REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

COMMERCIAL AND TAX DIVISION

CIVIL CASE NO 398 OF 2015

ELGON KENYA LIMITED.....PLAINTIFF

VERSUS

METROPOLITAN CANNON

GENERAL INSURANCE LIMITED.....DEFENDANT

JUDGMENT

1. The plaintiff by a plaint dated and filed on 19th August 2015 sued the Defendant, M/s Metropolitan Cannon General Insurance Limited. The defendant entered appearance on 25th September 2015 and filed a defence on 2nd November 2015. The plaintiff filed a reply to the defence dated 9th November 2015.

2. On 20th January 2017 the plaintiff filed an amended plaint seeking the following orders:-

a) A declaration that the Goods in Transit policy issued to the Plaintiff by the Defendant ought to have been on the same terms as the Goods in Transit Policy issued to the Plaintiff's related company, Elgon Chemicals Limited and that the policy ought to be rectified, read and captured as if it contained and had at the time of its execution contained the same terms and conditions as those set out in the Goods in Transit Policy issued to Elgon Chemicals Limited.

b) Special damages of Kshs.30, 972,322/-.

c) Interest in (a) above.

d) Costs.

3. The suit was part heard by the late Hon. Justice J.L. Onguto, (God rest his soul in peace) who heard evidence from **PW1, PW2** and **DW1.** That when I took over this matter the parties opted to proceed with the suit from where it had reached and I heard **DW2** and **DW3** before the defence closed their case.

Plaintiff's Case

4. The plaintiff as per the plaint avers, that it obtained a Good in transit Policy herein after called the "**GIT** policy," with cannon insurance limited for the period 1st April 2008 to 31st March 2009. The terms of the policy were to be the same as the terms in, Elgon Chemicals limited, a company associated with the plaintiff. It is the plaintiff's averment, that the terms set out in the policy had a clause on the integrity of the employees, which was not in accordance to their agreement. The plaintiff further avers, that vide a letter dated 24th October 2013 the defendant corrected the position, by stating, that the policies issued would be the same as terms held in Elgon Chemicals Limited. It is the plaintiff's statement, that despite several reminders the changes were not achieved even after subsequent renewals of the policy.

5. The plaintiff states, that on the 6th day of February 2013, a track carrying the plaintiff's consignment was hijacked and the contents thereby got lost. The plaintiff reported the event to the defendant and submitted the required documentation in support of the claim. It is stated by the plaintiff that the defendant informed the plaintiff that the claim was moved from **GIT** policy to a claim under fidelity guarantee policy also issued to the plaintiff. The plaintiff states that the defendant refused to pay up on the claim stating that it was a result of theft by servant and covered by the Fidelity guarantee policy.

6. PW1 KAMLESH KUMAR PATEL adopted the witness statement during examination in chief. In cross examination he stated that he called the driver and gave him instructions to leave the truck in Syngenta. Shortly afterwards he tried calling him and his phone was switched off. When he proceeded to Syngenta, he was informed that the vehicle was loaded and it had taken off with the driver.

7. PW2 MILKA MUTOLO adopted her witness statement and produced plaintiffs exhibit 1, 2 and 3. During cross examination she stated that the **GIT** policy was on the same terms as Elgon chemicals Ltd policy.

Defendant's Case

8. The defendant denied the plaintiffs assertions in the statement of defence dated 2nd November 2015. The defendant denied having agreed with the plaintiff to be limited to the same terms of policy as previously issued to Elgon Chemicals Limited. It further averred, that the plaintiff took a separate Fidelity Guarantee policy of insurance for the period 2012/2013 in order to cover itself against any dishonesty or fraud by any employee. The defendant further denied, that the contents of the letter dated 24th October 2013, being an admission, that the terms given to the plaintiff would be identical to terms given to Elgon Chemicals Limited. The defendant avers, that the actions of the plaintiff's driver were such, that it is obvious that he colluded fully in the theft. The defendant states, that it is under no obligation to indemnify the plaintiff under the terms of either the **GIT** or the **FG** policy as circumstances of the loss fell outside the scope of the cover.

9. DW1 John Muchangi Mukiri stated, that he prepared a report under Rapid Investigations services. He avers, that indeed goods were loaded in the vehicle however they were not delivered. It is his averment, that the driver's statement was not consistent in, that he was unscrewing a tyre but on inspection the next day the Lorries tyres were in perfect condition. In cross examination, he states, that he did not find any object of collusion by the plaintiffs directors

10. DW2 Lawrence Mutinda Kinyili, relied on his witness statement dated 29th October 2015 as his evidence in chief. He stated that the relevant policy at the time of the transaction was **GIT** which the defendant repudiated as there was no hijack or hold up. He testified the claim was repudiated due to collusion with other persons and integrity clause on the employees.

11. DW3 Lucrezia Midega adopted her statement dated 2nd November 2015 as his evidence in chief and stated, that he is now the **CEO** of the defendant company. He stated the insurance is as per policy of Elgon Chemicals and not Elgon Kenya Limited. The policy is Goods Transport Policy issued on 8/11/2017 before the incident. That in 2008 there was a request to issue the policy in the name of Elgon Kenya Limited through the agent Sarchi and also sought for insurance policy called Fidelity guarantee which he had not been issued to Elgon Chemicals previously; covering theft by employees. That the defendant put a clause to remove theft by employees of the Goods Transport Policy hence the integrity of the employee under **GIT.** That they at the same time issued Fidelity Guarantee Policy **(FG)** to Elgon Kenya Limited which Elgon Chemicals had not been issued with.

12. DW3 further testified if a claim is made the identity of policy to follow is very important. That a claim for hijack would follow under **GIT,** bearing the circumstances under which the loss happened, where other people take charge and control of the goods or the vehicle. He testified liability was rejected under both **GIT** and **FG.** He nevertheless testified, that the policies were renewed by agent and in **GIT** there is no reference to employee integrity. **DW3** further raised the issue of inflating the value of the claim from the initial sum insured of Kshs.12, 500,000. He further raised the issue of the effective date, urging it was 8/2/2013 which was by an error Mr. Ndambiri indicated as 4th February 2013, but commenced to 8/2/2013.

13. In the instant suit, I note the plaintiff filed two similar submissions all dated 15th March 2019. There are no other submissions by the plaintiff, though the filed ones which are similar word per word are titled plaintiff's further submission; the defendant's submissions are dated 4th March 2019 filed on the even date.

14. I have very carefully perused the pleadings; witness statements, evidence adduced before the late Hon. Justice J.L. Onguto, evidence adduced before me and parties rival submissions. The issues upon consideration of the same can be summed up as follows:-

a) Whether the GIT policy issued to the plaintiff should be rectified by deleting the integrity of employees clause?

b) Whether the defendant was justified in repudiating liability to identify the plaintiff for the loss suffered by the plaintiff on 6th February 2013?

c) In the event that the repudiation was not justified, what is the extent of the defendant's liability?

A) Whether the GIT policy issued to the plaintiff should be rectified by deleting the integrity of employees clause?

15. The plaintiff contends, that it had been agreed between itself and the defendant that the **GIT** Policy between themselves would be in similar terms as the **GIT** policy between the defendant and Elgon Chemicals Limited and, that the incorporation of the integrity of employees clause ran contrary to their agreement. The question thereof arises as to whether the **GIT** policy issued to the plaintiff should be rectified by deleting the integrity of employees clause so as to have it read in similar terms to **GIT** Policy issued to Elgon Chemicals Limited?

16. Halsbury's Laws of England, Fourth Edition, Volume 32 at paragraph 56 further addresses the point as follows:-

"56. Matters to be proved before rectification is granted. To justify the Court in correcting a mistake in an instrument the evidence must be clear and unambiguous that a mistake has been made, that the instrument does not represent the parties' common intention, what that common intention was and that the alleged intention to which it is desired to make the

agreement conformable continued concurrently in the parties' minds down to the time of execution of the instrument."

17. It is contended by the defendant, that the plaintiff did not lay before court evidence, that meets the test laid out in the law. That no evidence whatever was adduced to show, that there was prior agreement between the parties, that the **GIT** Policy issued to the plaintiff would be exactly in the same terms of the **GIT** policy previously issued to Elgon Chemicals Limited. The pleadings are urged, do not support the claim. It is urged the plaintiff has not pleaded the issue that there was an error in **GIT** policy.

18. In order to examine the nature of the policy between the plaintiff and the defendant then we needs to appreciate the concept of insurance that requires the parties to act in good faith.

Newsholme Bros. vs. Road Transport and General Insurance Co. Ltd [1929] All ER 442 at 444:

> **"…the contract of insurance requires the utmost good faith; the insurer knows nothing; the assured knows everything about the risk he wants to insure and he must disclose to the insurer every fact material to the risk."**

19. In the instant suit, it is not in dispute that the defendant insured the plaintiff against any loss, that would occur when goods were in transit. This is the policy the parties are referring to known as the Goods on Transit policy dated 8th November 2007. The dispute pertains to the clause in the agreement that states

> **"it is hereby declared and agreed that the company shall not be liable in respect of loss or damage by theft which is in any way facilitated or brought about by any persons in the service of or employed by the insured or in which any such person or persons may be concerned."**

20. The defendant submitted, that the incorporation of the integrity clause in the plaintiff's **GIT** Policy is in issue because it was the basis of repudiating liability to indemnify the plaintiff for the loss, that occurred on 6th February 2013. However the plaintiff acknowledges the existence of the said clause but is of the argument, that it directed the defendant to omit the clause upon perusal of the policy. The plaintiff relies on the endorsement dated 23rd April 2008 contained in the supplementary List of documents at page 1 which states:-

> **"The GIT policy now effected under Elgon Kenya- policy Number 01/06/021572/08 w.e.f 1/4/2008. Subject otherwise to terms, exceptions and conditions of the policy."**

21. Considering the further amended plaint dated 16th January 2019, at paragraphs 5, 6 and 7 it is expressly pleaded that; *interalia*, the defendant had refused to amend the policy by deleting the integrity of employees clause. It is therefore clear the plaintiff led evidence and submitted on matters duly pleaded. The defendant on the other hand in its letter of 24th October 2013 admitted that the terms of and conditions in the policies that were held in the name of Elgon Chemicals Limited were applicable on the issue to the plaintiff. **DW3** on cross-examination testified the terms of policy for Elgon Chemicals Limited and Elgon Kenya were the same. This gives credence to the plaintiff's contention, that the policy in respect of the two companies had no integrity of employees clause.

22. In the case of **Choitram vs Nazari (1984) KLR 327,** the Court of Appeal held as follows:-

> **"Admission can be expressed or implied either on the pleadings or otherwise, e.g. in correspondence. Admissions have to be plain and obvious, as plain as a pikestaff and clearly readable because they may result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning."**

23. I have considered the defendant's letter of 24th October 2013 duly signed by Lucrezia Midego, **DW3;** I find the letter clearly has disclosed the correct position as regards the plaintiff's **GIT** Policy. I find **DW3,** contradicted himself in his evidence before court by attempting to state contrary to his position as stated in his letter of 24th October 2013. I find the change of her position as an attempt to evade liability in respect of the plaintiff's claim. Her testimony is in contravention of the parol evidence rule and I disregard the same.

24. As regards the parol Rule, I am guided by Court of Appeal decision in **Prudential Assurance Company of Kenya Limited vs Sukhwinder Singh Jutley and Another [2007] eKLR,** the Court of Appeal held that;

> **"It is a familiar rule of law that no parol evidence is admissible to contradict, vary or alter the terms of a deed or any written instrument. The rule applies as well as deeds as to contracts in writing. Although the rule is expressed to relate to parol evidence, it does in fact apply to all forms of extrinsic evidence. As it stands this is not a rule of interpretation but of law, and means that the interpretation of the document must be found in the document itself with the addition if necessary of such evidence as we have previously seen is admissible for explaining or translating words and expressions used therein."**

25. I find, that in this case there has been an attempt on part of the defendant to rely on extrinsic evidence against clear evidence adduced by its witnesses especially **DW3.** The parol evidence Rule requires this court to disregard in totality the evidence and submissions on issue of rectify, caution when there exists clear, unambiguous evidence stating the plaintiff's policy was not supposed to have integrity of employees clause.

Section 120 of the evidence Act on doctrine of estoppel binds the defendant. **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."

The parol evidence rule "is not a rule of interpretation but of law and means that the interpretation must be found in the document itself. A letter which is plain and unambiguous as the letter of 24th October 2013, I find should not be subjected to any other meaning other than what its contents clearly spells out.

26. In view of the above, I find that the plaintiff sufficiently demonstrated, that pursuant to the defendant's own admission in its plain and clear and unambiguous letter of 24th October 2013, the **GIT** Policy should be rectified to remove the integrity of employees clause. I find the prayer on an removal of integrity of employees clause is justified.

B) Whether the defendant was justified in repudiating liability to identify the plaintiff for the loss suffered by the plaintiff on 6th February 2013?

27. The defendant repudiated the policy on the grounds, that the driver who is an employee of the plaintiff was involved in the theft. They rely on the evidence of **DW1** and **DW2.** The parties referred to the case of **Hormal vs Neuberger Products (1957)1QB247** where the court of appeal held that:-

> **"in a civil action where fraud or other matter which is or may be a crime is alleged against a party or against persons not parties to the action, the standard of proof to be applied is that applicable in civil actions generally, namely, proof on the balance of probabilities, and not the higher standard of proof beyond all reasonable doubt required in criminal matters; but there is no absolute standard of proof, and no great gulf between proof in criminal and civil matters; for in all cases the degree of probability must be commensurate with the occasion and proportionate to the subject matter. The elements of gravity of an issue are part of the range of circumstances which have to be weighed when deciding as to the balance of probabilities."**

28. The Defendant has made heavy weather alleging, that the Plaintiff's driver was involved in the theft, and therefore, pursuant to the integrity of employees clause, the Defendant is not liable. This conclusion arises from the findings of Rapid Investigators who were duly appointed to investigate the matter by the Defendants. Further it is urged the integrity of employees clause once removed upon rectification of the policy, it follows that the plaintiff should be indemnified for the loss as indeed, a hijack occurred on the material date. It is further submitted by the defence, that the fact of a hijack is evident from the evidence on record and that the driver was not involved in the theft and therefore, the defence should fall apart. On alternative defence which the defendant attempt to put forward of the holdup clause, was not pleaded and cannot be considered for it has not been part of the defence.

29. In **Duncan Maweu Mutiso vs Edwin Owiti Owanga [2018] eKLR,** the High Court held as follows:

> **"In law, a party is not permitted to ambush the other by evidence not on the pleadings and not hinted at cross examination. The law is that a defendant is bound to put the substance of their defence to the plaintiff witness so that there would be an opportunity for the plaintiff to respond before the case closes."**

30. I have already under issue (A) above found, that the defendant relied on the employee clause to justify, that the plaintiff is not entitled to damages; however having removed the clause in question, the defendant's action in repudiating liability to identify the plaintiff for the loss suffered by the plaintiff on 6th February 2013 is unjustified and without any legal basis.

C) In the event that the repudiation was not justified, what is the extent of the defendant's liability?

31. The plaintiff prays, that this honourable court grants it special damages of 30,972,322. The rules with regard to special damages can be found in the case of **Coast Bus Service Limited v Murunga & Others Nairobi CA No. 192 of 1992 where it was stated:-**

> **"It is now trite law that special damages must first be pleaded and then strictly proved."**
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> **Further, the case of Eldama Ravine Distributors Limited and another vS Chebon Civil appeal number 22 of 1991 (UR). In the latest case, Cockar JA who dealt with the issue of special damages said in his judgment:**
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> > **"It has time and again been held by the courts in Kenya that a claim for each particular type of special damage must be pleaded. In Ouma v Nairobi City Council [1976] KR 304 after stressing the need for a plaintiff in order to succeed on a claim for specified damages. Chesoni J quoted in support the following passage form Bowen LJ's judgment at 532-533 in Ratcliffe v Evans [1892] QB 524, an English leading case of pleading and proof of damage."**
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> ***"The character of the acts themselves which produce the damage, and the circumstances under which those acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry."***

32. The Risk Note issued by the Plaintiff's Insurance Agent and received by the Defendant on 19th May 2008 sought a limit of Kshs.2, 500,000/- per any one carry/transit. The Risk Note is contained at page 115 of the Plaintiff's List and Bundle of Documents. The limit was subsequently, as from 30th May 2008, increased by the parties to Kshs. 12,500,000/-per any one carry/transit. This is borne out by the endorsement contained at page 23 of the Plaintiff's List and Bundle of Documents. The limit of Kshs.12,500.000/- per any one carry/transit

was retained by the parties in the subsequent annual policy renewals, as borne out in the Renewal Endorsements dated 9th April 2009, 21st April 2010, 1st April 2011, and 21st April 2012 copies of which are contained at pages 25, 27, 30 and 32 of the Plaintiff's List and Bundle of Documents respectively.

33. I have perused the renewal endorsement dated 21st April 2012, one can see that the **GIT** Policy was to run for the period 1st April 2012 to 31st Marc 2013, meaning that the Defendant's liability per any one carry/transit was limited to Kshs.12,500,000/- for that duration. The theft of the Plaintiff's consignment of chemicals occurred on 6th February 2013, which date falls within the period of cover specified above.

34. It is undisputed, that on 8th February 2013, two days after the loss had been suffered, the Plaintiff's Insurance Agent *(Mr. Lakhani of Sarchi Agencies)* wrote to Ms. Lucrezia Midega, then the Defendant's Senior Manager –Underwriting, requesting an increase of the limit per any one carry/transit from Kshs.12,500,000/- to Kshs.35,000,000/-. This communication is contained at page 2 of the Defendant's list & Bundle of documents. Mr. Lakhani's communication to Ms. Lucrezia Midega simply states that on 4th February 2013 he received instructions from the Plaintiff to have the limits increased. The communication does not state or require that the increment in the limit be as from 4th February 2013. Nor is there any basis why such increase in cover could or should be backdated. Following the request, Ms. Lucrezia Midega approved an increase of the limit per any one carry/transit from Kshs.12,500,000/- to Kshs.35,000,000/- effective 8th February 2013- being the date she received Mr. Lakhani's request. This is borne out by the communication shown at page 2 of the Defendant's bundle of documents.

35. From the chronology of the facts of the case it is clear, that the limitations were not enhanced on 4th February 2013 as the first request for enhancement was made on 8th February 2013 two days, after the loss the consignment, which the defendant had not been briefed and that which would have been illegal and anti-business to enhance cover as from 4th February 2013 as it would amount to indemnifying the plaintiff for a loss that had already occurred contrary to existing insurance policy. Further it has been demonstrated that the endorsement contained an error or mistake of fact to the extent that it specified 4th February 2013 as the date of enhancement of the limit and it is for that reason, I find it unenforceable; however the mistake of fact was rectified on 6th March 2013.

36. I find that the purpose for insurance is to replace the loss and not to make profit. Therefore the insurance company is bound by the policy cover to compensate to the extent provided for by the policy.

37. Having come to conclusion that I have; I find the plaintiff's suit to be meritorious and I proceed to enter judgment in favour of the plaintiff as follows:-

a) A declaration be and is HEREBY issued that the Goods in Transit policy issued to the Plaintiff by the Defendant ought to have been on the same terms as the Goods in Transit Policy issued to the Plaintiff's related company, Elgon Chemicals Limited and that the policy ought to be rectified, read and captured as if it contained and had at the time of its execution contained the same terms and conditions as those set out in the Goods in Transit Policy issued to Elgon Chemicals Limited.

b) Special damages not proved and, as such awarded nil.

c) Kshs.12,500,000 awarded to the plaintiff being the extent of the insured cover at the time of loss was sustained with interest from the time of filing this suit till payment in full.

d) Costs of the suit to the Plaintiff.

Dated, signed and delivered at Nairobi this 13th day of June, 2019.

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J .A. MAKAU

JUDGE