Tanad Transporters Ltd v Africa Merchant Assurance Co. Limited (Civil Suit 361 of 2011) [2023] KEHC 20757 (KLR) (Civ) (21 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20757 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL SUIT 361 OF 2011

CW MEOLI, J

JULY 21, 2023

BETWEEN

TANAD TRANSPORTERS LTD ..... PLAINTIFF

AND

AFRICA MERCHANT ASSURANCE CO. LIMITED ..... DEFENDANT

JUDGMENT

1. Tanad Transporters Ltd, (hereafter the Plaintiff) sued Africa Merchant Assurance Co. Ltd (hereafter the Defendant) seeking inter alia a declaration that the Defendant answers to the claims by the plaintiffs in Kapenguria Civil Case Numbers 9-24 of 2011 and 31-41 of 2011 (hereafter the primary suits) pursuant to terms contracted in the Policy No. AMI/080/1/004905/2007 between the Plaintiff and the Defendant company.

2. It was averred that at all material times the Plaintiff's motor vehicle reg. no. KAW 755R (hereafter suit motor vehicle) was insured by the Defendant Company under Policy No. AMI/080/1/004905/2007 under which the Defendant undertook to cover the Plaintiff for any third party claims for loss or injuries as a result of an accident involving the suit motor vehicle.

3. That on or about 27.05.2011 the Plaintiff was served with twenty-six (26) summonses from Kapenguria Law Court' in respect of the primary suits filed by the firm of Gacathi & Co. Advocates on behalf of twenty-six (26) claimants who were allegedly involved in an accident involving the suit motor vehicle and motor vehicle reg. no. KBK 907A. It was further averred that prior to service of the summons, the Plaintiff had promptly reported the said accident to the Defendant as stipulated in the policy of insurance, and forwarded the summons to the Defendant, who declined to receive them without any proper or valid explanation.

4. That as a consequence of the foregoing, the Plaintiff was compelled to engage a firm of advocates to defend the primary suits, and that despite demand to the Defendant, they had refused or neglected to answer to the demand and are therefore in breach of the contract between the parties. That the Defendant had a statutory duty to answer to the claims in the primary suits as contracted in the policy of insurance.

5. On 14.10.2011 the Defendant filed a statement of defence denying the key averments in the plaint. However, it was averred that through a commercial vehicle policy of insurance issued by the Defendant in respect of the suit motor vehicle, the said policy only covered risks within and limited to the scope of the said policy and was subject to the Plaintiff observing, fulfilling and complying with the terms and conditions of the said policy which it flagrantly, willfully and negligently failed and refused to observe, fulfill and or comply with.

6. It was further averred that despite the Defendant calling for pleadings in the alleged primary suits, which were received on or about 13.09.2011, whereupon the Defendant instructed its own advocates to take over conduct of the matters in the said suits. As such the instant suit has been overtaken by events, has no basis and should be struck out with costs.

7. During the trial, David Maigwa Njenga, testified on behalf of the Plaintiff as PW1. He identified himself as the Finance Manager of the Plaintiff and having adopted his witness statement dated 26.08.2011 as his evidence- in –chief produced the documents in the list of documents of even date as PExh. 1 – 4, and the documents in the list of documents dated 19.07.2012 as PExh. 5 – 12. It was his evidence that the Plaintiff reported the accident involving the suit motor vehicle to the Defendant who refused to act. Forcing the Plaintiff to appoint an advocate to represent it in the primary suits and as a consequence incurred expenses in the sum of Kshs. 780,000/- being fees paid to the said advocates to take up the matters. That, later the Defendant took over the matters but failed to refund the said payments to the Plaintiff.

8. Under cross-examination, he stated that the accident involving the suit motor vehicle occurred on 14.01.2011 and a notification of the accident was received by the Defendant on 15.02.2011. That the Plaintiff received 26 copies of summons in respect of the primary suits but the Defendant, refused to receive them, prompting a demand letter dated 12.07. He reiterated that it was the Defendant's verbal refusal upon being furnished with the summons that prompted the Plaintiff to engage its own advocates as the time within which to enter appearance was about to lapse.

9. That afterwards, the Plaintiff's advocates informed them that the Defendant had requested to be furnished with pleadings in respect of the primary suits which were duly forwarded to the Defendant. He asserted that the obligation of instructing of counsel in respect of the primary suits was the responsibility of the Defendant, and that it was only after the Plaintiff instructed their own counsel that the Defendant agreed to take up the matter. On re-examination he reiterated the Plaintiff's claim for the refund of the legal fees paid to defend the primary suits on the basis of the policy of insurance with the Defendant who ought to have promptly taken up the matters upon being notified of the claims.

10. On behalf of the Defendant, Grace Nyambura Njuguna testified as DW1. She identified herself as a senior legal manager with the Defendant. Adopting her witness statement dated 26.10.2021 as her evidence -in -chief she proceeded to produce the documents in the list of documents filed on 14.10.2011 as DExh.1 - 3. The gist of her evidence was that per Section 1 of the Insurance Policy consequential loss was not covered.

11. During cross-examination she confirmed that the accident in respect of the suit motor vehicle occurred on 14.01.2011 was reported and that the Defendant was obligated to defend the primary under the

contract of insurance. She asserted that an advocate had been instructed by the Defendant in that regard, however the Plaintiff proceeded to procure services of its own advocate to defend the primary suits. That the Defendant's had notice of the suits as of May 2011 and subsequently entered appearance but the Plaintiff opted to appoint its own advocate.

12. It was her evidence further, that upon request, the pleadings were sent to Defendant which commenced verification of the claim. That the Plaintiff acted negligently by proceeding to instruct an advocate to represent it in the primary suits, contrary to the policy of insurance. She contended that the Plaintiff was obligated to forward pleadings to the Defendant to enable it defend its insured. She stated that a mere letter concerning the existence of the suits did not suffice, because legal representation under the policy document could only be taken up by the Defendant upon service of the pleadings by the insured (Plaintiff) which the Plaintiff failed to do.

13. On re-examination, she asserted that under the policy document, compensation of the insured could only be made in respect of expenses incurred with the consent of the insurer.

14. Upon the close of the respective parties' cases, submissions were filed in the matter. While restating the events leading to the instant suit, counsel for the Plaintiff centered his submissions on the sole issue whether the Plaintiff is entitled to the expended costs incurred in defending the primary suits. Citing the provision of Section 5 and 10 of the Insurance (Motor Vehicles Third Party Risk) Act Cap 405, counsel submitted that it is the duty of the insuring company such as the Defendant, to take up liability that may be incurred by the insured, in respect to and arising out of the use of the suit motor vehicle while insured and on the road.

15. That as of the date of the accident the suit motor vehicle was insured by the Defendant, which pursuant to the policy document undertook to indemnify the Plaintiff. And was thus obligated to defend any civil proceedings in a court of law related to any event which was the subject of indemnity under the cover. Counsel further contended that by dint of the Defendant's admission of the contractual liability having arisen by seeking for the pleadings in respect of the filed suits for their further action, it is estopped from denying liability for the costs incurred by the Plaintiff in defending the primary suits. In conclusion, the court was urged to find in favour of the Plaintiff and hold the Defendant liable for costs incurred by the Plaintiff.

16. On the part of the Defendant, counsel having restated the events leading to this suit, relied on the decision in *Sita Steel Rolling Mills Limited v Jubilee Insurance Co. Ltd* [2007] eKLR and provisions of the policy document to contend that contacts of insurance are contract of utmost good faith and every fact is required to be disclosed. That despite the Plaintiff being served with summons, it failed and or refused to forward the same as provided under the policy of insurance, to enable the Defendant appoint its external lawyers to assume the defence. The Defendant opting instead to appoint its own lawyers to defend the suits without the Defendant's knowledge or consent in breach of the terms of the contract of insurance. Counsel further contended that, in any event, the Defendant eventually instructed an advocate to defend the primary suits which were subsequently concluded, thus the instant suit is overtaken by events.

17. On whether the Defendant is liable to bear costs paid to the Plaintiff's advocates, counsel argued that consequential loss is often not covered by ordinary insurance policies unless specifically factored into the payment of the premiums. That the Plaintiff could not recover in respect of avoided or avoidable loss and is duty bound to mitigate its loss. Besides, the Plaintiff could not claim in respect of loss occasioned by its conduct rather than breach of duty on the part of the Defendant. It was further submitted that the policy of insurance between the parties was a standard policy of indemnity which only covered actual loss but not consequential loss.

18. The English decision in *Hadley v Baxendale* [1854] EWHC EXCH J70, Hesbon Onyuro & Another v First Assurance Company Limited [2017] eKLR, as well as several local decisions,namely, Madison Insurance Co. Ltd v Solomon Kinara t/a Physiotherapy Clinic [2004] eKLR, Mohammed Athman Mahjid v Gateway Insurance Company Limited [2005] eKLR and Concord Insurance Company Ltd v David Otieno Alinyo [2005] eKLR were cited in support of the above submission.

19. Finally, citing Section 27(1) of the *Civil Procedure Act* and the decision in *Supermarine Handling Services Ltd v Kenya Revenue Authority*, Civil Appeal No. 85 of 2006, counsel urged the court to award costs to the Defendant in the event the Plaintiff's suit is dismissed.

20. The court has considered the respective parties' pleadings, evidence as well as the written submissions. It is the court's view that the issue falling for determination is whether the Plaintiff has established its claim on a balance of probabilities. In *Wareham t/a A.F. Wareham & 2 Others Kenya Post Office Savings Bank* [2004] 2 KLR 91, the Court of Appeal stated in this regard that: -

> " We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the *Civil Procedure Rules*. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail."

21. Further, the applicable law as to the burden of proof is found in Section 107, 108 and 109 of the *Evidence Act*. In *Karugi & Another v Kabiya & 3 Others* [1987] KLR 347 the Court of Appeal stated that:

> " [T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof....The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim."

22. The parties' respective pleadings have been highlighted earlier in this judgment. The dispute herein revolves around a Policy of Insurance No. AMI/080/1/004905/2007, admittedly issued by the Defendant in favour of the Plaintiff in respect of the suit motor vehicle, which was involved in an accident on 14.01.2011 during the currency of the policy of insurance. The Plaintiff's suit is based on the alleged breach of the contract by the Defendant by its failure to take up the defence of the primary suits, resulting in the expenses allegedly incurred by the Plaintiff in instructing its own advocates.

23. The Defendant's case is firstly, that the Plaintiff willfully and negligently failed and refused to observe, fulfill and or comply with the terms and conditions of the said policy in that upon being served with summons, it failed to forward the same in accordance with the policy of insurance, to enable the Defendant appoint its external lawyers to take up the conduct of defending the suit. And secondly that the policy of insurance between the parties hereto was a standard policy of indemnity which did not cover consequential loss in the nature of costs expended by the Plaintiff in appointing its own counsel to defend the primary suits.

24. The issues in dispute can therefore be briefly stated to be whether the Defendant was in breach of the contract of insurance and whether the Plaintiff is entitled to the reliefs sought.

25. The pertinent Policy of Insurance No. AMI/080/1/004905/2007 is the instrument setting out the respective parties' rights and obligations under the contract of insurance. The role of the court in adjudicating a dispute arising between contracting parties is well settled. In the oft-cited decision of *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & Another* [2001] eKLR, the Court held that; -

> " A court of law cannot re-write a contract between the parties whereas its role is limited to interpretation of the same. This is because contracting parties are free to specify the terms and conditions of their agreement, and that when parties do contract, the court does not have the right or ability to substitute its judgment for that of the parties."

26. The Policy document at the heart of the matter was produced as DExh.2 while the Motor Accident Report Form, the Certificate of Insurance and Proposal Form were produced as PExh.1, PExh.3 and DExh.1 respectively. The relevant clauses in DExh.2 provided as follows; -

> " Section Ii – Liability To Third Parties
>
> 1. Indemnity to insured
>
> The company will subject to the limits of liability and the jurisdiction clause indemnify the insured against sums including claimant's costs and expenses which the insured shall become legally liable to pay in respect of: -
>
> (a) death of or bodily injury to any person.
>
> (b) damage to property where such death or injury or damage arises out of an accident by or in connection with the motor vehicle or the loading or unloading of the motor vehicle.
>
> 2. Indemnity to other persons. The company will subject to the limits of liability and the jurisdiction clause indemnify the authorized driver or at against sums including claimant's costs and expenses which the insured shall become legally liable to pay in respect of: -
>
> (a) death of or bodily injury to any person.
>
> (b) damage to property where such death or injury or damage arises out of an accident by or in connection with the motor vehicle or the loading or unloading of the motor vehicle.
>
> 3 .....
>
> 4 .....
>
> Representation and Defence
>
> 5. The company may at its own option
>
> a. Arrange for representation at any inquest or fatal inquiry in respect of any death which may be the subject of indemnity under this Section.

b. Undertake the defence of proceedings in any court of law in respect of any act or alleged offence causing or relating to any event which may be the subject of indemnity under this Section.

Expenses

6. The company will pay all costs and expenses incurred with its written consent.

27. The Policy of Insurance further provides that; -

"Conditions

1 .....

2. Insured's Duty

The due observance and fulfilment of the terms of this policy insofar as they relate to anything to be done or not to be done by insured or any person claiming to be indemnified and the truth of the statements and answers in the proposal shall be conditions precedent to any liability of the company to make any payment under this policy

3 .....

4 .....

5. Notification of Accident

In the event of any occurrence which may give rise to a claim under this policy the insured shall as soon as possible and in the event not later than seven days give notice thereof to the company with full particulars. Every letter claim writ summons and process shall be notified or forwarded to the company immediately on receipt. Notice shall also be given to the company immediately the insured or any person claiming to be indemnified shall have knowledge of any impending prosecution inquest or fatal inquiry in connection with any such occurrence. In case of theft or other criminal act which may give rise to a claim under this policy the Insured shall give immediate notice to the police and co-operate with the company in securing the conviction of the offender.

7 .....

8 ....." (sic)

28. From the foregoing it is evident that upon the occurrence of an accident or event covered under the policy document, the Plaintiff was obligated to promptly inform the Defendant for the obvious purpose that the Defendant would defend any arising claim made or lodged in court in respect of liability involving the suit motor vehicle. The suit motor vehicle was involved in an accident 14.01.2011 (see PExh.1). Clause 5 of the Condition reproduced hereinabove, obligated the Plaintiff to notify the Defendant of an occurrence giving rise to a claim under the policy as soon as possible and in any event not later than seven (7) days upon its occurrence. Further in the event of receipt of a letter of claim, writ, summons and process, the Plaintiff was to notify or forward the same to the Defendant immediately.

29. PW1's evidence at trial was that the Plaintiff reported the accident involving the suit motor vehicle to the Defendant. From the material tendered by the Plaintiff, the earliest communication to the

Defendant (PExh.1) was apparently received by the Defendant on the face of it, on 15.02.2011, whereas the accident occurred on 14.01.2011. Evidently, the accident was reported a month after its occurrence, the Plaintiff not having tendered any proof of notice to the Defendant within the seven (7) days of occurrence as prescribed in the policy of insurance. By its letter dated 24.05.2011 and received by the Defendant's on 26.05.2011 (DExh.3), the Plaintiff through its counsel inquired whether the Defendant was intending to take up defences in respect of the claimants who subsequently lodged the primary suits. The letter appears to have elicited no response.

30. Equally, the Plaintiff was obligated to forward pleadings and or summons on suits lodged against it in connection to the liability covered by the policy of insurance immediately upon receipt of the same. In that regard, it was not until 12.07.2011 that the Plaintiff's advocates on record at the time wrote a letter to the Defendant (PExh.5), stating as follows: -

> " Kindly note that our said mutual client was served on or about 27th day of May 2011 and 29th day of June 2011 with court summons with respect to an accident that occurred in Kapenguria between the insured's lorry above captioned and various Plaintiffs
>
> The total number if summons received so far are twenty six (26) in number to which we filed defences at Kapenguria, taking consideration the urgency of meeting the deadline of filing defence in court.
>
> Our client seeks that you take over the cases herein having been served with a statutory notice as required by law by the Plaintiffs advocate Gacathi & Company Advocates (annexed is a copy of notice).
>
> Do let us know whether we can forward the filed defences to you for your further action or whether you would like us to proceed with the matter on your behalf." (sic)

31. On 26.08.2011, via a letter (PExh. 6), the Defendant responded to the above letter, upon conclusion of investigations and called for the pleadings to enable them instruct advocates on their panel of advocates. Based on the contents of PExh. 5, it appears that the Plaintiff had received summons in respect of the primary suits between 27.05.2011 and 29.06.2011 but did not immediately and directly forward them to Defendant as required under the Clause 5 of the Conditions in the Policy Document. It appears that by the date of the letters of 26.05.20211 and 12.07.2011 (P. Exh.3 and 5), the Plaintiff had already proceeded to instruct counsel, who entered appearance and filed defences in the 26 primary suits. (see PExh.11).

32. The subsequent acceptance of the pleadings forwarded by the said counsel to the Defendant by the said counsel took effect on 08.09.2011 after a back and forth revolving around the issue of reimbursement of legal fees allegedly paid to counsel, in the sum of Kshs. 780,000/- (See PExh. 7, PExh. 8 & PExh. 12). On 13.09.2011 the Defendant finally instructed its own advocates to take up the primary suits (PExh. 9).

33. From the foregoing, it is evident that the Plaintiff was guilty of certain infractions in relation to the terms of the policy document. Firstly, its failure to promptly report the claim, and secondly, its failure to promptly forward the summons in respect of the primary suits to the Defendant. On its own accord however, the Plaintiff instructed its own counsel to represent it in the primary suits. The Plaintiff's claim that it did so because the time for filing pleadings in the primary suits was running out is unconvincing; the initial pleadings and summons had been received almost two months prior to the letter of 12.07.2021 which, inexplicably did not forward the summonses and pleadings in the Plaintiff's possession.

34. In the circumstances, the Plaintiff cannot blame the Defendant for its own dilatory conduct and resultant failure to abide by the conditions of the policy document. The Plaintiff has not demonstrated the breach alleged against the Defendant in respect of the contract of insurance in the circumstances. On the contrary, so far as the Plaintiff's claim is concerned, the facts call to mind the decision of Kuloba, J (as he then was) in *Gabriel Mbui v Mukindia Maranya* [1993] eKLR where in his characteristic pithy style, the learned Judge stated:-

> "No one can improve his condition by his own wrong. The latin of it is Nemo ex suo delicto meliorem suam conditionem facere potest...it is an ancient dictum of our law, that a person alleging his own infamy is not to be heard. People whose wisdom I cannot profane by making modern comparisons to them abbreviated their wisdom in the saying, Allegans suam turpitudinem non est audiendus.... By which they meant that no one shall be heard in a court of justice to allege his own turpitude as a foundation of a right or claim. No one shall be allowed to set up a claim based on his own wrongdoing. A person cannot take advantage of his own wrong and in equity, the maxim holds good that he who comes into equity must come with clean hands... Null prendra advantage de son tort demesne... meaning no man shall profit by the wrong that he does, and Nullus commodum capere potest de injuria sua propria... which means, no one can gain an advantage by his own wrong."

35. Upon receipt, albeit late, of the pleadings in the primary suits, the Defendant eventually performed its obligation under the Policy Document, by appointing counsel to defend the primary suits. In the circumstances, the declaration sought by the Plaintiff "that the Defendant answers to the claim by the Plaintiff's in Kapenguria Civil Case Number 9-24 of 2011 and 31-41 of 2011 as contracted in the policy number AMI/080/1/004905/2007 between the Plaintiff and the Defendant company", and indeed the entire suit appears moot.

36. As to whether the Plaintiff was entitled to sum of Kshs. 780,000/- from the Defendant as legal fees paid to its erstwhile advocates in the primary suits, it is settled that issues for determination before a court generally flow from the pleadings and a court ordinarily pronounces judgment on the issues arising from the said pleadings. See the Court of Appeal decision in North Kisii Central Farmers Limited v Jeremiah Mayaka Ombui & 4 others [2014] eKLR. It is equally a settled principle of law, reiterated in Hahn -v- Singh [1985] KLR 716, that special damages must not only be specifically claimed but also strictly proved.

37. In the instant suit, the Plaintiff purported through his testimony to press the claim for refund of Kshs. 780,000/- being payment allegedly made to the erstwhile counsel in the primary suits. This sum was not pleaded in the plaint and is unavailable to the Plaintiff.

38. Under section 107 of the *Evidence Act*, the burden of proof lay with the Plaintiff and if his evidence did not support the facts pleaded, he failed as the party with the burden of proof. See Wareham t/a A.F. Wareham (supra). In the result, the Plaintiff's suit against the Defendant must fail and is hereby dismissed with costs.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 21ST DAY OF JULY 2023.

C.MEOLI

JUDGE

In the presence of:

For the Plaintiff: N/A

For the Defendant: Ms. Nyakara

C/A: Carol