



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Case 1991 of 1996

BON MOTORS LIMITED.....PLAINTIFF

VERSUS

CORPORATE INSURANCE CO. LTD.....DEFENDANT

JUDGMENT

The plaintiffs a Limited Liability Company incorporated in Kenya under the Companies Act (Cap 486 Laws of Kenya) and are car dealers and repairs carrying on business along Lusaka Road Nairobi. The defendant is also a Limited Liability Company and is a Registered and Licensed Insurance Company under the Insurance Act (Cap 487 Laws of Kenya).

By a Burglary Policy of Insurance Number BURG/400525/90 dated 1st August 1993 to 31st August 1994, the Defendant and other Underwriters who subscribed thereto, in consideration of a premium

of Sh.62,665/- then paid to them, agreed for a period of one year from 1st August 1993 to 31st August 1994 to insure and indemnify the plaintiff against loss by burglary of all their stock in trade and the motor vehicles brought for repair and all the appliances at their said premises up to the value of Sh.19,250,000/=.

It was a term of the said policy of Insurance that the defendant would cover loss or damage to property insured from forcible or violent entry and or exit from the plaintiffs premises.

On or about the night of 23rd and 24th of April 1994 and the night of 6th and 7th August 1994 during the currency of the said policy of Insurance, the plaintiffs premises were broken into by trespassers who stole therefrom a large quantity of motor vehicle spare parts, radio cassette players and other goods with the total value of Sh.690,326.40. entry was gained through climbing a 20 ft wall. The matter was reported to the police who issued police abstract report. The theft was also reported to the defendant. The Insurance Policy transactions were carried out through MINET ICDC Insurance Brokers Ltd.

The Defendant upon receipt of the theft report from the plaintiff wrote Minet ICDC Ltd informing them that they had received a theft report of spare parts from the plaintiff Bon Motors Co. Ltd and had registered the claim and had appointed CUNNINGHAM GM (K) LTD to verify and adjust the matter on their behalf and requested them to urge the insured to accord them maximum co-operation. The letter further requested Minet ICDC Ltd to forward to the defendant claim forms police abstract report and any other supporting documents.

Cunningham GM (K) Ltd compiled their report which they sent to the defendant. The said report was concluded with the following remarks:

(a) Insurers will note that apart from forced entry into the insured Workshop Managers Office, there is no evidence of forcible/violent entry as the thieves scaled the boundary wall to enter the opensided shed where the vehicles were parked.

(b) The premises are described as used as “workshop garage repair of motor vehicles spray painting”. The above premises are basically open-sided sheds.

The standard Burglary Policy will generally cover property whilst contained in permanent buildings of standard construction enquire from the Insurance whether they surveyed the premises and are aware of the nature of the risk.

The defendant on receipt of this report declined to honour the policy arguing that there was no Clause for indemnity in the Insurance Contract against burglary of goods in open and outside the building which provided the filing of the instance suit.

PW1 JOSEPH BORO MUNGAI who gave evidence on behalf of the plaintiff stated that garages and/or workshops have open sheds but the premises are normally enclosed with a permanent perimeter wall and their perimeter wall was about 20 ft high. When ICIDC Minet who were the agents of the defendant visited the premises the plaintiff had indicated that the cover was required in respect of goods in the open/out building and this was included in the Addendum /Debt/Credit/Note after the agent had realised the premises to be covered included a garage and a workshop which had open sheds but with a perimeter wall of about 20ft all round with the main gate where they had placed a watchman.

The plaintiff took a Burglary Policy Cover with the defendant being Policy NO.BURG/400525/90 dated 27th July 1993. The total value of the risk was Sh.19,250,000/= and the premium was Sh.57,760/= . The said policy was to cover the goods in Bon Motors which included goods in the open/out building. These goods were situate within the perimeter of Bon Motors.

The defendant acted through Minet ICDC. The instructions to the defendant company included cover of goods in open and out building.

During the nights of 23rd and 24th April 1994 and the night of 6th and 7th August 1994 burglaries took place at the premises of the plaintiff. The matter was reported to the police and police abstracts were obtained. The burglaries were reported to the defendant. The burglaries were also reported to the agent Minet ICDC Ltd. The plaintiff forwarded their claim to the defendant but the defendant declined to indemnify.

The list of the stolen goods and their value was produced. The amount of the claim was Sh.690,042,40.

The defendant called two witnesses to testify. DW1 GABRIEL MUIGAI who is a registered Loss Adjuster and DW2 NANCY SHIKUKU who works with the defendant company. DW1 GABRIEL in his evidence told the court that he is a registered loss adjuster working with CUNNINGHAM LINDSEY and has over 25 years experience.

At the request of the defendant they did investigate and adjusted the claim which had been reported by their insured Bon Motors Co. Ltd and prepared a report dated 11th May 1994.

The report covers the circumstances as investigated during the first visit on the entry into the premises. The report contains the list of the alleged stolen items and their value. The motor vehicles from which the said items were stolen were in the open yard and entry was gained by climbing over the 20ft high wall which surrounds the premises. In his report he made the following conclusion. The premises are basically open sided sheds. The standard burglary policy will generally cover property whilst contained in permanent buildings of standard construction.

There was no evidence of forcible/violent entry as the thieves scaled the boundary wall to enter the open-sided sheds where the vehicles were parked. DW2 NANCY SHIKUKU in her evidence told the court

that she works with the defendant company. The plaintiff had a burglary policy with the defendant when they received a burglary report from the plaintiff, they appointed CUNNINGHAM (K) LTD to investigate, verify and adjust the loss which forwarded its report to the defendant on 11th May 1994.

On receipt of the said report the defendant repudiated the liability and declined to indemnify the plaintiff because under the policy, the property covered was in permanent premises and there ought to have been forcible/violent entry into the premises. But the items stole were in open sheds.

Mr. Saende submitted that since the goods stolen were in open sheds, the defendant was not liable to indemnify the plaintiff because the policy document excluded goods in the out/open building and further that there was no evidence of forcible/violent entry.

But Miss Wanga counsel for the plaintiff submitted that the insurance contract was effected though Minet ICDC Ltd who were agents of the defendant and who visited the premises before the contract was entered into. The goods covered by the policy were in open sheds.

On learning of the decline of the claim by the defendant, Minet ICDC Insurance Brokers Ltd wrote the defendant on 10th July 1995 as follows: The letter was addressed to Mrs. Wahome of Corporate Insurance Co. Ltd and it read:-

Dear Mrs. Wahome,

RE: BON MOTORS CO. LTD

BURGLARY CLAIMS

I would kindly request you for your personal intervention on these claims which are being declined on the ground that the goods were stolen from the open. As you are no doubt aware garages and/or workshops have open sheds but the premises are normally enclosed with a permanent perimeter wall which was the case in this matter and in these circumstances, underwriter would always grant cover for any losses from such sheds and/or workshops under a burglary policy.

In this particular case we did infact indicate that cover was required in respect of goods in the open/out buildings but through an oversight your exclusion was not picked up by the broker who placed this cover with you when the policy was prepared but to all intents and purposes it was the desire of the insured to cover their goods in the open within their own premises. We have indeed had similar losses settled for Amazon Motors who are insured through us and since this extension is available from other insurers, it being not a universal exclusion, I would kindly request you to reconsider the matter and authorize settlement of these claims.

Yours sincerely

D.W. Kahenya

Although the defendant is relying on the exclusion clause to decline to settle the claim, it is clear that the policy covered the plaintiff property which comprised motor vehicles in open sheds within their premises. The defendant's agents Minet ICDC Insurance Brokers Ltd visited the plaintiff's premises and saw that the property intended to be covered by the policy comprised of motor vehicles brought to the plaintiff's workshop for repair and were in the open/out sheds. This was before the policy cover was taken and that was the only business that the plaintiffs dealt with as far as the instant policy cover was concerned.

Infact it is evidence that the defendant had not visited the premises they covered until the CUNNINGHAM CO. (K) LTD which the defendant had appointed to investigate/verify and adjust the matter on their behalf brought it to their attention through their report dated 11th May 1994. Having established that what the plaintiff desired to cover in their insurance policy were their goods in the open

sheds within their own premises and the defendant having accepted to cover the same and receive the premium, the defendant is estopped from denying liability.

The plaintiff's claim herein therefore succeeds and there shall be judgment for the plaintiff for Sh.690,042.40 as prayed in the plaint with costs and interest.

Dated and delivered at Nairobi his 23rd day of March 2006.

J.L.A. OSIEMO

JUDGE