REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL SUIT NO 14 OF 2020

DOA DOA TENTED CAMPS AND LODGES LIMITED.....PLAINTIFF

VERSUS

JUBILEE INSURANCE COMPANY OF KENYA LIMITED.....DEFENDANT

Coram: Hon. Justice R. Nyakundi

Kilonzo Advocate for the Plaintiff

No appearance for the defendant

JUDGMENT

The plaintiff brought this suit vide a plaint dated 19th August 2020 supported by the witness statements of Mr. Philemon Mwakilulu Mwavala a director of the Plaintiff's company and Mr. Michael Mbuu Chege. The plaintiff seeks the following orders interalia;

a. A declaration that the defendant has breached the insurance policy cover P/MSA/1010/2014/14578 and the defendant is contractually entitled to indemnify the plaintiff against all the loses and damages which occurred on 14th April 2018 and 24th April 2018 to the plaintiff's insured business

b. Damages for breach of contract

c. An order compelling the defendant to indemnify the plaintiff a sum of Kshs. 35,243,145/- with regard to the plaintiff's claim No. C/MSA 1010/2018/10266 on the loss which occurred on the 24th April 2018 at the plaintiff's insured business.

d. An order compelling the defendant to indemnify the plaintiff a sum of Kshs. 378,600 with regard to the plaintiff's claim No. C/MSA/1010/2018/10235 on the loss which occurred on 14th April 2018 at the plaintiff's insured business.

e. Costs of this suit and interests thereon at court rates.

f. Any other just and equitable relief as this court may deem appropriate.

The defendant was served with summons to enter appearance and all accompanying pleadings but they did not enter appearance and file a statement of defence. The plaintiff requested that interlocutory judgment be endorsed after the defendant failed to enter its appearance. Vide a court order dated 17th November 2020, interlocutory judgement was entered against the defendant. The matter proceeded by way of formal proof on 14th December 2020 with the plaintiff calling three witnesses to testify. Up-on the close of the plaintiff case, the plaintiff filed its written submissions.

Brief facts of the case

The plaintiff, a hotelier was operating a business in the name of Doa Doa tented Camp and lodges situated off Tsavo East Road within Galana Ranch Ecosystem Malindi within Kilifi county. On or about the year 2014, the plaintiff entered into an agreement with the defendant for insurance of the business vide insurance **Policy no. 1010/2014/14578** for various policy covers including Fires and Allied Perils for a sum of **Kshs. 53,400,000** through its appointed Insurance Broker Liaison Insurance (I.B) Limited. The plaintiff had been taking insurance policies and/or covers from the defendant since the year 2014 to 2016 when the plaintiff took a deliberate break on the insurance cover due to

the low tourism business which facts were well explained to the defendant.

On 9th April 2018 after full and material disclosure to the defendant with regard to the risks of the insured premises, the plaintiff reinstated its said insurance policy cover under **policy no. P/MSA/1010/14578.** The plaintiff fulfilled his part of the bargain by paying premiums and the said policy was to run up to around 9th April 2019.

On or about 14th April 2018 while the plaintiff's camp was validly covered under the said policy by the defendant and the camp occupied by guests, there were strong winds at around 3.28 am which collapsed a tree occasioning damages to the plaintiff two tents, guest houses and furniture. These particulars of damage are set out under paragraph 7 of the plaint as described above.

The defendant was notified of the said loss by the plaintiff under **Claim No. C/MSA 1010/2018/10235.** The defendant then instructed General Loss Adjusters Kenya Limited to carry out a loss assessment leading to two reports dated 29th June 2018 referred to as the Final Report and 16th July 2018 referred to as the Addendum Report. The addendum report assessed the loss of 14th April 2018 at Kshs. 378,600 which the insurance, that is the defendant was obligated to pay. Vide a letter dated 14th September 2018 by the defendant to the plaintiff's insurance brokers, the defendant committed to pay the said amount of Kshs. 378,600. The plaintiff then signed a discharge voucher on 29th march 2019 accepting the compensation of Kshs. 378,600 in respect of the loss occurred on 14th April 2018.

Further on 24th April 2018 while the camp was still validly insured by the defendant and while still operational, it was wholly extensively destroyed by floods occasioned by heavy rainfalls which were being experienced in the month of April 2018. As particularized under paragraph 10 of the plaint, the following damages were suffered;

i. 16 units of canvas tents covered with makuti, 14 staff quarters of makuti decoration, 2 bungalows of makuti decoration and the restaurant block

ii. Damage to machinery

iii. Damage to furniture, fixtures and fittings

iv. Damage to fridges and kitchen equipment.

The plaintiff vide Claim No. **C/MSA/1010/2018/10266** notified the defendant of the loss suffered on 24th April 2018. The defendant instructed General adjusters Kenya limited to carry out a loss assessment who prepared a reported dated 20th August 2018 quantifying the loss at **Kshs. 35,243,905** which amount the defendant was obligated to pay as the insurer.

The defendant failed to compensate the plaintiff of its losses which led to the Plaintiff writing to the Insurance Regulatory authority seeking the authority to compel the defendant to make good the plaintiff's claim. The Authority initiated an arbitration between the plaintiff and the defendant with regard to the plaintiff's claim.

The plaintiff contends that that despite having written to the insurance through its insurance brokers and attempted arbitration by the Authority, the defendant has not made good the plaintiff's claim necessitating this current proceedings.

The submissions

The plaintiff frames the following issues for determination;

1. Whether the defendant was properly served

2. Whether there was a valid insurance cover ,whether the claim arose during the period of the cover, whether the defendant breached the insurance cover policy and whether the plaintiff is entitled to compensation

3. Whether the plaintiff is entitled to damages for loss of business due to the defendant's breach

4. Who is to pay the costs of the suit

On the question of service, the plaintiff submits that upon the filing of this suit the defendant was served with summons to enter appearance dated 25th August 2020 and the pleadings attendant to. An affidavit of service sworn by one **Mr. Benson Malova Adenya** dated 2nd September 2020 and filed in court on 13th October 2020 was placed on record as evidence of service. The defendant was served through e-service via an email address of one of its principal officers (phillomena.theuri@jubileekenya.com which email was given to the process server by the secretary of the defendant at their offices. The plaintiff submits that the said service was done in line with **Order 5 Rule 3 of the Civil procedure Rules 2020** and **Electronic Case Management practice Directions 2020**. That despite having been served, the defendant offended the provisions of **Order 6 Rule 1** and **Order 7 Rule 1** of the **Civil Procedure Rules 2020** by failing to enter appearance and filing its statement of defence.

The plaintiff submits that it was on this basis that vide a request for judgment dated 9th October 2020 and filed in court on 13th October 2020 requested for judgment in line with the provisions **of Order 10 of the Civil Procedure Rules 2010.** The court entered judgement and the matter proceeded ex-parte.

The plaintiff submits that on whether there was a valid cover and consequent breach that it is not in doubt that the plaintiff was insured by the defendant and had been paying its premiums from the year 2014 to 2016. That thereafter the plaintiff had taken a deliberate break before resuming its renewal of policy on 9th April 2018. The said renewal was in line with the principal of ***uberrima tides***. The plaintiff referred to the authority by this court ***Imara Steel Mills Ltd V Heritage Insurance co. Kenya Ltd &38others [2016] eKLR***.

The plaintiff submits that at the time the two losses occurred, the policy cover was in force and valid. That upon the losses the defendant was informed and appointed a loss adjuster to assess the losses.

The plaintiff submitted that the plaintiff's claims were encompassed under **Section 2 Clause 1** of the policy as below and that there was privity of contract between the plaintiff and the defendant with regard to the subject of the insurance policy.

The defendant failed to compensate the plaintiff of its losses despite several reminders from the plaintiff and the attempted arbitration by the Authority.

On whether the plaintiff is entitled to damages for loss of business due to the defendant's breach the plaintiff submitted that the camp was operational at the time when the subject losses occurred. The plaintiff also produced Exhibit no 19 the staff payroll and exhibit 24 being suppliers invoice as proof that the camp was operational. The camp ceased operating after the two losses thus losing business. In assessing general damages and loss of business, the plaintiff relied on the authority of ***Samuel Kariuki Nyangoti V Johaan Distelberger [2017]eKLR*** where the learned judges cited the case of ***Jebrock Sugarcane Growers Ltd V Jackson Chege Busi Civil Appeal no. 10 of 1991 (Kisumu) (unreported)***

On who is to pay for the costs of suit the plaintiff submitted that they do recognize that an award of costs is discretional in nature and urged the court to exercise it judiciously. They relied on the authority of ***Peter Gichihi Njuguna V Jubilee Insurance Co. Ltd [2016]eKLR.***

Analysis and determination

I have looked at the pleadings before me, the evidence and the comprehensive submissions by the plaintiff. This suit is undefended therefore all the evidence is uncontroverted. I adopt the plaintiff's issues for determination which I shall address as below.

1. Whether the defendant was properly served

The life of this suit dates to 25th August 2020 when the plaintiff filed its plaint and summons to enter appearance were taken out on the same day. Worth noting is that this happened when the country was grappling with the uncertainties of the novel corona virus panic. As a result, there was down scaling of activities more specifically those that required physical contact across many organizations. The judiciary was not spared and as a result there was need to accommodate the changes. This led to amendment of the **Order 5 Rule 3 of the Civil procedure Rules 2020** which provide that

> **3. Subject to any written law, where the suit is against a corporation the summons may be served;-**
>
> **(a). on the secretary, director or other principal officer of the corporation.**
>
> **Further, the Electronic Case management practice directions 2020 section 6 provides as follows;**
>
> **6 (1) where under any law a document is required to be lodged or filed in court, the filing shall be effected by electronic means in accordance with these practice directions**
>
> **(2) in every judicial proceeding, the court and the parties to the case shall employ the use of technology to expedite proceedings and make them more efficient**
>
> **(3) the technology referred to in subparagraph (2) shall include-**
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> **(a) e-filing;**
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> **(b) e-service of documents**
>
> **(c) digital display devices;**
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> **(d) real time transcript devices**
>
> **(e) video and audio conferencing**
>
> **(f) digital import devices**
>
> **(g) computers in the court**
>
> **Further, section 13 provides;**

13 (1) where under any law a document is required to be served on a person, service may be effected by electronic means in accordance with these practice directions.

(2) every person who files a document in court shall electronically serve the document to everyone who by law is entitled to be served through the address contained in the electronic system.

(3) where the person or the advocate of the person on whom service is to be effected is not registered in the system,the initial service may be effected through any other means authorized by law and an affidavit of return of service shall be filed in court.

There is an affidavit of service on record ("affidavit of service'') sworn by a licensed court process server on 2nd September 2020 which he states at the material part;

2. That on 1st September 2020 I received copies of summons to enter appearance dated 25th august 2020 together with the plaint dated 19th august 2020 from the firm of M/S Kilonzo & Aziz Advocates with the instructions to serve upon Jubilee Insurance Company Limited herein the defendant.

3. That on the same day at around 11.10 am, I proceeded to Jubilee insurance Building located at Wabera street to serve the said defendant.

4. That upon arrival, I introduced myself to the secretary and the purpose of the visit whereby the service was not acknowledged instead the secretary gave me the email address because she said they were not receiving any hard copy due to the corona virus pandemic.

5. That thereafter I proceeded to the cyber café whereby I scanned the relevant documents and served the defendant herein through e-service via the email (*Philomena.Theuri@jubileekenya.com*).

From the affidavit of service then there is no doubt that the defendant was duly served. I therefore agree that the defendant was in deed served and elected not to enter appearance or file a statement of defence thus rendering the suit undefended.

2. **Whether there was a valid insurance cover, whether the claim arose during the existence of the cover, whether the defendant breached the insurance cover policy and whether the plaintiff is entitled to compensation**.

Indemnity has several interlinked meanings in the insurance contract context inherent in the notion that an insurance contract should provide no more and no less than a full indemnity is the goal of preventing windfalls to either party. This aspect is emphasized in **Castellain v Preston. Brett LJ declared** that:

> **"The very foundation…….of every rule which has been applied to insurance law is this, namely, that the contract of insurance contained in a marine or fire policy is a contract of indemnity, an of indemnity only, and that this contract means the assure, in case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified. That is the fundamental principle of insurance, and if ever a proposition is brought forward which is at variance with it……that proposition must certainly be wrong."**

In discussing whether the plaintiff's was entitled to claim upto the liability limit in respect of each loss one has to take the approach as illustrated in the case of **Crisp v. Security Nat'l Ins. Co, 369 S.W. 2d 326 (1963),** the court stated that

> **"Indemnity is the basis and foundation of insurance coverage not to exceed the amount of the policy, the objective being that the insured should neither reap economic gain or incur a loss is adequately insured.**
>
> **….The measure of damage that should be applied in case of destruction of this kind of property is the actual worth of value of the articles to the owner for use in the condition in which they were at the time of the fire excluding any fanciful or sentimental considerations"**

The question of indemnity and a right to recover must be commensurate with the loss actually sustained by the insured. A strong view in support of indemnity exist in the codified report from the loss adjuster dated 29th June, 2018. The problem before the court is clarified as noted between the insured and the insurer from the analysis carried out according to the terms of the contract. I have considered this matter carefully and it resonates well with the principles in **Lucena v Craufurd , 127 Eng. Rep 630, 642 (1805)** in which the court observed as follows:

"The term 'insurance contract'….shall….be deemed to include any agreement or other transaction whereby one party, herein called the insurer, is obligated to confer benefit of pecuniary value upon another party, herein called the insured or the beneficiary, dependent upon the happening of a fortuitous event in which the insured or beneficiary has, or is expected to have at the time of such happening of such event. A fortuitous event is any occurrence or failure to occur which is, or is assumed by the parties to be, to a substantial extent beyond the control of either party. In a general sense insurance is a contract to pay a sum of money upon the happening of a particular event or contingency, or indemnity for loss in respect of a specified subject by specified perils; that is, an undertaking by one party to protect the other party from loss arising from named risks, for the consideration and upon the terms and under the conditions recited".

I therefore find that the forensic report dated 29th June, 2018 provides sufficient proof together with the reason of inferences to be drawn there from to sustain the claim on the amount of loss for the property in question. The court in **Braddock v Memphis Fire Ins. Co (1973) 493 S. W, 453, 459** expressed this view

> **"While some of these authorities do say that the cost of replacement is not the measure of the loss but a limitation upon the recovery, all for age, wear, and tear, is not only evidence of the amount of the loss, but is perhaps the most potent factor, among all the others in ascertaining the amount"**

Firstly, its worthy to note that an insurance policy covers the insured's financial interest in the subject matter of the policy, not the thing itself. Therefore, an insured must have a financial interest in the item that has been lost or damaged to have a right and a cause of action to make the claim. For example, in case of a fire indemnity there will be damage to the wall's decorations, electrical installations, the ceiling, tiles or any such roofing material and possibly some structural features of the building. At best from the point of view of indemnity it is significant that each element of the damage be valued separately. There will be obvious factors on depreciation cost giving effect to the expected life of each item.

In summary the prima facie measure of the loss is to be found in the documentary evidence admitted on account of this claim. In addition, the evidence tendered before this court which remains uncontroverted to this far, the plaintiff took out an insurance cover with the defendant first in the year 2014 for cover including Fires and allied perils for a sum of Kshs. 53,400,000 under **Policy no. 1010/2014/14578.** The plaintiff dutifully paid its premiums up to the year 2016 when it took a deliberate break owing to slow business that rocked the tourism sector a fact which was well made known to the defendant.

On or about 9th April 2018, the plaintiff resumed its cover which was expected to run for one year up to around 9th April 2019 under **policy no. 1010/2014/145758**

Having covered the plaintiff before, the defendant was well aware of the existing risks. Furthermore the plaintiff did give full material disclosure in good faith of the risks with regards to the premises under the principle of ***uberrima tides*** which has been previously upheld by this court in the case of ***Imara Steel Mills Ltd V Heritage Insurance Co.Ltd (supra).***

The plaintiff's first loss occurred on14th April 2018. This was five days after the insurance policy had been taken out. The second loss occurred on 24th April 2018 approximately 15 days after the insurance policy had been taken out. Thus, to say the subject losses in deed occurred during the existence of the insurance cover.

The plaintiff adduced evidence before this court showing that the defendant was notified on the two incidences when they happened. The defendant at both incidences appointed a loss adjuster (General Adjusters Kenya Limited) carry out a loss assessment to quantify the losses. The adjuster prepared reports in both incidences which was presented to the defendant.

In regards to the loss of 14th April 2018, the defendant through the insurance broker, wrote to the plaintiff committing to pay a sum of Kshs. 378,600 as had been assessed. However, this did not materialize despite the defendant having had the plaintiff sign a discharge voucher for the same.

The plaintiff in quest for compensation, wrote to the Insurance regulatory authority who arbitrated the matter and held that the defendant should compensate the plaintiff.

There are two things to consider here; the fact that the defendant had a loss adjuster assess the two losses then the defendant must have believed that there was a privity of contract at the time of the subject loses. Secondly this matter was arbitrated the Insurance regulatory Authority a body best placed to arbitrate such claims. Further, the defendant did not at any point dispute the said losses.

By the respondent following the best principle of indemnifying the insured for the financial loss, they sustained for loss or damage to their property and in deciding on the sums appropriate the plaintiff provided a guide in the report dated 29th June, 2018. The specific terms of insurance contract did stipulate certain limitation as to the table of occurrences that may cause losses for which the insurer will pay an indemnity. As a result of the mutual character of the insurance company on the basis of accepting the premium in advance and retaining it, a legitimate expectation operates as a bar for the defendant to repudiate the policy.

The upshot is, I do find that the premises were under the insurance cover by the defendant and the same was liable for compensation in pursuance of this recommendation.

3. Whether the plaintiff is entitled to damages for loss of business due to the defendant's breach.

It seems to me that the bottom line of the plaintiff's case is whether general or special damages are payable in this claim. As a matter of fact, special damage is such a loss as the law will not presume to be the consequence of the defendant act but which in part arises due to the special circumstances of the case. It is specifically pleaded and explicitly proved at the trial. A leading English case, **Perestrello e Companhia Ltda v. United Paint Co. Ltd., [1969] 3 All E.R. 4796** states per Lord Donovan of the English Court of Appeal: **"Accordingly, if a plaintiff has suffered damage of a kind which is not the necessary and immediate consequence of the wrongful act, he must warn the defendant in the pleadings that the compensation claimed will extend to this damage, thus showing the defendant the case, he has to meet and assisting him in computing a payment into court. The limits of this requirement are not dictated by any preconceived notions of what is general or special damage but by the circumstances of the particular case. The question to be decided does not depend upon words, but is one of substance (per Bowen L.J., in Ratcliffe v. Evans ([1892] 2 Q.B. 524 at 529)). The same principle gives rise to a plaintiff's undoubted obligation to plead and particularize any item of damage which represents out-of-pocket expenses, or loss of earnings, incurred prior to the trial, and which is capable of substantially exact calculation. Such damage**

is commonly referred to as . . . A special.

in the sense that fairness to the defendant requires that it be pleaded. The obligation to particularize in this latter case arises not because the nature of the loss is necessarily unusual, but because a plaintiff who has the advantage of being able to base his claim upon a precise calculation must give the defendant access to the facts which make such calculation possible." See (Hahn v Singh, Civil Appeal No. 42 OF 1983 (1985) KLR 716.)

The way I understand this claim it falls within two categories of compensatory damages in the form of general and special damage. To warrant the award under the policy one can classify the property damage under the class of incidentals, consequential losses arising out of the policy document

The plaintiff adduced evidence showing that the camp was operational at the time of the two losses. It then follows that after the second loss, the camp was totally ridden and thus no activity took place. Based on the financial statements of the years, 2018, 2019 and 2020, the plaintiff projected a total loss of Ksh. 104,664,208.

I do believe that the plaintiff is required to take reasonable steps to mitigate its loss. Further due to the unpredictability of the market in the prevailing pandemic, I do not find this claim tenable.

On the other hand, I find the plaintiff subject to any limitation which may be stated in the policy he has a right to damages based on his expectation interest as measured by the loss in the value to him from the insurer as provided for in the contract of insurance. In this claim the approach taken by the plaintiff has been analyzed by the loss adjuster against the backdrop of the scope to be addressed under the circumstances required to be indemnified by the defendant. The principle of full compensation requires that where an injured party has proven a breach of contract and it has suffered damages then he should be compensated in so far as it was foreseeable.

As a result, there is prima facie evidence as illustrated above of a right to indemnity by the defendant. In the foregoing the award of damages in favour of the plaintiff shall be limited to the following declarations:

a. A declaration that the defendant has breached the insurance policy Cover P/MA/1010/2014/14578 and the defendant is contractual entitled to indemnify the plaintiff against all the losses and damage which occurred on 14th April, 2018 and 24th April, 2018 to the plaintiffs insured business as stipulated in the terms of the policy.

b. An order be and is hereby issued compelling the defendant to indemnify the Plaintiff in the sum of Ksh 35,243,145.00 with regard to plaintiff's claim No. C/MSA/1010/2018/10266 on the loss which occurred on 24th April, 2018 at the plaintiffs insured business.

c. An order be and is hereby issued compelling the defendant to indemnify the plaintiff a sum of Ksh 378,600 with regard to plaintiffs claim no C/MSA/1010/2018/10235 on the loss which occurred on 14th April 2018 at the plaintiffs insured business.

d. Cost of the suit be payable by the defendant

DATED, SIGNED AND DELIVERED AT MALINDI THIS 17th DAY OF MAY, 2021

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R. NYAKUNDI

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 by Her Ladyship, The Acting Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

(Maurice.kilonzo@yahoo.com, marymulwa@yahoo.com)