REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

HCCC NO. 354 OF 2017

RAJESH SHAH..PLAINTIFF

VERSUS

JUBILEE INSURANCE COMPANY LIMITED............1ST DEFENDANT

UNDERWRITING AFRICA LIMITED..........................2ND DEFENDANT

RULING

1. The financial distress of Nakumatt Holdings Limited (Nakumatt) has left a trail of misery. Amongst those afflicted is Rajesh Shah (the Plaintiff or Rajesh) who being a Note Holder lent a sum of Kshs.47,753,386.45 to Nakumatt.

2. In commercial parlance a Note is :-

> "A written promise by one party (the matter) to pay money to another party (the payee) or to bearer. A note is a two party negotiable instrument, unlike a draft (which is a three-party instrument). Also termed as promissory note. (*Blacks Law Dictionary 10th Edition).*

3. It is the case of Rajesh that upon the maturity of the Notes, Nakumatt only paid to him a sum of Kshs.12,500,000/= leaving a balance of Kshs.38,806,803.52 being the Special Damages he claims herein. In addition he claims Nominal interest at 16.50% on the sum from the date of filing suit. That claim is not against Nakumatt but Jubilee Insurance Company Ltd (the 1st Defendant or Jubilee) and Underwriting Africa Ltd (the 2nd Defendant or UAL). It is averred through an Amended Plaint filed on 17th January 2018 that Jubilee insured the risk of the short term notes of Nakumatt and that Rajesh had an insurance policy with Jubilee which insured 80% of the money owed by Nakumatt as the obligor and which was payable on default.

4. As for UAL, it is Rajesh's case that Jubilee notified him that Nakumatt had entered into a contract in respect of the policies with UAL as the ultimate risk carriers.

5. Rajesh faults both Jubilee and UAL for breaching the Insurance policy and sets out the particulars of breach in paragraph 10 of the Amended Plaint. One of the breaches is that both have failed, neglected and/or refused to honour demands and remainders for payment when made by the Plaintiff.

6. The Defendants resist the claim and have separately sought an early exit from these proceedings. In a Chamber summons dated 29th March 2018 UAL seeks the following orders:-

> 1. THAT the Honourable Court be pleased to strike out UNDERWRITING AFRICA LIMITED as the 2nd Defendant herein.
>
> 2. THAT in the alternative, this Honourable Court be pleased to order the Plaintiff to give security for all of the 2nd Defendant's costs in the sum of Kshs.1,000,000/= and a time within which the said security is to be given, be fixed.
>
> 3. THAT this Honorable Court be pleased to order the said security in the sum of Kshs. 1,000,000/= be deposited in an interest earning bank account in the joint names of the respective Advocates of the Plaintiff and the 2nd Defendant.
>
> 4. THAT this Honorable Court be pleased to order that pending the provision of security all proceedings herein be stayed.

5. THAT the costs of this entire suit as against the 2nd Defendant and of this application be borne by the Plaintiff.

7. A similar application but only limited to striking out of the suit against it was filed by Jubilee on 29th June 2018.

8. In a twist of fate, the two Defendants seem to blame each other for the predicament faced by Rajesh. Let me first set out the position of Jubilee.

9. Jubilee's position is that it was approached by UAL with an offer to front a Financial Guarantee Policy in favour of Rajesh. This was to underwrite the short term loans granted by Rajesh to Nakumatt as the obligor. The policy was to insure a financial facility of USD 5,000,000. That as UAL was well aware that Jubilee did not issue Financial Guarantee Policies, Jubilee accepted only to front the Policy as a Zero Risk Carrier. The intention being that the policy was to be reinsured by Ocean Reinsurance Company (Ocean) who would bear a 100% risk in the policy.

10. As security for the above arrangement UAL was to ensure that personal guarantees of Nakumatt were provided to it and a cash collateral of 25% of the intended insurance limit be deposited in an escrow account within 30 days of the policy's inception. Jubilee contends that both UAL and Nakumatt failed in this obligation notwithstanding numerous indulgence by it. Eventually and following persist breach, Jubilee cancelled the policy on 5th May 2017 and notified Dry Associates Limited (Dry Associates) of the cancellation of policy on 5th June 2017. Dry Associates was the entity designated by Nakumatt to maintain the register of Noteholders on behalf of Nakumatt.

11. Jubilee argues that UAL was defined in the Insurance Policy as the Insurance broker to the insured and therefore the agent of Rajesh and had an obligation to secure the Financial Guarantee in favour of its principal (Rajesh). Jubilee's position is that failure to secure the policy is fully attributable to the negligence of UAL which was a direct cause of Rajesh's alleged loss.

12. Reacting to the allegations of breach, UAL states that in the transaction it was merely a credit risk insurance broker and only acted as a liason between the insured and the 1st Defendant. Further that its role was to place the insurance policy with an Insurance Company that was willing to accept the risk and terms and conditions of the placement as well as accept the reinsurance of the policy by Ocean. It asserts that it discharged its duties professionally and that cancellation of the policy was occasioned by failure of the insured and Rajesh to fulfil their obligations.

13. UAL contends that Jubilee is a necessary party to this suit having fronted the Insurance Policy which is the subject matter herein.

14. In seeking to absolve itself from the claim herein, UAL argues that it does not insure any risks under any contract of insurance and is not obligated to settle any claims made by any persons insured under any policy of Insurance. In addition, it makes the point that Rajesh having joined Jubilee as the principal is estopped from suing as agent under the law of Agency.

15. Rajesh asserts that he has a good cause of action against both Defendants worthy of trial. Rajesh states that UAL has admitted that it was the Insurance Broker in the transaction and that Nakumatt was to pay the premiums. That at no time during the subsistence of the Insurance were the noteholders informed that the policy issued by Jubilee had been cancelled. That only when his lawyers made demands on 28th July 2017 and 8th September 2017 did Jubilee allege that the policies had been cancelled.

16. In regard to the filed Defences, Rajesh depones as follows:-

"13. THAT I have perused the defences filed by the Defendants and I wish to point out the following;

a. Even though the Defendants deny entering into any insurance relationship with me, the 1st Defendant acknowledges on oath that there existed such a relationship.

b. That even though the 2nd Defendant alleges that it is not liable, there is no evidence that it involved me in the alleged cancellation of the policy.

c. The defences filed do not make any clear assertions and are contradictory".

17. The two applications before this Court carry the principal Prayer for striking out of the Plaint. The Court of Appeal in Kivanga Estates Limited vs. National Bank of Kenya Limited [2017] eKLR succinctly describes the nature of such an order as follows:-

"It is not for nothing that the jurisdiction of the court to strike out pleadings has been described variously as draconian, drastic, discretionary, a guillotine process, summary and an order of last resort. It is a powerful jurisdiction, capable of bringing a suit to an end before it has even been heard on merit, yet a party to civil litigation is not to be deprived lightly of his right to have his suit determined in a full trial. The rules of natural justice require that the court must not drive away any litigant from the seat of justice, without a hearing, however weak his or her case may be. The flip side is that it is also unfair to drag a person to the seat of justice when the case brought against him is clearly a non-starter. The exercise of the power to strike out pleadings must balance these two rival considerations.

Although the court exercises discretionary powers in striking out pleadings, because of its far reaching consequences, **order 2 rule 15** of the Civil Procedure Rules, has established clear principles which guide the court in the exercise of that power in the following terms;

“**15.(1) <u>At any stage</u> of the proceedings the court <u>may</u> order to be <u>struck out or amended</u> any pleading on the ground that—**

a) it discloses no reasonable cause of action or defence in law; or

b) it is <u>scandalous</u>, <u>frivolous</u> or <u>vexatious</u>; or

c) it may prejudice, embarrass or delay the fair trial of the action; or

d) it is otherwise an abuse of the process of the court....and may order the suit <u>to be stayed or dismissed or judgment to be</u> <u>entered</u> accordingly, as the case may be.” (Our emphasis).

The language as highlighted demonstrates that, as a drastic measure in litigation, the remedy must be resorted to sparingly. It is only where a pleading cannot be salvaged by an amendment that the court will utilise this procedure, hence the use of the word “may”. **Order 2 rule 15** which retains word for word

Order VI rule 13 of the repealed Civil Procedure Rules has been construed over the years in a long line of cases, both by this Court and the courts below. For instance in **<u>Co-Operative Merchant Bank Ltd.</u> vs <u>George Fredrick Wekesa</u>** Civil Appeal No. 54 of 1999 the Court summarized the principles as follows;:

“*The power of the Court to strike out a pleading under Order 6 rule 13(1) (b) (c) and (d) is discr*etionary and an appellate Court will not interfere with the exercise of the power unless it is clear that there was either an error on principle or that the trial Judge was plainly wrong.....Striking out a pleading is a draconian act, which may only be resorted to, in plain cases...Whether or not a case is plain is a matter of fact....A Court may only strike out pleadings where they disclose no semblance of a cause of action or defence and are incurable by amendment.”

See **<u>Yaya Towers Limited</u> vs Trade Bank Limited (In Liquidation)** CivilAppeal No. 35 of 2000 and **<u>DT Dobie & Company (Kenya) Ltd</u> vs <u>Muchina</u>**(1982) KLR 1”.

It is an order of last resort and to be used only in clearest of cases.

18. As a general proposition a contract affects only parties to it and will not be enforced on behalf or against strangers. This rule of privity of contract is nevertheless with exceptions. The Court of Appeal in <u>Aineah Likuyani Njirah vs. Aga Khan Health Services</u> [2013] eKLR identifies some of the exclusions. Because of the importance of the decision, it is reproduced in extenso:-

“5. Throughout its development, however, this doctrine has provoked much criticism and debate.[3]In the year 2008, the report of the **Law Reform Commission of Ireland on “The Privy of Contract and Third Party Rights”** recommended that, subject to certain limitations, the privity of contract rule should be reformed so that a third party who the contracting parties clearly intended to benefit from their agreement would be able to rely on and enforce the agreement if it is not carried out properly.[4] That Commission confirmed its view, and indeed the view of the majority of the Commissioners, legal consultants[5] and academicians,[6] that the doctrine of privy of Contract is ripe for reform.

6.Before that recommendation was made, the major argument had been that the privity rule “can thwart the intentions of the contracting parties” and run counter to the basic principle of freedom of contract. **Lord Steyn** summarized this criticism of the privity rule as follows:

“The case for recognizing a contract for the benefit of a third party is simple and straightforward. The autonomy of the will of the parties should be respected. The law of contract should give effect to the <u>reasonable expectations of contracting parties</u> ... [T]here is no doctrinal, logical or policy reason why the law should deny effectiveness to a contract for the benefit of a third party where that is the expressed intention of the parties ... It is, therefore, unjust to deny effectiveness to such a contract...”[7](Emphasis supplied).

7. Thus in its central recommendation, that Commission proposed that third parties (subject to being expressly identified) should have the right to enforce contractual provisions where:

1. The contracting parties expressly so provide the “first limb” of enforcement, and

2. **The contracting parties intend to confer a benefit on the third party the “second limb” of enforceability- provided that the contracting parties do not also intend that the third party beneficiary should not have the right to enforce the contract.**

The Report thus signaled a decisive break from the orthodoxy of the privity doctrine.

8. More fundamentally, however, when the contracting parties intend to give a right of enforcement to a third party, “it is difficult to see how it can be said that effect is given to that intention by allowing the promisee, <u>but not the third party, to sue...where an unjust or illogical result is caused by the privity rule</u>.*[8]* (Emphasis supplied). It would surely be much simpler and clearer to give effect to the intentions of the contracting parties by allowing the third party to enforce the contract.

9. ,,,,,,,,,,

10. ,,,,,,,,,

> 11. There are now many exceptions to the privity rule, both at common law and in the statute books. They developed in an ad hoc fashion as a response to specific situations where the courts or the legislatures ascertained a need to grant third parties the right to enforce a contract made for their benefit.[11] Second, a third party should be able to enforce a term of the contract when the contract expressly states that the third party has a right of enforcement, regardless of whether or not the contract benefits the third party. Third, the third party should have a right to rely on a term of a contract which excludes or limits the liability of the third party, provided that was the intention of the parties".

19. Let me start with the position taken by UAL. While admitting that it was the Broker to the Insurance contract, it repeatedly makes the argument that it is not privy to any contract of insurance between Rajesh and Jubilee. That it did not insure any risk under the policy and cannot therefore bear any liability.

20. The policy which is the subject of the dispute herein is that of 2nd September 2016. Undoubtedly Rajesh is an insured. UAL is named as the Broker and in the definitions section of the policy the following meaning is assigned to the word 'Broker'.

> "4.4. Broker means the entity acting as broker to the insured with respect to the insurers interest as stated in item 4 of the schedule"

UAL was the broker to the insured and therefore an Agent of Rajesh in the contract.

21. Under clause 20 on Security Documentation it is provided;-

> 'Security Documentation
>
> Directors' personal guarantees cash cover for upto 25% of the insurance limit will be deposited in an escrow account in the joint names of Underwriting Africa Insurance Brokers and Nakumatt Holdings"

The Security Documentation was to be made available within 30 days of the Policy inception.

22. The position of Jubilee is that the UAL failed to meet its obligation of ensuring the conditions of Security Documentation were met within the stipulated timeline. UAL on the other hand maintains that the obligation on the Security and documentation clause was on Nakumatt as the obligor. Looking at the provisions of clause 20, UAL may successfully argue that the obligation to provide the cash cover for upto 25% of the Insurance limit was on Nakumatt.

23. Nevertheless UAL was not a peripheral player in the transaction as evidenced by the correspondence exchanged between it and Jubilee (see FKS4, FKS5). A matter that could come up at trial is whether, in the circumstances of the case, it was not aware of the responsibility placed by clause 20 on Nakumatt to make the deposit within 30 days of the policy inception. And if so whether on the failure by Nakumatt to meet its obligations, UAL as agent for the insured timeously informed the insured of this failure and the possible risk of cancellation. This may not be a trivial issue given that Rajesh's case is cast on the theory that there was a valid insurance policy arranged by UAL and Jubilee. The latter being the insurer. The possible obligation of UAL to timeously inform the insured of the default on the part of the obligor is a matter that may defeat the privity of contract argument.

24. For Jubilee two distinct defences are taken up. The first is that no liability attaches to it under the alleged policy as it bore zero risk as Ocean which held reinsurance was to bear 100% risk on the policy. It is therefore proposed that no relief lies to Rajesh against Jubilee. The second is that the policy upon which the claim by Rajesh is founded does not exist as it was cancelled. Simply that Rajesh cannot claim on a non-existing policy.

25. Let me start with the latter proposition. There seems to be sufficient evidence that Nakumatt failed to meet the conditions for security documentation and by a letter of 27th March 2017, Jubilee gave UAL Notice of cancellation of the Policy with effect from 26th April 2017. Notwithstanding indulgence sought by UAL, there was continued default and the Policy is said to have been cancelled with effect from 5th May 2017.

26. Rajesh however persists on the premise that there is a valid existing Policy.

27. On the question of cancellation, the issue of Notice may turn out to be of some importance. In this regard clause 8.6 of the General conditions reads:-

> "8.6 Any information, documents or notices communicated by the Insured and Underwriters shall be communicated through the Broker and are deemed to be delivered to the respective party on the earlier of the date of receipt or 3 working days following the date of delivery".

Any cancellation Notice to UAL is therefore deemed to be Notice to Rajesh.

28. An issue that may then arise is whether cancellation was effective on or before the event of risk. The event of risk being;-

‘1.1 Failure or refusal, for any reason, by the obligor to honour its obligations under the facility Agreement on the date(s), during the policy period”.

29. To be observed is that cancellation was with effect from 5th May 2017 while the maturity date of the short term notes is said to be on 11th January 2017, on which date Nakumatt failed to honour its obligation to pay. Yet on the other hand, the evidence this far, is that Rajesh through its Advocates made a Demand for payment of the claim from Jubilee on 28th July 2017, about two months after the cancellation of the Policy. An issue that may need an answer is when the obligation on the insured to meet the claim arose. Was it the date the event of risk happened or on the date a demand was made on Jubilee? This answer is not readily available to Court at this point and it warrants further inquiry for which a trial provides a good arena.

30. What is to be said about the defence that Jubilee cannot possibly be liable as Ocean being the Re-insurer bears full liability? The basis of this defence is the Hold Harmless Agreement and the Cut Through Clause. The latter is simply a clause obliging the insured to claim directly from the Re-insurer in the event of a claim arising. The real foundation for allegedly passing on 100% risk to Ocean would be the Hold Harmless Agreement. That agreement is annexed as FK5 to the affidavit of Felix Kipyegon Sang sworn on 27th June 2018 to UALs application. This agreement ought to have been executed by Jubilee being the Insurer and Dry Associates Limited on behalf of Rajesh. The trouble is that although the agreement displayed there is executed by Jubilee, it is not executed by Dry Associates.

31. This needs to be looked at in the context of the letter of 5th June 2017 from Jubilee to Dry Associates Ltd. The letter is reproduced:-

Monday 5th June 2017

Mr. James R. Dry

Dry Associates Ltd

Managing Director

Dry Associates House

Brookside Grove, Westlands

P.O.Box 684-00606

Nairobi, Kenya

Dear Mr. Dry

RE: NAKUMATT FINANCIAL GUARANTEE:

I refer to your discussions with the Jubilee Group Chairman–Mr. Nizar Juma regarding the above subject which he shared with me instant whilst away in Dar Es Salaam, Tanzania. My sincere apologies for the delay in response caused by my travelling in the region.

By now I trust Underwriting Africa have explained to either you or Nakumatt that we do not underwrite Financial Guarantees. We had done them a favour to front the Insurance Cover for Ocean Re but unfortunately the clients involved (including Nakumatt) did not comply with all the requirements of placing cash deposits and collaterals as well as their Company’s Guarantees and Personal Guarantees of the Directors that were to have been provided under the contracts to the Insurers/reinsurers at inception of cover. We made frantic efforts to have them but they were not forthcoming many months after inception.

Under the circumstances, we were compelled to cancel all the covers arranged by Underwriting Africa as we could not keep holding the risk exposure as this meant Jubilee Insurance was to be construed as the 100% carrier of the risk instead of Zero(0%) as per the intended arrangements a the commencement of cover. As you might be aware, we facilitated the replacement of the covers by Underwriting Africa and this has been fully resolved.

We trust the foregoing clarifies our position but should you need further clarification, please do not hesitate to contact the undersigned.

Yours faithfully

Signed

PATRICK TUMBO

CHIEF EXECUTIVE OFFICER

One interpretation that can be given to the letter is that Dry Associates Ltd had not been looped into the Re-insurance arrangement at the

inception of the Policy and were informed about this later. Otherwise why would Jubilee be making the explanation herein if Dry Associates had executed the Hold Harmless Agreement? This defence, again requires further interrogation.

32. I turn to quickly consider the second limb of the application by UAL which is for an order that Rajesh gives security for UAL's costs in the sum of Kshs.1,000,000/=. UAL alleges that Rajesh has no known assets which could satisfy an order of costs to it if such an order is ultimately made. This allegation is only to be found in the grounds on the face of the application and not in the affidavit in support thereof or subsequent affidavit of Cecilia Rague Kaisha sworn on 8th October 2018. This is not without a consequence.

33. The Prayer is brought under the auspices of order 26 Rule (1) and (6) of the Civil Procedure Rules which reads:-

> "(1) Where security by payment has been ordered, the party ordered to pay may make payment to a bank or a reputable financial institution in the joint names of himself and the defendant or in the names of their respective advocates when advocates are acting.
>
> 6 (1) Where security by payment has been ordered, the party ordered to pay may make payment to a bank or a reputable financial institution in the joint names of himself and the defendant or in the names of their respective advocates when advocates are acting".

34. As observed, UAL only sought to allege that Rajesh had no known assets which would satisfy an order of costs on the ground. UAL was not confident enough to make this allegation on oath by way of affidavit. Having failed to do so, the allegation did not even warrant a response from Rajesh. It did call for Rajesh to rebut it by way of proving his ability to meet the costs. That must be the end of the matter.

35. Ultimately both applications of 29th March 2019 and 27th June 2018 are hereby dismissed with costs.

Dated, delivered and signed in open Court at Nairobi this 3rd Day of May, 2019.

....

F. TUIYOTT

JUDGE

Present:-

Mwangi for Plaintiff

Kamau (miss) for 1st Defendant

Nixon – Court Assistant