Wondernut International (EPZ) Ltd v AIG Kenya Insurance Company Limited (Civil Suit E047 of 2021) [2023] KEHC 31 (KLR) (Commercial and Tax) (13 January 2023) (Judgment)

Neutral citation: [2023] KEHC 31 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL SUIT E047 OF 2021

A MABEYA, J

JANUARY 13, 2023

BETWEEN

WONDERNUT INTERNATIONAL (EPZ) LTD ..... PLAINTIFF

AND

AIG KENYA INSURANCE COMPANY LIMITED ..... DEFENDANT

JUDGMENT

1. The plaintiff is a limited liability company incorporated and carrying on business in Kenya and the defendant is also a limited liability company incorporated and licensed to carry on insurance business in Kenya.

2. At all material times to this suit, the plaintiff undertook the business of exporting value addition to raw Macadamia Nuts harvested in Kenya and thereafter exporting the same outside Kenya.

3. The plaintiff's case was that it contracted the defendant for the insurance of its Macadamia products for the period between 1/5/2018 and 30/4/2019. That on or about 24/8/2018, it exported from Mombasa to Los Angeles, USA, a consignment of Kenyan Macadamia Kernel nuts for a total sale value of USD 276,693.75 following an order from its customer, Torn and Glasser, Inc.

4. Thereafter, the plaintiff received a report from the United States of America, Food and Drug Administration (USA FDA) that part of the consignment of the Macadamia Nuts "... appears to consist in whole or in part of a filthy, putrid or decomposed substance or otherwise unfit for food." and subsequently ordered the shipment of the consignment back to Kenya. The said shipment arrived in the Port of Mombasa on or about 11/7/2019.

5. The plaintiff alleged that upon the loss and destruction of its Macadamia Nuts, following the decay, impairment, rotting and/or spoiling of the exported nuts, the insured risk crystallised and therefore

it was entitled to compensation under the Contract of Insurance dated 8/5/2018. However, the defendant declined liability on grounds that the plaintiff's claim was not covered under the Contract of Insurance.

6. It was argued that the defendant committed breach of the Contract of Insurance and as a result, the plaintiff had suffered significant loss and damage, loss of business and profits.

7. On the foregoing, the plaintiff prayed for judgment against the defendant for; a declaration that the defendant was liable to indemnify it under the Insurance Policy Number 030029759 and for Kshs.391,772.71 and USD 386,474.86 together with interest at court rate from 18/12/2019 until payment in full. The plaintiff also prayed for the costs of the suit plus interest.

8. The defendant filed a statement of defence dated 24/4/2021. It admitted entering into a Contract of Insurance known as a Contaminated Product Insurance dated 8/5/2018. According to the defendant, the plaintiff subscribed for the provision of insurance services from the defendant for the purposes of covering loss caused by contamination of production subject to set conditions.

9. That from the information provided by the plaintiff, the Loss Adjustor commissioned by the defendant had concluded that the event and/or claim by the plaintiff did not fall within the conditions contained in the insurance policy. On that basis, the defendant declined the plaintiff's claim.

10. The defendant therefore denied liability claiming that the loss and damage suffered by the plaintiff was not caused by any of the perils insured in the Contract of Insurance. That there was no contamination whether accidental or deliberate which occurred during production, preparation, manufacture or packaging of the subject product. That there was no evidence that the use or consumption of the insured product resulted in visible symptoms of injury or disease of any person within seven days of consumption.

11. The defendant further contended that the IRA rightly determined that the reported loss did not fall within the confines of the Policy. That in the premises, the plaintiff was not entitled to any compensation.

12. During the trial, the plaintiff called 3 witnesses while the defendant called 2. Pw1 was Daniel Jacca, the plaintiff's Quality Control Manager. He relied on his two witness statements dated 21/1/2021 and 12/7/2021.

13. He testified that, Macadamia Nuts are organic products which are prone to decomposition and decay for reasons such as weather and handling. That to minimise this risk during the export process abroad, the plaintiff took out a Contaminated Products Insurance with the defendant for its products.

14. That the plaintiff maintained the Contaminated Products Insurance with the defendant for 6 years and the Contract of Insurance for the period between 1/5/2018 and 30/4/2019 was Policy Number 030029759 dated 8/5/2018. That prior to the consignment being exported, there were various analytical reports that were carried out in accordance with the legal and other export requirements.

15. He told the Court that the consignment arrived in the USA on 24/7/2018 after which samples of 100 Macadamia Nuts were inspected by USA FDA which found that the samples were contaminated and not fit for food. This led to their detention and eventual shipping back to Kenya.

16. On arrival in Kenya, the Kenya Bureau of Standards (KEBS) inspected the same and found them to have moulds, caked not uniform in colour and recommended for their destruction at the plaintiff's cost. That the contamination was an unfortunate incident which the plaintiff made effort to resolve with the USA FDA.

17. On cross examination, he stated that under clause 1A of the policy, crystallization of the insured event was contingent on bodily injury, sickness, disease or death of any person within seven days of consuming the nuts. That the plaintiff exported five containers of the Macadamia Nuts to the USA and only one container was detained while the other four were successfully cleared for consumption.

18. That the plaintiff still believed that it had a chance of proving that the nuts were not contaminated however, when they arrived in Kenya, they were confirmed to be contaminated by KEBS. That the Insurance Regulatory Authority had upheld the decision by the defendant to decline the claim.

19. On re-examination, Pw1 testified that the plaintiff decided to return the nuts to Kenya as it believed that they had a chance of getting a second opinion to confirm that the nuts were not contaminated.

20. Pw2 was Stanley Githinji, of Peace of Mind Insurance Brokers Ltd which had procured the insurance policy on behalf of the plaintiff. He testified that the insurance procured was a contaminated product and recall costs insurance that covered the product of the insured against accidental contamination. That accidental contamination was one of the events covered under the contract.

21. In cross examination, he testified that during the proceedings at the Insurance Regulatory Authority, the latter pushed back the matter to the plaintiff to show that the contamination occurred during the production, manufacturing, preparation and packaging.

22. In re- examination, he stated that the eating of the nuts did not vary or invalidate the results of the USA FDA analysis. That the defendant acknowledged the claim made by the plaintiff by responding to it. That accidental contamination meant any loss that the insured may suffer as a result of the product getting contaminated when it is not deliberate. That it was impossible to have documentary evidence of accidental contamination.

23. Pw3 was Barnabas Boit. He was an employee of the plaintiff who represented it during the destruction of the consignment pursuant to the direction of KEBS. He testified that the nuts that were returned from the US were destroyed in his presence. That the defendant was notified of the destruction and did not have any objection to the same.

24. He admitted in cross-examination that a representative of the defendant collected a sample before the destruction. That even if that sample was tested, it would have no effect since the consignment was already destroyed.

25. John D. Miners (Dw1), the Managing Director at Cunningham Lindsey Kenya Limited, a Loss Adjusting Firm testified that the relevant part of the contract was clause 1 of the policy where three events are identified for refund. That his advice to the defendant was informed by the fact that no evidence was adduced of any incidence causing contamination within the insured premises in Athi River and that the onus of proof was on the policyholder.

26. That there was no limitation except the contamination occurring in terms of the policy. That prior to the shipment, the plaintiff engaged three service providers who all gave the consignment a clean bill of health. That five containers were shipped to USA but only one was rejected. The USA FDA issued a report condemning the entire consignment of one container. That according to the terms of the policy, the loss suffered was USD 27,706.

27. In cross examination, he told the Court that his findings were based on the wording of the policy. That the plaintiff attempted to challenge the findings of the USA FDA but failed and that it tried to mitigate its losses in the USA. That according to the policy, the event stops at the factory and the claim would be maintainable if the discovery was done at Athi River not in the USA.

28. That clause 4 meant that the insured event occurred anywhere in the world during production, preparation, manufacture or packaging.

29. In re-examination, he admitted that he could not tell when the contamination occurred as he was not qualified to do so. That the onus was on the insured to prove loss or occurrence of the insured incident.

30. Dw2 was Linda Wanjiru Kanairu testified that the claim was reported on 7/6/2019 but it was rejected as the circumstances were not covered by the claim. She admitted in cross-examination that the cover was world-wide and that it did not matter where the loss occurred. She did not dispute USA FDA's finding and that it was reasonable for the plaintiff to have contested those findings.

31. She further admitted that the amount claimed was not in issue but rather whether the loss was within the policy. That the amount claimed was within the limit and the defendant would not need to look into the invoices and receipts.

32. In re-examination, she stated that the plaintiff confirmed how vigorous the processing was to show that the nuts were fit for consumption. That the plaintiff was hoping to have the nuts repackaged for another market and that the plaintiff claimed different sums.

33. The parties filed a statement of agreed issues dated 9/9/2021 where 6 issues for determination were agreed upon by the parties.

34. Issue 1: What is the interpretation of section 1A of the General Terms and Conditions of the Contract of Insurance?

35. The contract between the parties is the Contaminated Products Insurance Policy Number 030029759 ("the policy"). Paragraph 1A thereof provided that the defendant would reimburse the plaintiff for its loss from events such as: -

> " A. Accidental Contamination
>
> Accidental Contamination is any accidental or unintentional contamination, impairment or mislabelling of an Insured's Product(s) which occurs during or as a result of its production, preparation, manufacture or packaging; provided that the use or consumption of such insured product(s) has resulted in or would result in clear, obvious, or visible symptoms of bodily injury, sickness, disease or death of any person(s), within seven (7) days following such consumption or use." (underlining mine).

36. The plaintiff submitted that the Court ought to apply a practical interpretation of the contract. One that makes it practical for the plaintiff and other business people to take out insurance.

37. On the other hand, the defendant submitted that since the plaintiff failed to satisfy the conditions as required by the policy, it cannot be afforded the luxury of having the said section interpreted in broader terms to suit its interest.

38. I have considered that provision. My understanding of it is that; there must be unintentional contamination, that contamination should occur during or as a result of production, preparation, manufacture or packaging. The contamination should be one that would cause sickness or death should the product be consumed.

39. Was there unintentional contamination of the Nuts?

40. The evidence on record is that there was thorough checking and analysis of the products after their production at the plaintiff's factory at Athi River. That three service providers gave them a clean bill of health. They were then packaged and exported to the USA.

41. Upon arrival at Los Angeles California, the USA FDA inspected the consignment and found in one container that the nuts 'consisted in whole or in part of a filthy, putrid or decomposed substance otherwise unfit for food.'

42. The plaintiff, through its lawyers in the USA, attempted to challenge those findings but this bore no fruits. The goods were reshipped back to Kenya and were tested by KEBS. Vide its report dated 25/7/2019, KEBS found that 'the consignment had presence of moulds, caked, not uniform in colour and lack of proper labelling (manufacture and expiry dates)'. It therefore ordered that they be destroyed at the plaintiff's cost.

43. Based on USA FDA and KEBS findings, I find that there is sufficient proof that the consignment was contaminated and it was unfit for human consumption. This is so notwithstanding the offer by the plaintiff's agents in the USA to consume the same.

44. In this regard, it was not necessary to show that the consumption of the nuts caused injury or death within 7 days of such consumption. The fact that two reputable authorities certified them unfit for food or consumption was proof enough of contamination.

45. Was the contamination accidental as required under the policy? There is nothing on record to indicate that the contamination was intentional. It is also not disputed that the contamination was unintentional.

46. The second limb to consider is whether the contamination occurred during or as a result of production, preparation, manufacture or packaging.

47. The plaintiff submitted that the correct interpretation of section 1A of the policy is that the plaintiff was covered for any loss or damage occasioned by the contamination or impairment of the Macadamia Nuts whichever destination or place it was discovered.

48. On the other hand, the defendant argued that the contamination ought to have been discovered whilst the goods were in Kenya in the plaintiff's premises at Athi River. That although the policy had a worldwide territorial coverage, it could only be invoked once the conditions of the policy had been met.

49. It should be noted that what section 1A of the policy required was that, the accidental contamination does occur during or as a result of its production, preparation, manufacture or packaging. It did not provide the place or time of discovery of the contamination.

50. In Amuga and Company Advocates v Kisumu Concrete Products Limited [2021] eKLR the Court cited with approval the case of Athwal v. Black Top Cabs Ltd 2012 BCCA 107 (B.C.C.A) stating the principles of contractual interpretation as follows: -

> "The contractual intent of parties to a written contract is objectively determined by construing the plain and ordinary meaning of the words of the contract in the context of the contract as a whole and the surrounding circumstances (or factual matrix) that existed at the time the contract was made, unless to do so would result in an absurdity. Where the language of a contract is not ambiguous (that is, when viewed objectively it raises only one reasonable interpretation), the words of the written contract are presumed to reflect the

parties' intention. An interpretation that renders one or more of the contract's provisions ineffective will be rejected."

51. I concur with the foregoing finding. I do not think that there is any absurdity in section 1A. The plaintiff obtained an insurance cover against the contamination of its nuts that were export bound. The insurance covered the plaintiff's goods worldwide. It did not matter where the discovery of the accidental contamination of the Nuts is made. All that was required was that the contamination should have been during or as a result of its production, preparation, manufacture or packaging.

52. In the present case, the contamination was discovered upon the nuts' arrival in the USA. It is not disputed that there was a thorough analysis and checking before packaging at Athi River. They were given a clean bill of health. After packaging, they were exported to the USA where upon arrival they were found to be contaminated. There was no evidence to suggest that the contamination took place en-route to the USA. The discovery was made at the earliest opportunity upon their arrival in the USA.

53. The only logical conclusion is that, the goods having been given a clean bill of health before packaging, they must have been contaminated during packaging before exportation. I reject the defendant's contention that the discovery should have been made in Kenya at the plaintiff's factory. That was not the intention of the parties as contained in the policy.

54. Pw1 was categorical that the Nuts in question being organic, they would be affected by either weather or handling. It would be obvious that if the contamination was as a result of the weather, it is most likely that all the five containers would have been affected. But in this case, it was only one container which suggests that the contamination must have been during packaging.

55. In this regard, I find that the accidental contamination must have occurred during the packaging.

56. The foregoing being the case, I find that liability attached to the defendant in accordance with the contract of insurance. That the loss occasioned to the plaintiff was covered in the policy and that the defendant committed a breach of the Contract of Insurance by refusing to compensate the plaintiff. This settles the second, third and fourth issues in the Statement of Agreed Issues.

57. There was no evidence that the Nuts were examined after packaging. In any event they could not be removed from the packaging for examination but until they were examined in the USA.

58. In the plaint, the plaintiff prayed for Kshs.391,772.71 and USD 386,474.86 with interest at court rates from 18/12/2019 until payment in full. The defendant submitted that the loss was only USD27,706 after adjusting the loss according to Dw1.

59. With greatest respect, the amount claimed cannot be in question. The plaintiff produced documents to prove the actual loss suffered. The contract was for re-imbursement of loss suffered. The alleged adjustment of the loss was without basis and was self-serving. Indeed, Dw2 was categorical that the amounts were not in question but only the issue of liability. The contract entered into was one for compensation. The plaintiff proved to the required standard that the loss suffered was as claimed in the plaint.

60. Accordingly, the plaintiff having proved its case on a balance of probability, I enter judgment for the plaintiff against the defendant for Kshs.391,772.71 and USD 386,474.86 with interest at court rate from 18/12/2019 until payment in full. The plaintiff will have the costs of the suit.

It is so decreed.

DATED and DELIVERED at Nairobi this 13th day of January, 2023.

A. MABEYA, FCIArb

JUDGE