



**Afroplast Industries Limited v Sanlam Insurance Co Ltd (Civil Suit
11 of 2019) [2023] KEHC 20524 (KLR) (13 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20524 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL SUIT 11 OF 2019
DO CHEPKWONY, J
JULY 13, 2023**

BETWEEN

AFROPLAST INDUSTRIES LIMITED PLAINTIFF

AND

SANLAM INSURANCE CO LTD DEFENDANT

RULING

1. This Ruling is in respect to the Notice to Produce Documents dated April 17, 2023 where the 1st Defendant requires the Plaintiff to produce the following documents:
 - a. The Lease Agreement for the premises where the factory is alleged to have been located at Go-Down No 15 situated in Plot No 13/520 along Kibiko Road in Thika.
 - b. The proof of purchase by the Plaintiff and/or receipts for the machinery, office furniture and equipment, stock, raw materials allegedly valued at Kshs 204,367,000 as at March 23, 2018.
 - c. Proof of loss of income of Kshs 24 Million for 8 months and costs for the expert assessors from China of Kshs 300,000.00.
 - d. The court proceedings in Thika Criminal Case No 6065 of 2018.
2. Brief facts of the case are that the Plaintiff rented out property known as Go- Down No 15 situated in Plot No 13/520 along Kibiko Road in Thika, (hereinafter ‘the Go-Down’. The Go-Down had heavy machineries used for manufacturing assorted PVC Pipes, raw materials and finished products.
3. The Plaintiff took out an insurance cover for the Go-Down against burglary and fire for indemnification under Policy No xxxx. The Plaintiff’s Go-Down was set ablaze by a known arson



which caused the Plaintiff to suffer loss and damage in the sum of Kshs 228,667,000.00 being Kshs 204,367,000.00 for the machines and finished goods value, loss of income for 8 months Kshs 24,000,000.00 and Kshs 300,000.00 for costs of expert assessors from China. The suspected known arson, Mr James Macharia Njue was charged at Thika Law Courts in Criminal Case No 6065 of 2018 with the offence of Arson contrary to Section 332(a) of the Penal Code.

4. The Plaintiff then filed the present suit seeking a declaration that the Defendants be obligated to indemnify the Plaintiff in terms of the policy, issued on March 23, 2018, to make known the findings of their investigations surrounding the incident, loss of business from time of filing suit till payment in full, interest on the decretal sum and costs.
5. The 1st Defendant entered appearance and filed its Statement of Defence together with the list of witnesses and bundle of documents dated October 18, 2022. The 2nd Defendant, the Insurance Agency's name was struck out from the suit after its application dated July 9, 2019 was allowed.
6. On June 22, 2023, the matter came up for mention for parties to confirm compliance with Pre-trial directions as provided for under Order 11 of the *Civil Procedure Rules*. The 1st Defendant's counsel confirmed filing of their list of witnesses and documents on October 18, 2022. However, counsel for 1st Defendant indicated to court that they had filed and served the Plaintiff with a Notice to produce documents dated April 17, 2023 in which they were asking for four documents but the Plaintiff had yet to comply.
7. The Plaintiff's counsel confirmed to court service of the said Notice to produce but urged the court to proceed and issue a hearing date for the main suit as they believed they had fully complied with Pre-trial directions. It was the Plaintiff's counsel's position that the Defendant having filed the suit, it was them who would determine which documents they would rely on in their case and it was not for the Defendant to inform which documents to produce in support of their case. The Defendant's counsel on the other hand holds that the Notice was served upon the Plaintiff under the provisions of Order 11 Rule 3(2) of the Civil Procedure Rules and they were not directing the Plaintiffs on how to proceed with their case. All they required was for the Plaintiff to make full disclosure of the documents that they have referred to in their pleadings to enable the defence effectively defend its case. Counsel urged that the Plaintiffs either comply with the Notice or file a formal response thereto.
8. Having listened to the arguments advanced by each counsel on the issue of the Notice to produce documents, this Court finds that the issue for consideration is whether or not the Plaintiff is obligated to comply with such Notice.
9. For effective, efficient and expeditious disposal of cases, and case management, parties to a case, under the supervision of a court undertake Pre-trial directions and case conference. This is provided for under Order 11 of the Civil Procedure Rules.
10. The purpose of production of documents is for parties to provide documents that are relevant to their respective cases to their counterparts. This was the position in the case of *Oracle Productions Limited -vs- Decapture Limited & 3 Others [2014]eKLR*, where Kimondo J rendered himself thus:-

' Pre-trial discovery is so central to litigation that the entire order 11 of the Civil Procedure Rules, 2010 has been substantially devoted to it, including sanctions for non-compliance. Orders 4 and 7 now require parties to file and serve documentary evidence with their pleadings. Order 14 empowers the court to order for production, impounding and return of documents. I agree with the holding of Havelock J in the Concord Insurance case (supra) that discovery should be limited solely to the matters in contention. Relevance can only be gauged or tested by the pleadings or particulars provided. Halsbury's Laws of England



(supra) paragraph 38. See also Kahumbu –vs- National Bank of Kenya Limited [2003] 2 EA 475, Oluoch –vs- Charagu [2003] 2 EA 649.'

11. It is trite law that the Defendant must show the relevance of the documents and the nexus of the documents sought and the case as was held in the case of *Crown Paints (Kenya) Limited –vs- Dry Associates Limited [2015] eKLR*, where it was held that: -

' The Defendant has to show in its application as to the relevance of the particulars it seeks, or the application will stand to be dismissed. Relevance must be tested by the pleadings and particulars. In my opinion, the Defendant has been able to show that the documents it seeks are relevant. Indeed, there is a nexus shown by the Defendant as to the documents it seeks in its application in relation to its pleadings. The pleadings details that the defendant has sought a joint reconciliation of the amounts owed to the investors in vain. That further the Plaintiff has numerous documents that are not in the Defendant's possession. The same will aid in its case, which is whether it indeed owes the Plaintiff the balance of the investor funds'.

12. I have perused the Notice to produce Documents dated April 17, 2023 which is in contention and find that the documents being sought by the 1st Defendant are indicated as those appearing at Paragraphs 6, 7, 9, 14 and 15 of the Plaintiff dated April 25, 2019 and in the Pro-forma Invoices appearing as annexures h of the Plaintiff list of documents dated April 25, 2019. I have gone on to read through the Plaintiff and Plaintiff's list of documents, both filed on April 24, 2019 and confirm that indeed the documents the 1st Defendant requires produced touch directly on the case herein. This Court believed that the lease agreement of where the Go-Down was housed is necessary as proof or evidence of ownership, the invoices and receipts as proof of purchase of the machinery and furniture; proof of loss of income and costs for expert assessors from China as these will go on to prove the loss and damages sought by the Plaintiff, while the court proceedings in Thika Criminal Case No 6065 of 2018 would be relevant as this will show the action taken against the accused or suspect in the arson case.
13. It is worth-noting that the Plaintiff has not filed any response to dispute the relevance or irrelevance of the documents that have been requested for by the Defendant. It is not plausible to allege that since they filed the suit, it is only them who can determine what documents to rely on in their case but not for the Defendant to direct then on this. In view of the foregoing discussion, the Plaintiff is likely directed to produce the documents listed in the Notice to Produce dated April 17, 2023 within 30 days from the date hereof to enable a hearing date be fixed.

14. It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 13TH DAY OF JULY, 2023.

D. O. CHEPKWONY

JUDGE

In the presence of:

M/S Langat holding brief for Mr. Mbanda for Plaintiff

Mr. Thuo for 2nd Defendant

Court Assistant - Martin

