



**Multiple Hauliers (E.A) Limited v Cannon Assurance Limited (Civil Case 675 of 2012)
[2021] KEHC 155 (KLR) (Commercial and Tax) (14 October 2021) (Judgment)**

Neutral citation: [2021] KEHC 155 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 675 OF 2012
F TUIYOTT, J
OCTOBER 14, 2021**

BETWEEN

MULTIPLE HAULIERS (E.A) LIMITED PLAINTIFF

AND

CANNON ASSURANCE LIMITED DEFENDANT

JUDGMENT

1. In the still of the night of November 18, 2010, bulldozers and other heavy machinery belonging or acting on instructions of one or more departments of the Government of Kenya demolished a section of a perimeter wall, office blocks and other structures erected on plots No. LR. 9042/607 and LR. 9042/608 (jointly the property). Multiple Hauliers (E.A) Ltd (Multiple or the plaintiff) alleges loss as a result of the incident and seeks compensation from Cannon Assurance Ltd (Cannon or the defendant).
2. The basis of the claim is insurance policy no. 04/041/415/96 which was extended by endorsement no. EN044517. To the policy was a “Malicious Damage Endorsement” which was to cover, inter alia, loss of damage to the property insured directly caused by the malicious act of any person not being an act excluded under the “Riot and Strike Endorsement”. Multiple postulates that the “Riot and Strike Endorsement” does not relieve Cannon of its liability in respect of permanent or temporary dispossession resulting from confiscation, commandeering or requisition by any lawfully constituted authority where such physical damage or loss to the property insured occurred before dispossession.
3. Resulting from the events of the night of November 18, 2010, Cannon instituted Constitutional Petition No. 88 of 2010 against 6 Government ministries, the Attorney General, Kenya Urban Roads Authority and the City Council of Nairobi. In that Petition, Multiple alleged a violation of its right to property and among the various declarations and orders it sought is the sum of Kshs.84,193,425.86 said to be incurred by it towards repair and/or reconstruction of the property. Perhaps to note is that



this is the exact sum claimed by Multiple here. In the end, and in a Judgment of December 19, 2013, Hon. Mumbi Ngugi J (as she then was) made an award of Kshs.2,000,000/= for violation of Multiple's right to fair administrative action. That decision features in this matter from time to time.

4. Cannon resists the claim on three substantial fronts. That both the "Malicious Damage Endorsement" and "Riot and Strike Endorsement" are vitiated by and/or subject to the overriding provisions of the "Political Risks Exclusion" clause; that the constitutional Court found that the demolished structures were illegally constructed on public land and; that at all material times relevant to the suit the plaintiff had no insurable interest in respect of the demolished structures.
5. The Court heard the evidence of three witnesses Shreyesh Dave (PW1) for Multiple, and George Karanja Macharia (DW1) and Lucrezia Midega (DW2) for Cannon. A substantial bit of the evidence is not disputed and it is unnecessary to rehash it save where it addresses the following issues that need to be determined:-
 - a. Whether Cannon had an insurable interest in the property both at the time of taking out the insurance contract and at the time of demolition.
 - b. Whether the claim is a claim under the "Malicious Damage Endorsement" clause.
 - c. Whether the claim was excluded from indemnification by dint of the provisions of the Political Rules Exclusion clause.
 - d. What would be the appropriate order on damages and costs?

Of an insurable interest in the property

6. In its pleadings, Cannon asserts that the Court dismissed the Multiple's claim in Constitutional Petition No. 88 of 2010 on the ground that the structures that were demolished were illegally constructed on public land and for that reason Multiple had no insurable interest in respect to the demolished structures. In dismissing a substantial portion of the Petition, the Court held:-

“

“[38] A more complex question, one that has not been adequately addressed by the petitioner, is the extent of this property. As observed by the respondent, the road reserve from the City Cabanas junction is 36 metres, that it narrows down to 25 metres at the petitioner's property, then widens to 36 metres on the rest of the road to Thika Road at Ruiru. The respondent explains this by asserting that the petitioner has encroached on the road reserve, while the petitioner asserts that it placed reliance on government departments on the size and location of the property. From the material before me, it would appear that there was encroachment by the petitioner on the road reserve for about 11 metres, which the respondents were entitled to recover. The question is whether the respondents were entitled to recover the portion of the road in the manner that they did, and if not, whether they violated the petitioner's right to fair administrative action by not granting it a hearing before proceeding to demolish the perimeter wall and recover the portions of the road reserve they alleged had been encroached upon by the petitioner.



[56.ii] That there was no unlawful or arbitrary acquisition of the petitioner’s property as the evidence on record indicates that the boundary of the suit property had encroached on a road reserve.”

7. It is common ground that the decision has neither been appealed against, set aside nor varied in any way. Important, as well, is that Multiple, through PW1, contends that it accepts that decision. He stated, in respect to the decision; “we are comfortable with it.”

8. As correctly submitted by counsel for Multiple an insurable interest is the pecuniary or proprietary interest which is at stake or in danger should the insured opt to take out an insurance policy on the subject matter. In *Lion of Kenya Insurance Company Limited v Edwin Kibuba Kihonge* [2018] eKLR the Court enumerated the determinants of an insurable interest:-

“Courts of law have abstracted the following rules as the determinants of insurance interest.

- a. A direct relationship between the insured and the subject matter.
- b. The relationship must have arisen out of a legal or equitable right or interest in the subject matter.
- c. The interest bears any loss or liability arising in the event the loss or risk attaches.
- d. The insured’s right or interest in the subject matter must be capable of pecuniary estimation or quantification.”

9. The evidence of PW1 was that Multiple purchased the property on or about 22nd September 2003 from Realty Brokers Limited (P. Exhibit pages 1 to 22). This was after searches at lands office revealed the title and property to be proper. That the measurement, location and demarcation were all accurate. After the purchase, Multiple paid rates and rent to the public authorities (P. Exhibit pages 22 to 33).

10. It is on the premise of this undisputed evidence, that Multiple relies on the provisions of section 23(1) of the *Registration of Titles Act* (Repealed) to argue that it had title over the property and therefore a legal relationship with the property. Section 23(1) of the repealed statute reads:-

“The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.”

11. Multiple further argues that the Constitutional Court did not determine that it had acquired the property irregularly or illegally and cited paragraph 53 of that decision which reads:-

“It should be stated at the outset that this Court is not making any findings one way or the other with regard to whether or not the petitioner’s property was regularly acquired or not. However, as I observed earlier in this judgment, the contents of the primary documents, particularly the grants in respect of the two properties relied on by the petitioner and the Interested Party, raise some doubts with regard to the legitimacy of the petitioner’s and the Interested Party’s expectations. While it is true that a party ought to rely on documents sourced from the government, and the failures and omissions of the respondents with



regard to the issuance of documents of title and approval of development plans are to be decried, the entries in the title documents, particularly the absence of an entry evidencing the petitioner's title, ought to have put, at the very least, the Interested Party on notice."

12. That may be so but reading the entire decision, the Judge found that the property had encroached on a road reserve and held:-

"(55) I agree with the respondents in this regard. As often happened in that regrettable epoch in our history when public property was being parcelled out in complete disregard of the interests of the public, the petitioner may have been a victim of surveyors who may have prepared subdivision plans in ignorance or disregard of the existing road corridor-see *Cycad Properties & Others -vs- Ministry of Roads & Others* High Court Petition No. 70 of 2010. In the circumstances, I cannot find a basis for alleging a violation of the petitioner's legitimate expectations on the part of the respondents."

13. The Court then made an emphatic finding that the Government did not unlawfully or arbitrarily acquire the Petitioner's property as the property had encroached on a road reserve. Second, that to make an order for compensation of the demolitions would be to make a compensation order in respect to an illegality. Explicit in those findings is that Multiple did not have legal title to that part of "its property" which had encroached on the road reserve. This is a decision which Multiple did not appeal against and which it expressly stated to have accepted.

14. The Court has to find that even if Multiple was under an impression that it had an insurable interest in the demolished structures, which were standing on public land, in truth it could as it had no legal ownership over that portion of land. That may well be the end of the matter but I may be wrong and proceed to examine the other two issues related to liability.

"A Malicious Damage Claim"

15. Multiple pegs its claim on the "Malicious Damage Endorsement" which reads:-

"It is hereby agreed and declared that the insurance under the said Riot and Strike Endorsement shall extend to include MALICIOUS DAMAGE which for the purpose of this extension shall mean loss of damage to the property insured directly caused by the malicious act of any person (whether or not such act is committed in the course of disturbance of the public peace) not being an act amounting to or committed in connection with an occurrence mentioned in Special Condition 6 of the said Riot and Strike Endorsement but the Company shall not be liable under this extension for any loss or damage by fire or explosion nor for any loss or damage arising out of in the course of burglary, house breaking, theft or larceny or any attempt thereat or caused by any person taking part therein. Provided always that all the conditions and provisos of the said Riot and strike Endorsement shall apply to this extension as if they had been incorporated herein."

16. It is common ground that the Constitutional Court found that the Government bodies had demolished the properties without giving due notice to Multiple and therefore in violation of its right for fair administrative action. Multiple submits that this, together with the timing of the demolition at 1.00 a.m, demonstrated pure malice on the part of the Government and therefore placed this claim within the Malicious Damage Endorsement.



17. Cannon did not address this matter directly and instead dealt on the exclusion provisions of the condition 5 of the “Riot and Strike Endorsement” and the Political Risks Exclusion which I shall return to later.
18. So in regard to whether the acts of the Government agencies would amount to a malicious act, the Court resolves this matter by looking at the meaning of the word malice in *Black’s Law Dictionary (10th Edition)*. Malice means:-
- “The intentional doing of a wrongful act without just cause or excuse, with an intent to inflict an injury or under circumstances that the law will imply an evil intent.”
19. It is of course true that the Constitutional Court found that the demolished structures were improperly constructed on a road reserve. It is equally true, however, that the demolition was without notice and in violation of the Multiple’s right to fair administrative action. The Constitutional Court had therefore found that the Government was doing something right in a wrong way.
20. Given the time of the demolition and its extent, there can be little doubt that the demolition was done in reckless disregard of the law and trampled on Multiple’s legal rights, at the least, the right to fair administrative action. Reckless disregard of the law and of personal legal rights falls within the ambit of malicious conduct. I would therefore have had little doubt finding that, were it not for other difficulties, the claim by Multiple would have fallen under the “Malicious Damage Endorsement”.

Of the Political Risks Exclusion Clause?

21. The fulcrum of Cannon’s defence is that Multiple’s claim is excluded by the provisions of the “Political Risks Exclusion Clause” which reads:-

“Notwithstanding any provision to the contrary within this Agreement or any endorsement thereto it is agreed that this Agreement excludes loss, damage, cost or expense of whatsoever nature directly or indirectly caused by, resulting from or in connection with any of the following regardless of any other cause or event contributing concurrently or any other sequence to the loss:

1. War, invasion, act of foreign enemy, hostilities or warlike operations (whether war be declared or not), civil war.
2. The Abandonment and/or permanent or temporary dispossession resulting from detention, confiscation seizure, restraint, commandeering, nationalization, appropriation, destruction or requisition by order of any government de jure or de facto or by any public authority.
3. Mutiny, Civil commotion assuming the proportions of or amounting to a popular rising, military rising insurrection, rebellion, revolution, military or usurped power, martial law or state of siege or any of the events or causes which determine the proclamation or maintenance of martial law or state of siege.
4. Any act or activity including riot, strike or public disorder which is calculated or directed to bring about loss or damage in order to further any political aim, objective or cause, or to bring about any social or economic change, or in protest against any State or



government, or any political or local authority, or for the purpose of imposing fear in the public or any section thereof.

5. Plundering, looting, war pillage in connection with riots and/or civil commotion.
6. The act of any lawfully established authority in controlling, preventing, suppressing or in any other way dealing with any occurrence referred to in clauses 4 and 5 above.

For the purposes of clauses 4, 5, and 6 any loss or damage occasioned directly by a labour disturbance, lock-out or strike shall not be excluded.

In any action, suit or other proceeding in which the Reinsurer alleges that by reason of these provisions any loss or damage is not covered by this Agreement, the burden of proving that such loss or damage is covered shall be upon Company.”

22. There is convergence by the parties that as an exclusion of liability, the effect of the political risks exclusion clause is to completely exclude the liability of Cannon if the facts of the loss fall within it. Multiple argue that for that reason the clause must be clear and unambiguous. Multiple sees two ambiguities in the provisions. So as not to appear to dilute the strength of the arguments by Multiple, I will not paraphrase the twin submissions. Multiple argues:-
 - a. The clause does not address the legality of the dispossession order made by a government or public authority. The question – what effect an illegal or unconstitutional dispossession would have on the clause – is not addressed.
 - b. The clause is also not clear on which loss or damage is exempted by the clause – loss arising from being dispossessed of the property (income which would have been derived from the property) or loss arising from the damage which was inflicted on the property as the dispossession was taking place (destruction of fittings and fixtures).”
23. In the list of losses or damages excluded are those that result from or are connected with “the Abandonment and/or permanent or temporary dispossession resulting from detention, seizure, restraint, commandeering, nationalization, appropriation, destruction or requisition by order of any Government de jure or de facto or by any public authority.” For sure the clause does not distinguish between legal or illegal orders of the Government or public authority. But I cannot see any ambiguity because what sub-clause 2 simply means is that any type of order (be it legal or illegal) that falls within that category is excluded. Nothing in the wording of clause lends credence to the argument that the scope of the exclusion is unclear.
24. Multiple argues that if that dispossession had been done lawfully and a constitutional process followed, then it would have been able to salvage the fittings contained in the property prior to the dispossession. It is then submitted that this would have altered the liability excluded by the exclusion clause. I am not too sure I follow that argument because the essence of the Malicious Damage Endorsement is to cover loss or damage to property insured directly caused by the malicious act of any person. An act done lawfully and in accordance with the constitution can never be a malicious act. The true object of the sub-clause 2 of the Political Risks Exclusion clause is to exclude named acts of Government or public authorities even if done maliciously, that is unlawfully. By implication it would mean that the clause contemplates even unlawful orders.



25. A second argument by Multiple is that the clause is not clear on which loss or damage is exempted. Is it loss arising from being disposed of the property or is it a loss arising from the damage which was inflicted on the property as the dispossession was taking place? Again I do not see any imprecision because the clause is clear that it excludes loss, damage, cost or expense of whatever nature directly or indirectly caused by, or resulting from or in connection with any of events and activities which are listed there. That is broad! As to the conduct of Government or public authority that is excluded, the list brooks of no ambiguity they are “abandonment and/or permanent or temporary dispossession resulting from detention, confiscation, seizure, restraint, commandeering, nationalization, appropriation, destruction or requisition.” These are to be construed disjunctively.
26. In this instance, Multiple suffered a loss from being permanently dispossessed of the demolished structures as a result of destruction by order of Government. This was an excluded conduct.
27. Whichever way one looks at it, Cannon is not liable. It is little wonder that in meetings prior to the filing of this suit, Multiple had confirmed that the claim was not covered by the policy. Under cross-examination and upon being shown minutes of a meeting of 20th January 2016 held between the two parties (P. Exhibit Pages 83-85) PW1 stated:-

“I agree that demolition was not covered under the policy.”
28. The minutes also show that Multiple had commenced a suit against various Government Ministries for compensation of the loss as a result of the demolition (the Constitutional Petition). Being aware that the demolition was not covered under the policy, Multiple nevertheless expected a cash assistance of about Kshs.25-30M from Cannon as a commercial consideration given the many years of relationship between the two.
29. Clearly therefore Multiple, by filing this suit, was simply throwing a dice but which on the merit of the case falls on a face that is uncharitable to its claim.
30. If, however, I had found Cannon liable then I would have made an award of Kshs.84,193,425/= as the evidence of this loss was uncontroverted.
31. Ultimately, however, the Plaintiff’s entire case is hereby dismissed. Costs to the Defendant.

DATED AND SIGNED THIS 29TH DAY OF SEPTEMBER 2021

F. TUIYOTT

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 14TH DAY OF OCTOBER 2021

A. MABEYA, FCI Arb

JUDGE

PRESENT:

