



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**Civil Case 1218 of 2002**

**NATIONAL BANK OF KENYA LTD.....PLAINTIFF**

**VERSUS**

**PHOENIX OF EAST AFRICA ASSURANCE**

**CO. LTD. AND ANOTHER .....DEFENDANS**

**JUDGMENT**

The plaint in this case was first filed on 28<sup>th</sup> November, 2002 and amended on 27/1/2003. The prayers are:-

- (a) A declaration that the contract of insurance between plaintiff and the defendants is valid and subsisting and that the defendants are liable to indemnifying the plaintiff under the said contract.
- (b) An order that the first and second defendants do pay to the plaintiff sum of Kshs.2,200,650/= due to the plaintiff under that contract. The proportion of 80% and 20% respectively as per terms therein.
- (c) Interest on (a) at commercial rates from 14/3/1996 until payment in full.
- (d) Costs.

The facts are stated by the plaintiff's witness Charles Makori Ligoro an advocate of High Court. Before joining private practice he was employed as a manager of the Bank, National Bank at their Hill Branch during the period between 1996 to 1998.

The defendants were insurers of Fidelity Indemnity Guarantee Policy covering any fraudulent actions of employees of the plaintiff bank from 1/1/1996 to 31<sup>st</sup> December, 1996 when the policy was always renewed. Between 1997-1998 there was an employee Boniface Chege who was colluding with a customer of the Bank called Purity Wanjiku Kimani who was introduced by Kiarie to open an account to defraud the bank of Kshs.2,192,950. She had a savings account card. Boniface Chege was a clerk in accounts department to prepare and issue Bankers cheques. The woman would write, withdraw request and ask for Bankers cheques. Chege would add some figures. Ellan Enterprises opened by Chege had an account where cheques fraudulently stolen were banked. Say a cheque for Kshs.500/= Chege would add (6) to read Kshs.6,500/=. This was done in collusion with the customer. Then the said Boniface ensured the voucher was suppressed. He recycled the documents. After the cheque was ready it was collected by Purity.

The witness who was the manager exhibits documents from exhibit 1, 2, 3, 4, 7(a) and 7(b) and 8 and 9. He exhibits 3 deposit slips exhibit 10(a), 10(b), 10(c). There was a letter addressed by Chege dated 9/3/98 in the process the account of Purity was never debited because the vouchers were suppressed and were not released to department concerned. One day the application was for Kshs.85,000/=. The account held Kshs.149,838/=. The forms went to Boniface and he added 7 therefore the amount was Kshs.785,000/= and a cheque was issued. The exhibit 12 – 12(a), 12(b), 12(c) and exhibit 12(d) their documents relate to this transaction. At this time a fellow clerk noticed and took issue. Then the PW1 manager came to know and he initiated investigations. PW1 produced police abstract as exhibit 13.

The clerk Boniface was sacked and himself and Purity were charged and convicted in a criminal court. PW1 produced exhibit 14 the judgment of the criminal court and exhibit 15 letter of dismissal. After that the plaintiff made claim through Brokers AON Minet exhibit 16.

The bank claimed to be covered under the indemnity Policy – claim form exhibit 18. The claim was never paid by the defendant.

The parties filed written submissions. The plaintiff submitted that there were matters not disputed:-

- (a) Policy was issued by the defendants.
- (b) That the defendants share of liability was 80%:20%.
- (c) The defendants would under the policy reimburse the plaintiff to the extent of Kshs.10,000,000/= and the amount was later in January 1999 increased to Kshs.20,000,000/=.
- (d) The policy was in force between September, 1997 and March, 1998 when the fraudulent acts were committed against the plaintiff.
- (e) Boniface Chege an employee of the plaintiff and Purity Wanjiru Kimani customer were the architects behind the fraud and the two were arrested and charged together with 3 others in criminal case NO.595/1998 in connection with loss of money from the plaintiff bank.
- (f) That policy excess amounting to Kshs.100,000/= was to be shared by the plaintiff. The parties filed agreement issues. It was paid that the premium were paid in full for the period which is material and relevant.

The plaintiff lost Kshs.2,192,950/= during this period. PW1 has narrated how the money was stolen and the defendants witness produced a loss adjusters report which confirmed that the plaintiff incurred loss and the suspects were actually convicted confirming fraud by criminal court of competent jurisdiction.

The plaint was amended and particulars of fraud/dishonesty are pleaded. The court found the accused persons guilty and sentenced them. This is a conclusive judicial pronouncement on the fraud. Condition 3 of the policy provided that the insured was to give notice in writing of an act committed by an employee immediately the same came to the knowledge of the insured. This condition was satisfied. Also the allegations that plaintiff breached policy conditions regarding lodging the claim are without merit. By letter dated 26/3/1999 the plaintiff wrote to Brokers notifying of the fraud. The brokers were agents of the defendant. This pleading was not traversed and is deemed to be admitted under the provisions of Order VI rule 9(1) and 9(3).

It is to be noted that no specific period was set to notify the defendant “*notice to be give immediately once the act insured against came to the notice of the plaintiff.*” This means as soon as the plaintiff collected sufficient evidence to demonstrate that the act insured against is truly committed.

On 12/4/98 defendants agent AON Minet Insurance Brokers informed the defendant that the claim may be repudiated for late notification. The claim was not repudiated but defendant employed loss adjusters despite having said the notification was late. In the circumstances they are estopped by conduct from

breach of policy conditions. The claim form was lodged with AON Minet the Brokers on 28/11/2000. Did it take close to two years for defendants to write on 28/6/2002 before repudiating the claim. It is not true that the claim form was given to the loss adjuster, the letter was forwarded to Agent AON Minet Insurance Brokers.

Furthermore, they were notified on the letter dated 12/4/1999 that the claim may be repudiated but they took close to 4 years to do so.

The defendant is guilty of misrepresentation when by letter dated 20/8/2001 from Agent AON Minet who was asking for settlement papers since the case was fully documented. It is clear there was no breach of policy conditions indicated to the plaintiff. Under paragraph 12 of the amended statement of defence, defendant alleges that the plaintiff appropriated a Nissan Matatu valued at Kshs.630,000/=. Evidence was that the Matatu was held by police as an exhibit and has never been released. This vehicle belonged to the employee involved. No proof of this allegation was offered. The doctrine of subrogation applies.

Whether or not the plaintiff set off the employee terminal benefits, it was the evidence of plaintiff who testified it was so. "shall be set off against the amount agreed to be made good under the policy". No amount was agreed under the policy.

Furthermore, nowhere in the policy was it provided that non disclosure of a loss mitigating factor or a judicial pronouncement of proof of fraud or dishonesty were conditions produced to the settlement of the claim under the policy. In any case, there was conviction by a competent court. The employee was dismissed 4 days after discovery of the fraudulent act. Further evidence by the witness of the plaintiff showed the precautions taken but this instance the guilty employee suppressed cheques and it was not easy to detect and that is why this insurance policy was taken. The plaintiff claims Kshs.2,192,950/= less Kshs.100,000/= and the amount payable to the plaintiff is Kshs.2,092,950/=. The plaintiff has referred to Sande versus Kenya Co-operative Creameries Ltd. Court of Appeal 1992 CC314 CAK where it was held that special damages must be pleaded with particulars. If not available at the time of drawing the plaint by amendment of plaint thereafter.

On the defendant's submissions were filed on 25/9/09. the defendant submitted that issues that are vital are:-

- (a) Did loss occur as alleged or at all?
- (b) If the loss did occur was the loss recoverable under the policy?
- (c) If the loss was recoverable what is the quantum?

The defendant raises also the issue of validity. This issue was not raised earlier. "*Amended at Nairobi this 27<sup>th</sup> day of November, 2003*". The court stamp reads 28/12/2002. That is the date the original plaint was dated November, 2002 not 2003 and it was amended on 27/1/2003 and file on 28/1/2003. this objection is not valid and is intended to distract the court.

On the merit of the case the defendants do not dispute that the loss occurred. Therefore the contract of insurance did exist. The vehicle states that the observance of the conditions was a condition precedent to liability. The court is of the view that the plaintiff complied with all conditions. In the circumstances of this claim. That means that the defendant on evidence is liable under the policy.

Regarding the quantum, the plaintiff admits liability to pay Kshs.100,000/= excess under the policy. The policy was left at the police station as exhibit and the plaintiff had no access to it. Regarding terminal dues and the amount of Kshs.156,159/=: I find that falls under the policy. The plaintiff failed to explain accurately these items. I find that the defendant is entitled to deduct the same. The plaintiff is therefore entitled to Kshs.1,936,791/= which I award.

The outcome is that I find the plaintiff less proved its case on a balance of probability are stated as prayed under prayer (a). I enter judgment in the sum of Kshs.1,936,791/= plus interest at the rate of 14% from the date of filing plaint to the date of payment in full.

Orders accordingly.

Dated, signed and delivered at Nairobi this 30<sup>th</sup> October, 2009.

**J. N. KHAMINWA**

**JUDGE**