



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)**

**COMMERCIAL AND TAX DIVISION**

**CIVIL CASE NO.396 OF 2014**

**NITI DISTRIBUTORS LIMITED.....PLAINTIFF**

**VERSUS**

**OCCIDENTAL INSURANCE COMPANY LIMITED.....DEFENDANT**

**JUDGMENT**

**1. NITI DISTRIBUTORS LIMITED** sued **OCCIDENTAL INSURANCE COMPANY LIMITED** through a plaint dated 12<sup>th</sup> September 2014 praying for judgment against the defendant for:-

- a) Kshs.23, 013,842.00.
- b) Interest on (a) at 24% per annum from 30<sup>th</sup> May, 2013 until payment in full.
- c) Cost of this suit.

**2.** The defendant through a defence dated 9<sup>th</sup> December 2014 denied liability and prayed the plaintiff claim be dismissed with cost.

**3.** The parties complied with order 11 of Civil Procedure Rules and had the matter set down for hearing and determination after parties has filed and exchanged witnesses statements and list of documents in support of their rival positions.

**4.** The brief facts of this suit are that the plaintiff and the defendant entered into contract herein, in which the defendant offered a burglary insurance policy for the stock in trade in a Godown **No. 1 L.R No.209/15662**, Embakasi road, Nairobi. The plaintiff completed the proposal form, (*see page 20 of the plaintiff's bundle of documents*) and the defendant issued a burglary insurance policy document (*see pages 22 – 24 of the plaintiff's bundle of documents*).

**5.** In the instant suit the following matters are not in dispute:-

**"i) The Defendant issued the Plaintiff Burglary Policy No.OLG/BP/10/64640/09 and the same was renewed on 1<sup>st</sup> October 2013.**

**ii) The Plaintiff filed the Proposal Form and the policy document was issued.**

**iii) The Defendant repudiated the Claimant's claim and the reasons thereto were communicated. (See page 29 of the Plaintiff's bundle).**

**iv) The Plaintiff did not refer the dispute to arbitration within 12 months from the date of repudiation of the claim by the Defendant (see clause 14 of the policy document page 25).**

**v) In the proposal form, the Plaintiff indicated that all the doors were secured by an alarm system. (See paragraph 3 page 20 of the Claimant's bundle).**

**6.** The plaintiff called one witness in support of its claim whereas the defence called one defence witness in support of the defence case.

**7.** I have very carefully considered the pleadings; parties witnesses statements and exhibits in support, oral evidence as well as parties rival

submissions. I have also considered the statements of issues which were separately filed by the parties as well as parties issues in their submissions and I find that the issues for consideration may be summed up as follows:-

**a) Whether the Honourable court has jurisdiction to hear and determine this matter?**

**b) Whether the premises where the goods insured were kept or stored subject matter of Burglary policy (Business premises) No. OLG/BP/10/64640/09 had a Burglar Alarm installed at the time of the theft?**

**c) If the defendant is liable to compensate the plaintiff, what is the amount of compensation?**

**A) Whether the Honourable court has jurisdiction to hear and determine this matter?**

8. The Defendant contends that under clause 14 of the policy document it was provided thus:

**" (i) If the company (defendant) shall disclaim liability to the insured (plaintiff) for any claim hereunder and such claim shall not within twelve calendar months from the date of such disclaimer have been referred to arbitration under the provisions herein contained and no notice of action shall have been received by the Defendant within the said period of twelve calendar months then the claim shall for all purposes be deemed to have been abandoned and shall not thereafter be recoverable hereunder.**

**(ii) On the happening of any event which may give rise to a claim under the policy the insured (plaintiff) shall give immediate notice to the Defendant accompanied with a detailed statement of the loss with an estimate of the loss and particulars of information and proof.**

**(iii) The premises must be protected by the burglary alarm/electric fence installed by a professional security firm and that the same be inspected, maintained and kept in thorough working order by the said security firm under contract during the continuance of the policy."**

9. It is therefore defendant's contention in view of clause 14 in case of any dispute arising from the policy and the defendant disclaims liability and the claim is not referred to arbitration within 12 months from the date of such disclaimer, the claim shall be for all purposes be deemed to have been abandoned and shall not therefore be recoverable.

10. In the instant suit, there is no dispute that the defendant disclaimed the claim vide its letter dated 16<sup>th</sup> August 2013 as per claimant's bundle of documents on page 29. The plaintiff did not refer the claim to arbitration as provided under clause 12 and 13 of the policy document (*see plaintiff's bundle of documents on page 25*) within 12 months which lapsed on 16<sup>th</sup> August 2014 but proceeded to file the present suit on 15<sup>th</sup> September 2014.

11. In response to the issue of the court's jurisdiction to hear and determine this matter, the plaintiff counters the same by urging that flowing from the pleadings none of the parties had raised the issue of jurisdiction or an arbitration clause as an issue for determination. It is further pointed out that the defence does not raise any jurisdiction issue and as such the issue of the jurisdiction of the High Court cannot be an issue for court to determine in this matter.

12. In every suit before court a party is bound by its pleadings and cannot be allowed to deviate from its pleadings. **Order 2 Rule 6 of Civil Procedure Rules** provides:-

**"(1) No party may in any pleading make an allegation of fact, or raise any new ground of claim, inconsistent with a previous pleading of his in the same suit.**

**(2) Subrule (1) shall not prejudice the right of a party to amend, or apply for leave to amend, his previous pleading so as to plead the allegations or claims in the alternative."**

In view of the above-mentioned Rule a party is bound by its pleadings and cannot seek prayers or orders contrary to its pleadings.

13. I have very carefully perused the defendant's defence, witness statements, and issues for determination and it is clear that the issue of the court's lack of jurisdiction to determine this matter has not been raised. The court's jurisdiction has not been challenged in the defendant's pleadings. The issue of existence of arbitration clause is only raised for the first time in the defendant's submissions and as such I find the same has not been pleaded and the defendant having freely and voluntarily taken part in the hearing of this suit, without any objection or filing a preliminary objection or raising the issue of existence of an arbitration clause is stopped from raising the issue for the first time in its submissions.

14. The defendant did not seek stay of the proceedings or raise a preliminary objection as provided by the law but took part in the hearing of this matter; I find by its own conduct it waived its rights to the objection to the suit proceeding before court.

15. Section 6 of the Arbitration Act provides:-

**"1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds—**

(a) That the arbitration agreement is null and void, inoperative or incapable of being performed; or

(b) That there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.

(2) Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined.

(3) If the court declines to stay legal proceedings, any provision of the arbitration agreement to the effect that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings."

In view of the provisions of the above section the proceedings herein ought to have been sought to be stayed on an application by either party but instead none did so. An appearance was made and defence filed. Party proceeded with the full hearing of the matter without raising the issue of an existence of an arbitration clause. In view of the parties conduct I find that the defendant cannot raise the issue of courts lack of jurisdiction at this stage. It is estopped from doing so by its own conduct as it is deemed to have waived any rights to an objection.

16. Section 120 of the Evidence Act provides:-

**"When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing."**

I therefore find the doctrine of estoppel applies in this matter and more specifically as provided under the above mentioned section. I find the defendant by its omission to raise the issue of arbitration clause in its pleadings, it cannot be allowed to raise the same at this stage.

17. I have considered several authorities referred to the court in support of the defendant's proposition, and upon considering the same and I have found them not relevant in view of the fact that the issue raised and supported by the said authorities was not pleaded nor canvassed before this court during the hearing. I therefore found the authorities not relevant in this matter.

**B) Whether the premises where the goods insured were kept or stored subject matter of Burglar policy (Business premises) No. OLG/BP/10/64640/09 had a Burglar Alarm installed at the time of the theft?**

18. In the instant suit, there is no dispute that the plaintiff made representations that all doors were secured and protected by an alarm system as per Burglar policy (*Business premises*) No. OLG/BP/10/64640/09. It is further not in dispute that both the original Burglar policy and the Renewal had a burglar alarm and electric fencing clause which stated that:

**"It is a condition of this policy that the premises are protected by a Burglar alarm/Electric fence installed by a professional security firm and that such alarm/electrical fence are inspected, maintained and kept in thorough working order by the said security firm under contract during the continuance of this policy and that the alarm/electric fence are always set before the premises are closed against customers and callers and that the said security and the company be informed immediately if any defect be discovered. It is also a condition that if alarm comes on, the insured shall immediately arrange to open the premises for physical checkup if burglars/thieves are hiding there. Violation of the above shall make**

**insurer free from liabilities."**

19. The plaintiff called PW1 Marsh Shah, (PW1) Finance Director of the plaintiff company, who adopted his witness statement dated 12<sup>th</sup> September 2014 and filed on 15<sup>th</sup> September 2014 as his evidence in chief (**Exhibit P-1**) and list of documents (**Exhibit P-2**). The defence on the other hand called Mr. Bernard Ayuko (**DW1**), a legal and claims manager, who adopted his witness statement dated 22<sup>nd</sup> August 2018 as his evidence in chief (**Exhibit D-1**) and list of documents (**Exhibit D-2**).

20. PW1 testified that by a Burglar policy (*Business premises*) No. OLG/BP/10/64640/09 the defendant insured the plaintiff's goods stored or lying in Godown No.1 at the premises situated and known as L.R. No.209/15662 Embakasi Road. He testified that on the night of 29<sup>th</sup>/30<sup>th</sup> May 2013 at around 7.45 am the premises was broken into and plaintiff's goods, stored therein, stolen. The particulars of stolen goods are listed under paragraph 8 of PW1's witness statement valued at Kshs.23, 018,842/-. The matter was reported to the police, vide **OB No.24/30/5/2013** and police file given as **No.152/237/2013**. Land lord is given as Erro Holdings Limited, insurance broker as Nelion Insurance Brokers Limited and insurer as the defendant.

21. PW1 averred in his statement under paragraph 7 of the witness statement, the premises where the goods were stored was protected both day and night with regularly checked electric fence and alarm back-up services. That as a further security measure the plaintiff stated it had installed, on the premises, a closed circuit Television (**CCTV**) Surveillance camera system, inclusive of a day and night guards from M/"A" (*Akisha*) Team Security Limited.

22. The issue of contention herein is whether or not there was a Burglar Alarm back up system. The plaintiff urges there was a Burglar Alarm back-up system whereas the defendant contests that there was none.

23. The plaintiff in support of its contention that there was a Burglar back up system referred to a letter of offer dated 1<sup>st</sup> March 2012 in leasing the premises on page 1 of plaintiff's list of documents (**under exhibit P-2**) under paragraph 7 it states as follows:-

"7 Service Charge

Service Charge indicated below is included in the rent, determined in the manner stated in the standard lease to reimburse the landlord for a fair proportion of the operating expenses of the building.

(a).....

(b).....

(c).....

(d).....

(e).....

(f).....

(g).....

(h) Security costs including alarm back-up."

From the foregoing, it is clear the landlord was responsible for installing an alarm back-up. **PW1** in his evidence provided a letter dated 17<sup>th</sup> October 2013 at page 6 of the plaintiff's list of documents in exhibit P-2 which letter stated as follows:-

"17<sup>th</sup> October 2013

Our ref: ERRO/1/19/13

The Directors

Niti Distributors Ltd

P.O. Box 16941-00620

NAIROBI.

Dear Priyadh

RE: GODOWN NO.1-NITI DISTRIBUTORS

LTD ON LR.NO. 209/15662

We, the land lords, (Erro Holdings Ltd) would like to confirm that our premises are protected both day and night with electric fence which is regularly serviced, and an alarm back-up services for our godowns as mentioned in the letter of offer.

Yours faithfully

Singed

Rohit Harilal Shamji."

24. The defendant through **DW1**'s statement admit there was break in at Godown No.1 **L.R 209/15662**, Embakasi Road, Nairobi and upon the report of the break in, the defendant instructed Mcharens Young International to investigate the claim, who informed the defendant there was an alarm at the gate of **L.R 209/15662**, in which there were 10 separate godowns on **L.R 209/15662** and that there was no burglar alarm on the premises insured namely Godown. **DW1** during cross-examination stated that defendant repudiated the contract on the basis that there was no alarm and relied on a letter dated 6<sup>th</sup> June 2013 which was not addressed to the defendant as they had not instructed the author or the investigator. **DW1**'s evidence is hearsay evidence in that it makes reference to an investigator and report by Mcharens Young International and quotes the said report and opinion as having concluded that there was no "burglar alarm protecting the specific premises namely Godown". It is of great significant to note that **DW1** did not produce the alleged report nor was such a key and important witness called to confirm the outcome of its investigation. I find the evidence on the alleged report to be hearsay and not admissible.

25. Section 109 of the Evidence Act provides as follows:-

"The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

26. In the instant suit, the plaintiff having called evidence in support of existence of Burglar alarm protecting the premises and having produced document to that effect it discharged its burden and the burden shifted to the defence, who had alleged that the plaintiff had breached the terms of the policy document, in that it had failed to install a Burglary Alarm back-up in the premises by failing to adduce evidence from the alleged investigator in respect of the status of the premises. In absence of such evidence, the defence remains a mere denial that no alarm back-up system has been installed.

27. In the case of **Johnson M. Mburugu vs Fidelity Shield Insurance Co. Ltd (2006) eKLR** the Court of Appeal addressed itself thus:-

**We have considered the above findings and conclusion anxiously. In our view, we do not share the learned Judge's views that the respondent was at a disadvantage as to the allegations of theft and therefore could not tender any evidence to show that theft never took place. It cannot escape one's mind that unlike such pleadings where the respondent would have simply denied the allegation of theft and put the appellant to strict proof of the same allegation, in this case, the respondent was positive and stated in its statement of defence at paragraphs 6 and 7 which we have reproduced hereinabove and which the learned Judge also reproduced in his judgment that there was no theft of the motor vehicle as alleged or at all. That statement by the respondent was positive and the respondent assumed the onus of showing that the alleged theft of the subject motor vehicle was a figment of the appellant's fertile imagination or that the appellant was an outright liar. ....The respondent, for instance, needed to show that it made inquiries through police or through professional investigators and found that the vehicle was not stolen as alleged or was not stolen at all. ....In our view, it was not open to the superior court to hold as it did that regarding theft, the respondent who had asserted that the vehicle was not stolen as alleged was obviously disadvantaged in that it could not by the very nature of the circumstances surrounding the incident, tender any positive evidence to dispute what the appellant said. Of course, it could tender positive evidence to dispute the appellant's evidence if it was sure the vehicle was not stolen. .... To proceed the way the learned Judge did was to ignore the requirement in law that in civil cases, he who makes an allegation must prove it and that proof required is that within the standard of probability and no more."**

28. Having said so much and having considered the evidence and submissions by learned Advocates, I am satisfied that the plaintiff has on balance of probabilities proved that the premises where the goods insured were kept or stored subject matter of Burglar policy (*Business Premises*) and **OLG/BP/10/64640/09** had a burglar alarm installed at the time of the theft and did not need to prove so by proceeding to produce receipts or certificate of installation of alarm back-up system, since there was a lease agreement in which the landlord was responsible for installing an alarm back-up as per the letter dated 17<sup>th</sup> October 2013 on page 6 of the plaintiff's list of documents and the landlord had already installed one and which evidence was not controverted or challenged at all by the defendant, who relied merely on hearsay evidence.

**C) If the defendant is liable to compensate the plaintiff, what is the amount of compensation?**

29. The plaintiff under paragraph 5 of the plaint has specifically pleaded the particulars of the goods stolen and given their value as Kshs.23, 013,842. It is trite law that special damages must not any be pleaded but be strictly proved.

30. In the case of **Kenya Power & Lighting Co. Ltd vs. Henry Wafula Masibayi, CA No.20 of 2001** while dealing with special damages the court held that;

**"The appellant would not recover special damages for failure to produce a single receipt to show that he purchased an alternative power equipment or fuel and audited accounts."**

31. The plaintiff called evidence through **PW1** in support of the loss suffered during the theft from its Godown No.1 on the night of 29<sup>th</sup>/30<sup>th</sup> May 2013. **PW1** produced books showing purchases of stock, stock movement and delivery of goods provided as follows:-

**"i) At pages 24 to 40 are copies of stock journal vouchers for the period 12<sup>th</sup> January 2013 to 30<sup>th</sup> May 2013. The said Journal shows movement of goods/stock from the warehouse/Godown which warehouse is named WH-Ghathika to the Head Office (HO).**

**ii) At page 41 it is shown a summary of goods and their respective cost/price per unit which were held at the Godown between 1<sup>st</sup> January 2013 and 3<sup>rd</sup> June 2013.**

**iii) At pages 42 to 45 is shown a summary of the stock that came in (see the word inwards) and the stock that went out (see the word onwards) between 1<sup>st</sup> January 2013 and 3<sup>rd</sup> June 2013 (this is the next date immediately after the theft). We invite the court to read the said document vis-à-vis the particulars of the items that were stolen as they appear at paragraph 5 of the plaint. For instance, see page 42 and note the particulars of item number one (H.P Desktop 600B) of paragraph 5 of the plaint as follows: Inwards Quantity is 800 Nos with a rate of Kshs.24, 764.40. Outwards Quantity is 339 Nos. while the Closing Balance gives a Quantity of 461 Nos at a rate of Kshs.24, 762.40 giving a total of Kshs.11, 415.465 as the Value. The same page 42 gives the particulars of H.P Desktop 8300 series and H.P Desktop 3500. At page 43 the particulars of H.P TFT 18.5" (250 and 30m units) and H.P TFT 20" are given."**

32. It is the plaintiff contention, that for the purposes of assessing the amount payable following a theft or damage to goods, **PW1** relied on the terms of the policy document. Paragraph 2 of the policy document (*page 9 of the Plaintiff's List*) provides as follows:-

**"Now this Policy Witnesseth that if at any time during the said period or during any other period for which the company accept payment for the renewal of this policy:-**

a) **The property described in the schedule hereto or any part thereof shall be lost destroyed or damaged by Theft following upon an actual forcible and violent breaking into or out of the premises or any attempt threat.**

b) .....

**Then the Company will subject to the terms exceptions and conditions contained herein or endorsed hereon pay or make good to the insured such loss to the extent of the intrinsic value of the property so lost or such damage to amount so sustained."**

The policy document further provides under Clause 9(1) as follows: - (Page 10)

**"Notwithstanding anything stated to the contrary in Condition 5 of this policy, it is hereby understood that no claim will be admitted unless books showing all purchases of goods for stock and particulars of articles or goods, manufactured or processed, and all goods or stock or otherwise disposed of shall have been duly and correctly kept and available to the Company for inspection at all times."**

It was the evidence of **PW1** that the Plaintiff satisfied the set conditions as evidenced by the documents at pages 24 to 52 of the Plaintiff's List of Documents. Having taken the position that there was a breach of the conditions of the policy document, the Defendant does not seem to have bothered to establish the quantum of the loss by inspecting the books.

33. The defendant gave evidence through **DW1** who admitted that on the night of 29<sup>th</sup>/30<sup>th</sup> there was a break-in at Godown **No.1 L.R. 209/15662**, Embakasi Road, Nairobi but denied the quantity and value of the items allegedly stolen. **DW1** on being cross-examined he testified that the defendant had not produced a loss report before court and that the defendant did not have any such loss report. He further admitted the defendant did not give instruction to any loss adjuster upon repudiating the contract on the basis that there was no alarm fitted to the premises. **DW1** further admitted the plaintiff had fully paid policy premiums. He further proceeded to contradict himself by stating that the defendant had instructed its own loss adjuster and that they have loss adjuster's report but it was not amongst their documents. He added that the premium paid by the plaintiff as at page 13 of plaintiff's documents was not farfetched in view of the claim adding the sum assessed was Kshs.50,000,000/-.

34. In the case of **Kenya Industrial Estates Limited vs Lee Enterprises Limited [2009] eKLR** the Court of Appeal stated as follows:-

**"Generally speaking, the normal measure of damages for damage to goods is the amount by which the value of goods has been diminished. The cost of repair is prima facie the measure of diminution in value of the goods and therefore the correct measure of the loss suffered. Where, however, the goods are destroyed, the owner is entitled to restitution in integrum and the normal measure of damages is the cost of replacement of the goods, that is, the market value at the time and place of destruction."**

35. In the instant suit, the plaintiff through **PW1** was able to provide evidence of the stock that was in the insured premises at the time of the theft. In the plaint and the statement of the witness, the plaintiff provided particulars of the goods that were stolen and the costs of each good. I find that the plaintiff specifically pleaded and strictly proved its claim as required by law and further under the policy document which provides as follows:-

**"5. On the happening of any event which may give rise to a claim under policy the insured shall**

**(a)...**

**(b)....**

**(c) deliver to the Company as soon as is reasonably practicable a claim in writing containing a detailed statement of the loss or damage with an estimate of the value of the property insured which is lost..."**

36. Having considered the evidence on record, parties witnesses evidence and considering the relevant provisions of the law and the policy issued, I find that the plaintiff has discharged its burden of proof on balance of probability, that it had a valid insurance policy for insurance of its stock and goods for the sum of Kshs.50,000,000/-, that a theft occurred during the subsistence of the policy at the premises where the goods were stored, that all conditions in the policy had been met and that the plaintiff has through documentary evidence, which has not been controverted, proved that the loss or value of the stock/goods stolen was Kshs.23,013,842/-

37. The upshot is that the plaintiff claim is meritorious and I proceed to enter judgement as follows:-

a) **Kshs.23, 013,842/00.**

b) **Interest on (a) above at court rate from the date of the filing of the suit till payment in full.**

c) **Costs of the suit to the plaintiff.**

**Dated, signed and delivered at Nairobi this 7<sup>th</sup> day of February, 2019.**

**J .A. MAKAU**

**JUDGE**