Akshar Logistics Limited v Monarch Insurance Co. Ltd (Civil Case E009 of 2022) [2023] KEHC 20106 (KLR) (6 July 2023) (Ruling)

Neutral citation: [2023] KEHC 20106 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL CASE E009 OF 2022

DKN MAGARE, J

JULY 6, 2023

BETWEEN

AKSHAR LOGISTICS LIMITED ..... PLAINTIFF

AND

THE MONARCH INSURANCE CO. LTD ..... DEFENDANT

RULING

1. This is an application for Summary judgment against the defendant. They claim a sum of 27,264.681.
2. They main reason was that the plaintiff's claim is for release of various discharge vouchers issued by the defendant in respect of the policy of insurance.
3. The defendant in their defence states that there is an express term of the contract of insurance that consequential loss is not covered. The Defendant admitted that there was a policy in force between 16/8/2021 and 15/8/2022 – motor vehicle policy.
4. The defendant however averred that there was discovery of a fact or occurrences which make the claim inadmissible. This thus made the Plaintiff's claim untenable and as such, the Defendant was under no obligation to compensate for the loss.

Analysis

5. Summary judgment, is provided under order 36, rule 1.] (1) as doth: -

> " In all suits where a plaintiff seeks judgment for—
>
> (a) a liquidated demand with or without interest; or
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> (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.

(2) The application shall be supported by an affidavit either of the plaintiff or of some other person who can swear positively to the facts verifying the cause of action and any amount claimed.

(3) Sufficient notice of the application shall be given to the defendant which notice shall in no case be less than seven days.

6. The claim herein is made under order 36 rule 1(a) of the *Civil Procedure Rules*. Summary judgment is given in clearest of cases. In other words, to be able to show that the defendant has no defence to the claim. Rule 2 Provides that the defendant may show either by affidavit, or by oral evidence, or otherwise that he should have leave to defend the suit. The Defendant does not need to show that they have many issues. One issue is enough. In the case of *DT Dobie & Company Ltd v Muchina* [1982] eKLR, Court of Appeal stated as doth:

> " The Court ought to act very cautiously and carefully and consider all the facts of the case without embarking upon a trial before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the Court. 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 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.
>
> As far as possible indeed, there should be no opinions expressed upon the Application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks right." (emphasis mine)

7. Further, in the case of *Simon Kirima Muraguri & another v Equity Bank (Kenya) Limited & another* [2021] eKLR, Justice E. C. Mwita, had this to say: -

> " 21. The jurisdiction to strike out pleadings is discretionary and must be exercised judicially. In *Postal Corporation of Kenya v I. T Inamdar & 2 Others* [2004] 1 KLR 359, the court stated that the law is now well settled that if the defence filed by a defendant raises even one bona fide triable issue, then the defendant must be given leave to defend.

8. In *Five Forty Aviation limited v Tradewinds Aviation Services Limited* [2015] eKLR, the court of appeal stated as doth: -

> " This Court in *Blue Shield Insurance Company Limited v Joseph Mboya Ogutu* [2009] eKLR went further on the same principles to say that the power to strike out a pleading which ends in driving a party from the judgment seat should be used very sparingly and only in cases where the pleading is shown to be clearly untenable. In that same case this Court held that a party need not raise more than one triable issue. The court stated:
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> > " In law, only one issue raised in defence if it constitutes a genuine defence and not necessarily a successful defence would warrant a full hearing."

9. The court proceeded as follows in the *Five Forty Aviation limited v Tradewinds Aviation Services Limited* [*supra*],

> " This Court in *Moi University v Vishva Builders Limited* [2010] eKLR considered various authorities on the matters which we are called upon to determine in this appeal. The court considered *H.D. Hasmani v Banque Du Congo Deige* [1938] 5 EACA where it had been held that only one trial issue was sufficient for a defendant to be granted leave to defend. The court added:
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> > " We must however hasten to add that a triable issue does not mean one that will succeed. Indeed, in *Patel v E.A. Cargo Handling Services Ltd* [1974] E.A. 75 at page 76 Duffus P. said:
> >
> > > " In this respect defence on the merits does not mean, in my view a defence that must succeed, it means as SHERIDAN, J put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication."
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> Also considered was *Continental Butchery Limited v Samson Musila Ndura*, Civil Appeal No. 35 of 1997:
>
> > " With a view to eliminate delay in the administration of justice which would keep litigants out of their just dues or enjoyment of their property, the court is empowered in an appropriate suit to enter judgment for the claim from the plaintiff under summary procedure provided by Order 35 subject to there being no triable issues which would entitle a defendant leave to defend.
>
> If a *bona fide* triable issue is raised the defendant must be given unconditional leave to defend but not so in a case in which the Court feels justified in thinking that the defences raised are a sham.
>
> That decision was made in 1977. In 1997, this Court again confirmed the same principle in the case of *Dhanjal Investments Limited v Shabana Investments Limited*, Civil Appeal No. 1232 of 1997 (unreported) where it stated:
>
> The law on summary judgment procedure has been settled for many years now. It was held as early as in 1952 in the case of *Kundanlal Restaurant v Devshi & Company Limited* [1952] 19 EA 77, and followed in the Court of Appeal for Eastern Africa in the case of *Souza Fiqueredo & Co. v Moorings Hotel* [1959] EA 425, that if the defendant shows a bona fide triable issue he must be allowed to defend without conditions."

10. The defendant stated that they had indicated a disclaimer on the discharge vouchers that stated that if they discover any fact of occurrence making the claim inadmissible then they were under no obligation to compensate the Plaintiff.

11. Though there are submissions, I will intertwine then with this analysis to save on space and time. This is because, if for any reason the application is not successful, parties need to retain their arguments for the main case.

12. They also deny that they issued a discharge voucher in respect of some motor vehicles, in particular, KDB 038G. They also give the same disclaimer in the voucher dated 7/6/2022. The Defendant averred

that the goods under policy No. WSL/0508) 0000002 do not belong to the plaintiff hence they had no insurable interest.

13. They also raise a similar defence in other motor vehicles.

14. The defendant raises the following defences in general: -

    a. The plaintiff had no insurable, interest in the various good he was claiming.

    b. The plaintiff did not suffer any loss.

    c. The various vouchers signed had a disclaimer that in event of discovery of any fact that makes the claim inadmissible then the defendant will be under no obligation to compensate the plaintiff.

15. Regarding Wiba, policy they stated that their liability not provided was excluded from the risk covered.

16. The employee whose claim was made was in respect of an employee of Ap Barkart agency Ltd and not the plaintiff. This by itself is a triable issue.

17. The said policy was thus repudiated. Windscreen claims are denied. In the case of *Raghbir Singh Chatte v National Bank of Kenya Limited* [1996] eKLR, where the court of Appeal stated as doth: -

> " The main object of this rule and r.14 is to bring the parties by their pleadings to an issue, and indeed to narrow them down to definite issues, and so diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing (per *Jessel M. R. in Thorp v Holdworth* (1876) 3 Ch. D. 637). This object is secured by requiring that each party in turn should fully admit or clearly deny every material allegation made against him. Thus, in an action for a debt or liquidated demand in money, a mere denial of the debt is wholly inadmissible", (underling supplied).
>
> I will also add that the crucial deficiency of a general denial which I have already described, also applies to the evasive, inconsistent and contradictory alternative general traverse in the appellant's defence. This was that if the respondent had extended any overdraft facilities without stating the amount involved, to the appellant which was moreover, denied, then the same and here again, without stating how and when, had been paid. Such a spurious pleading in the alternative cannot give any merit to the defence and so also makes it one which discloses no reasonable defence for all purposes including that of 0 6 r 13(1)(a)."

18. There needs to be very specific -pleadings. One cannot just come up with figures without specifically pleading so. In the case of *David Bagine v Martin Bundi* [1997] eKLR, the court of Appeal stated as follows: -

> " We are only concerned with the awards of damages. The superior court (Etyang' J) awarded special damages in the sum of Shs. 227,750/= as cost of repairs to the respondent's vehicle and sum of Shs. 540,000/= as damages for loss of user. It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of *Mariam Maghema Ali v Jackson M. Nyambu t/a sisera store*, Civil Appeal No. 5 of 1990 (unreported) and *Idi Ayub Sahbani v City Council of Nairobi* (1982-88) IKAR 681 at page 684: "....special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in *Bonham Carter v Hyde Park Hotel Limited* [1948] 64 TLR 177 thus: Plaintiffs must understand that if they bring actions for damages it is for thm to prove damage, it is not enough to write down the particulars and,

so to speak, throw them at the head of the court, saying, 'this is what I have lost, I ask you to give me these damages.' They have to prove it"

19. In respect of the windscreen claim, it is not even properly pleaded. How can I give summary judgment so such kind of pleading.

20. Further, I am satisfied that even without the defence being raised, the composite claims that are not for allowing. The claim consists of a composite claim. The first one is the motor commercial general where motor vehicle Registration No. KBL 055P was involved in an accident where there was material damages and incidental or constructive loss.

21. The defendant agreed to pay 2,200,000 on 1/4/22 where was claim for 369,365 the Defendant refused to pay. There was Accident on 202/10/2021 transporting cargo aboard motor vehicle Registration No. KBT 057H.

22. The vehicle and consignment were damages. The third claim and 4th was under cc/3373/21 and CL 337 / 2021. This is a claim for 3,334,000 and 11,849,639 on a fatal accident for an employee.

23. The 5th claim was CC/WSL/WIBA /0490/2022 for a sum of Kshs. 2,978,489. The defendant failed to pay Kshs. 2,978,485 to the Deceased employee's defendants.

24. The 6th and 7th claims were CL/3590/21 and CL/3481/2021 over KDB 038G a sum of Kshs. 3,258,1000 was reported due and KHs. 433,843 on 27/7/2022 on 16/3/2022. Motor vehicle registration No. ZF 023 was damaged and claim No. CL/0191V) 2022 was lodged as the 8th claim a sum of Kshs. 537,100 was claim under the said claim.

25. The defendant is said to have accepted but did not pay. The 9th and last claim is under commercial Act Risks for KBR 011Y involved an accident transporting cargo on behalf of one of the plaintiff's clients.

26. A sum of Kshs. 2,406,771 was said to be due. Then he also claims for over paid premiums of Kshs. 506,209. The total claim amount to 27,264,681.

27. I will start with the claim for refund of premiums. The claim is improperly pleaded. The pleading must and ought to show how the excess premiums arose. There is no such pleading. As stated in *David Bagine v Martin Bundi* (*Supra*) specials must not only be particularly pleaded they must also be specifically pleaded. In *Swalleh C. Kariuki & another v Viloet Owiso Okuyu* [2021] eKLR, the court, justice Luka Kimaru, as then he was, stated as doth; -

> "In regard to special damages the law is quite clear on the head of damages called special damages. Special Damages must be both pleaded and proved, before they can be awarded by the Court. Suffice it to quote from the decision of the Court of Appeal in *Hahn v Singh*, Civil Appeal No. 42 of 1983 [1985] KLR 716, at P. 717, and 721 where the Learned Judges of Appeal - Kneller, Nyarangi JJA, and Chesoni Ag. J.A. - held:
>
> > "Special damages must not only be specifically claimed (pleaded) but also strictly proved.... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves."
>
> A natural corollary of this has been that the Courts have insisted that a party must present actual receipts of payments made to substantiate loss or economic injury. It is not enough for a party to provide pro forma invoices sent to the party by a third party. In this regard, our

Courts have held that an invoice is not proof of payment and that only a receipt meets the test. (See *Total (Kenya) Limited Formally Caltex Oil (Kenya) Limited v Janevams Limited* [2015] eKLR; *Zacharia Waweru Thumbi v Samuel Njoroge Thuku* [2006] eKLR; *Sanya Hassan v Soma Properties Ltd*)."

28. In addition, excess is an accounting issue. It should be shown – premiums demanded and due premiums paid and then and only then will excess be found.

29. There must also be circumstances in which the Excess Premiums were paid. The excess cannot be paid without the mathematical precision. There needs to be a basis for this. This was not shown.

30. On the background of the foregoing the plaintiff made an application for summary judgment. The first ground which must fall is that the claim is a liquidated claims. In *Sichuan Huashi Enterprises Corporation (East Africa) Limited v Capital Realty Limited; Jacinta Muthoni Machua & another (Interested Parties)* [2020] eKLR, the court, G V Odunga, as then he was stated as follows -

> " In *Cimbria East Africa Limited v Kenya Power & Lighting Company Ltd* [2017] eKLR, Ochieng, J stated as follows:
>
> > " Black's Law Dictionary defines Liquidated Claim thus;
> >
> > '1. A claim for an amount previously agreed upon by the parties or that can be precisely determined by operation of Law or by the terms of the parties agreement.
> >
> > 2. A claim that was determined in a judicial proceeding'.
> >
> > 25. Meanwhile, Halsbury's Laws of England, 4th Edition Vol. 12, at paragraph 1109 says;
> >
> > > '....In every case where the court has to quantify or assess the damages or loss, whether pecuniary or non-pecuniary the damages are unliquidated'.
> >
> > Nonetheless, it is to be noted that;
> >
> > > 'A claim does not become a liquidated demand simply because it has been quantified. To qualify as liquidated demand, the amount must be shown to be either already ascertained or capable of being ascertained as a mere matter of arithmetic.'
>
> I adopt the following definition of a debt or liquidated demand from The Supreme Court Practice (1985) Volume 1, at page 33;
>
> > 'A liquidated demand is in the nature of a debt, i.e a specific sum of money due and payable under or by virtue of a contract. Its amount must either be already ascertained or capable of being ascertained as a mere matter of arithmetic. If the ascertainment of a sum of money, even though it be specified or named as a definite figure, requires investigation beyond mere calculation, then the sum is not a 'debt or liquidated demand' but constitutes 'damages'...'
>
> The words 'debt' or 'liquidated demand' do not extend to unliquidated damages, whether in tort or in contract, even though the amount of such damages be named at a definite figure.

Per Ringera J. (as he then was) in *Trust Bank Limited v Anglo African Property Holdings Limited & 2 Others* Hccc No. 2118 of 2000."

31. There are claims arising from damages from accident, death of employees, and damage to goods. There are in the nature of special damages. They must be particularized in the plaint they are not particulars.

32. It is not for the plaintiff throw damage, to the court and then state that this is what he has lost. I have seen documents to show. They must properly plead and prove. Then for summary judgment, there must be no defence.

33. For example, there is the aspect of revocation of the discharge vouchers. This is an issue that must be tried. The defendant has raised 4 triable issues before the court. The triable issues need not succeed. In any case, even if there was no defence the plaintiff is bound to proceed to formal proof of the claims.

34. There than excess premium which is a liquidated claim, the rest are special damages claim. The issue of cancellation or otherwise of the vouchers are pertinent. I am unable to find that the plaintiff is entitled to summary judgment.

35. I have seen submissions by the parties. I have read them. However, they go into the actual merit of the case. I have avoided making reference to avoid making final determination at this stage. The only order commanding itself is the dismissal of the plaintiff's is application dated 6/2/2023.

36. Given the fact that the application was not totally baseless will not award the defendant costs. The order commending itself is that each party bears its costs.

Determination

37. In the circumstances, I dismiss the application dated 6/2/2023 with Costs of 25,000/= to the Defendant.

38. I direct that the matter be set down for hearing. The court shall issue directions on Amendments and filing of documents and hearing after the Ruling.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 6TH DAY OF JULY, 2023. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:

Oruta for the Plaintiff/Applicant

Betty Bundi for the Defendant/Respondent

Court Assistant - Brian