in the Policy as well as the point raised that this suit ought to be stayed.

9. The Defendant's submissions were filed herein on 30th January 2013. After detailing the Affidavits which had been sworn in support of the Application and in reply, the Defendant noted that the Plaintiff had brought its Application under the provisions of the old **Order XXXV rule 1**, which now read as **Order 36 rule 1** of the *Civil Procedure Rules, 2010*. It quoted that **rule 2 of Order 36** read:

"The defendant may show either by affidavit, or by oral evidence, or otherwise that he should have leave to defend the suit."

The Defendant noted that it must be appreciated that it had been donated with a wide range of avenues by which to show that it be granted leave to defend. It embarked upon pointing the Court towards a number of authorities including the **Annual Practice 1956** in relation to **Order XIV of the Supreme Court of England.** The Defendant particularly outlined for passages in that regard as follows:

"<u>PAGE E-Judgment for Plaintiff</u>:

i. **"The purpose of O.14 (English) is to enable a plaintiff to obtain summary judgment without**

trial, if he can prove his claim clearly; and if the defendant is unable to set up a bona fide defence; or raise an issue against the claim which ought to be tried".

ii. **DEFENDANT'S RIGHTa.**

"O.14 (English) was not intended to shut out a defendant who could show there was a trial issue applicable to the claim as a whole from laying his defence before the Court, or to make him liable in such a case to be put on terms of paying into Court as a condition of leave to defend …….".

iii. **"The summary jurisdiction conferred by this Order must be used with great care. A defendant ought not to be shut out from defending unless it is very clear indeed that he has no case in the action under discussion".**

PAGE 9-Defence on the merits

"Leave to defend". Where there is a triable issue, the defendant is entitled to leave to defend, without being put upon terms to pay money into court, even though it may appear that the defendant is not likely to succeed.

PAGE 20:

"….. A complete defence need not be shown. Where there is a fair probability of a defence, unconditional leave to defend ought to be given ….".

Thereafter the Defendant referred this Court to the authorities of **Proline Supaquick Ltd v Kenya Oil Co. Ltd HCCC No. 256 of 2003, Halsbury's Laws of England 4th Edition Volume 25 Paras 499 and 500, Kenya Shell Ltd v Benjamin K. Kibiru & Anor (1982-88) 1 KAR 1018** and **Pop-in (Kenya) Ltd & 3Ors v Habib Bank A.G. Zürich Civil Appeal No. 80 of 1988 (unreported).** The Defendant also referred the Court to the **Chartered Insurance Institute Special Bulletin May 2001** as regards **Principles of Property and Pecuniary Insurances** as well as the textbook in that regard being **Property and Pecuniary Insurances** by **Chas.Hall**.

10. As referred to by the Defendant in its submissions herein, **Order 36 rule 1** of the *Civil Procedure Rules, 2010* has slightly amended the old **Order XXXV rule 1** by the inclusion of the words **"but not filed a defence"**. **Rule 1 (1)** now reads as follows:

"36. 1. (1) In all suits where a plaintiff seeks judgment for –

a. **a liquidated demand with or without interest; or**

b. **the recovery of land, with or without a claim for rent or mesne profits, by a landlord from a tenant whose term has expired or been determined by notice to quit or been forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser,**

where the defendant has appeared but not filed a defence the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits".

Unfortunately for the Plaintiff, with the above amendment, its Application which would now come under **Order 36** as opposed to the old **Order XXXV**, the addition of the above words would now result in the Application being spent as it is quite clear that the Defendant herein has filed a comprehensive Defence dated 20th August 2010 before the new Rules came into effect. Even if that had not happened, this Court would have disallowed the Plaintiff's said Application in any event. The principles involved in allowing Summary Judgement applications have long been aired before our

courts. As per my learned brother **Ochieng J.** in the **Proline** case (supra) quoting from the finding of the Court of Appeal in **Shah v Padamshi (1984) KLR 531** at **535**:

"Except in the clearest of cases, which this one is not, it is inadvisable for the court to prefer one affidavit to another in order to enter summary judgement. Summary judgement is a drastic remedy to grant, for inherent in it is a denial to the respondent of his right to defend the claim made against him. A trial must be ordered if a triable issue is found to exist, even if the court strongly feels that the defendant is unlikely to succeed at the trial. The court must not attempt to anticipate that the defendant will not succeed at the trial."

Similarly, in the case of **Awuondo v Surgipharm Ltd & Anor. Civil Appeal No. 134 of 2003** in which case, reference had been made to the holding in **Moi University v Vaishra Builders Ltd (unreported)** in which the Court had found:

"The law is now settled that if the Defence raises even one *bona fide* triable issue, then the Defendant must be given leave to defend…. We must however hasten to add that a triable issue does not mean one that will succeed".

11. Chesoni, J (as he then was) in **Richard H. Page & Associates Ltd v Ashok Kumar Kapoor (1979) KLR 246** reiterated that the purpose of summary judgment applications was to obtain a quick judgment where there was evidently and plainly no defence to the claim. In **Achkay Holdings Ltd v N.M Shah T/A Braidwood College H.C.C.C No. 2190 of 1994; (1995) eKLR** it was reiterated that such procedure should only be allowed in instances of clear and obvious unsustainability of a cause of action or defence. The learned judge found, *inter alia*:

    "The summary procedure under Order 6 Rule 13 can only be adopted when it can be clearly seen that a cause of action or defence on the face of it obviously unsustainable and should be applied only in plain and obvious case. The learned judge refused to grant the application because the pleadings involved serious unresolved issues which could only be determined at the trial."

This position was adopted by Visram, J (as he then was) in **Lacoste Ltd v Henry Oulo Ndede [2005] eKLR** in which he held inter alia:

"I am not at all convinced that this was a proper case for a summary procedure. As the Courts have indicated over and over again, summary procedure is drastic; it removes a litigant from the seat of justice without a hearing based on evidence that can be tested in cross-examination; and must be used sparingly in clear and straight forward cases where there are indeed no triable issues. Here there were actually two triable issues-both raised in the defence - relating to the failure of the Appellant's financiers to provide a satisfactory report, and breach of confidentiality. These issues were sufficient for the case to proceed to trial, and the lower court erred in not subjecting the case to full trial."

I consider that the issues raised herein by the Defendant are of a serious nature whose veracity and correctness needs be cross-examined and tested. The proper forum in which these issues may be canvassed is by full trial. In this regard, I adopt the position as reiterated in the English Court of Appeal in **Wenlock v Maloney & Others (1965) 1 W.L.R 1238** where at 1242 Sellers, J held *inter alia***;**

"…at this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at trial as the court itself is not usually fully informed so as to deal with the merits".

This was similar to the position adopted by Madan, J (as he then was) in **D.T Dobie (K) Ltd v Muchina (1982) KLR 1** when he stated inter alia:

“At this stage, the Court ought not deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits without discovery, without oral evidence tested by cross-examination in the ordinary way.”

12. The result of the foregoing is that I consider that there is not one but several issues that need to be tried as regards this suit including whether the incident giving rise to the Plaintiff’s claim can fall under the theft Policy taking into account the definition of “Theft”. Then there are matters in relation to the question of First Loss principles applying under the said Policy as well as whether there was a breach of condition by the fact that the Claim Form was lodged outside the seven day period as stipulated in the said Policy. All these issues are best canvassed before a full trial. As a result, I dismiss the Plaintiff’s Notice of Motion dated 18th November 2010 with costs to the Defendant.

DATED and delivered at Nairobi this 11th day of December, 2013.

J. B. HAVELOCK

JUDGE