REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 41 OF 2016

JAMWA CONSOLIDATED AGENCIES (K) LTD.....PLAINTIFF

VERSUS

UAP INSURANCE COMPANY LTD.....DEFENDANT

JUDGMENT

1. **JAMWA CONSOLIDATED AGENCIES (K) LIMITED**, the plaintiff, is a limited liability company which is in the business of transportation of petroleum products within the Republic of Kenya. At the material time the plaintiff had been contracted by Kenol-Kobil Limited to transport its petroleum products. UAP Insurance Company Limited, the defendant, is a limited liability company which is in the insurance business.

2. The plaintiff's claim against the defendant is for judgment for Ksh 6,109,132 in respect to the plaintiff's goods in transit (GIT) cover policy with the defendant.

3. The plaintiff was the owner of vehicle registration no. KBR 899k and its trailer/tanker registration No. ZD8291 and vehicle registration No. KBR 895K and its trailer/tanker registration No. ZD8420. It is not denied that those two vehicles were insured by the defendant under GIT policy from 1st March 2013 to 1st March 2014. Both those vehicles were involved in two separate accidents, on 10th September 2013 and 24th September 2013. As a result of those accidents the plaintiff lost the petroleum products that were being transported. The plaintiff's case is premised on the existence of GIT cover policy with the defendant. The defendant denies that at the time of the accident there existed a GIT cover policy.

4. It is important to state that the plaintiff had entered into Insurance Premium Financing (IPF) arrangement with Giro Commercial Bank Limited (Giro). The defendant witness, Joseph Mwai, confirmed that Giro had paid the defendant the plaintiff's premium for the period of the plaintiff's GIT cover policy. The plaintiff's witness, Jane Njeri Mwaura, in evidence stated that the plaintiff was not in default with its instalment payments in respect to IPF. The defendant relied on a letter written by Giro, dated 24th October 2013, by which letter Giro informed the defendant that the plaintiff had defaulted in payment towards IPF with Giro. That it was on the basis of that letter, and because the defendant was obligated to make good, to Giro, the amount the plaintiff allegedly defaulted with its payment towards IPF, that the defendant repudiated the plaintiffs claim for compensation.

ANALYSIS

5. Before setting out the issues to be considered by the court it is necessary for me to consider two matters raised by the defendant both in its pleadings and in its written submissions.

6. The defendant on being served with the summons and plaint, herein, filed, on 14th April 2016, a memorandum of appearance. On 8th February 2017 the defendant filed its defence. In that defence the defendant pleaded that the insurance contract between the parties had an arbitration clause. It was pleaded by the defendant that the court had no jurisdiction to hear this dispute in view of that arbitration clause.

7. The defendant despite pleading that the court lacked jurisdiction did not as required under section 6 of the Arbitration Act seek stay of this case pending arbitration. But even if the defendant had sought stay of this case under Section 6 after filing its defence such an application would have been a non-starter. This is because the defendant had acknowledged the claim by filing its defence. The defendant submitted to this court's jurisdiction when it filed its defence to the plaintiff's claim. A case in point is **Cementers Limited v Multichoice Kenya Limited & 13 others [2019] eKLR** where the learned judge stated:

> "*The question is; what constitutes an acknowledgement of a claim. In the case of;* ***Eunice Soko Mlagui v Suresh Parmar & 4 others [2017] eKLR,*** *the court held that, the filing of a defence constitutes acknowledgment of a claim, within the meaning of the*

provisions of section 6(1) of the Arbitration Act. In that matter, the 1st, 2nd and 3rd Respondents had already filed and even amended their statements of Defences while the 4th and 5th Respondent had entered appearance and filed their statements of defences. The Court held that, the Defendants had already submitted to the jurisdiction of the court and the matter could not be referred to arbitration."

8. In the case **FAIRLANE SUPERMARKET VS BARCLAYS BANK LTD NBI HCCC NO.102 OF 2011**, the court held that –

"the option to refer to the matter to arbitration was sealed when the defendant herein entered appearance and followed it with a defence. In the case of CORPORATE INSURANCE COMPANY VS. WACHIRA (1995-1998) IEA 20, it was held that if the appellant had wished to invoke the clause, it ought to have applied for a stay of proceedings after entering appearance and before delivering any pleading and that the appellant had lost its right to rely on the arbitration clause by filing a defence ...

any party who wishes to take advantage of the arbitration clause in a contract should either at the time of entering appearance or before the entry of appearance make the application for reference to arbitration."

9. I would reiterate the above case of Court of Appeal and say that the defendant's fate was sealed when, on 8th February 2017, if filed its defence. This case is therefore rightly before this court. This court's jurisdiction was acknowledged by both parties.

10. The defendant also pleaded that the plaintiff's suit is fatal because it lacks the plaintiff company's resolution for the director, Jane Njeri Mwaura, to plead and sign the verifying affidavit. The defendant other than pleading to that effect and making mention of it in its written submissions did not advance any authority in support of the same.

11. I hold the view that the failure, by the plaintiff, to file a company's resolution to file this action, just as was held in the case **Assia Pharmaceuticals v Nairobi Veterinary Centre Ltd Nairobi HCC No 391 of 2000**, the plaintiff can ratify the filing of this case subsequently, even after judgment. This is what was held in the case **Peeraj General Trading & Contracting Company Limited, Kenya & another v Mumias Sugar Company Limited [2016] eKLR** thus:

"The next issue is that there was no company resolution to institute the instant suit. It is trite that an incorporated person is but just a legal person in the eyes of the law. It is therefore needless to say that an incorporated body has of necessity to act through agents who are usually members of its Board of Directors. As was held by ***Hewett, J*** *in* ***Assia Pharmaceuticals vs. Nairobi Veterinary Centre Ltd. Nairobi (Milimani) HCCC No. 391 of 2000****:*

"It is settled law that where a suit is to be instituted for and on behalf of a company there should be a company resolution to that effect……As regards litigation by an incorporated company, the directors are as a rule, the persons who have the authority to act for the company; but in the absence of any contract to the contrary in the articles of association, the majority of the members of the company are entitled to decide even to the extent of overruling the directors, whether an action in the name of the company should be commenced or allowed to proceed. The secretary of the company cannot institute proceedings in the name of the company in the absence of express authority to do so; but proceedings started without proper authority may subsequently be ratified."

14. Looking at the court records, it is apparent that the no such company resolution was filed. However, going by the ***Assia Pharmaceutical Case*** *(supra), an action commenced without authority is capable of being ratified. It would therefore not be in the interests of justice to dismiss this suit on the ground merely that there was no authority filed to institute the suit. That is a defect that does not, in my view, go to the jurisdiction of this court, and is an omission is (sic) curable."*

The plaintiff company will be required to file a resolution ratifying the filing of this suit.

12. The only other single issue to consider in this case is whether the defendant was entitled to repudiate the plaintiff's claim.

13. Considering the evidence it is clear that the plaintiff had a GIT cover policy from 1st March 2013 to 1st March 2014. The defendant's witness confirmed that the plaintiff's premium for that policy were fully paid for the year by Giro through IPF. From the parties evidence it does look like the plaintiff's obligation was towards Giro, in repaying the instalments of IPF as they fell due. That obligation was not extended to the defendant. In other words under the instalment payment agreement, with Giro, the defendant had no privity of contract. Contrary to that, however, it is evident that Giro wrote to the defendant requesting that the defendant to deduct from the already paid plaintiff's premium, in order to make good the instalments which Giro alleged the plaintiff had defaulted on. The defendant did not prove to the court that it was entitled to reverse the premium paid on behalf of the plaintiff and remit such deductions to Giro. To my mind Giro could only make a claim for the alleged defaulted instalments from the plaintiff. It had no legal standing to demand the defendant to deduct the premiums already paid.

14. The defendant did infact deduct the already paid premiums on behalf of the plaintiff, and paid Giro as it demanded. As a consequence the plaintiff was informed by the defendant that it was indefault of its premium payment which default rendered the plaintiff's cover invalid.

15. The defendant had a burden to prove firstly that it was entitled to deduct the plaintiff's premiums which it had already received for the year 2013 to 2014; it had a burden to prove which month/s were affected by that deduction and whether the month/s fell within the period of the accident or outside that period; and it had a burden to prove it were by law permitted to deduct the plaintiff's premium. The defendant did not shift that burden of proof. It follows that the finding of the court is that the deduction of the plaintiff's premium by the defendant was unlawful. It also follows that the plaintiff's GIT cover policy was on and valid when the accident occurred. This finding is supported by the email of Sammy Kamau, the defendant's supervisor in the defendant's claims department where he stated:

"We (the defendant) did not come off cover. The policy continued to run and the claim occurred."

16. The finding of the court is that the defendant was not belatedly entitled to repudiate the plaintiff's claim as it attempted to do by its letter dated 26th March 2014.

17. It is pertinent to note that the defendant did not put up a defence against the plaintiff's claim that the accident, to two of its vehicles, occurred and that as a consequence of those accidents the plaintiff suffered loss claimed in this case. The defendant having not denied those two claims by the plaintiff no issues on those claims arises for consideration by the court.

18. The Court of Appeal in considering the Rule, in the Civil Procedure Rules, under which pleadings can be struck out in the case **Raghbir Singh Chatte v National Bank of Kenya Limited [1996] eKLR** had this to say:

> *"This rule enforces a cardinal principle of the system of pleadings, that every allegation of fact in a statement of claim or in a counterclaim must be traversed specifically, otherwise it is deemed to be admitted. It thus prescribes how the pleader should answer his opponent's pleading, by providing that the penalty for not specifically traversing an allegation of fact is that it will be taken to be admitted, whether this was intended or not. The effect of a traverse, if properly pleaded, is that the party who makes the allegation has to prove it; the effect of an allegation which is treated as admitted is that the party who makes it need not prove it.*
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> *The main object of this rule and r.14 is to bring the parties by their pleadings to an issue, and indeed to narrow them down to definite issues, and so diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing (per Jessel M. R. in Thorp v Holdworth (1876) 3 Ch. D. 637). This object is secured by requiring that each party in turn should fully admit or clearly deny every material allegation made against him. Thus, in an action for a debt or liquidated demand in money, a mere denial of the debt is wholly inadmissible (underling supplied)."*

19. The defendant having not denied that the accident occurred and having not denied the plaintiff's claim of Ksh 6,109,132 the same is assumed as admitted.

20. The plaintiff claimed for interest at commercial rate on the amount claimed.

21. Justice Gikonyo in the case **Feroz Nuralji Hirji v Housing Finance Company of Kenya Ltd & another [2015]** eKLR found that Commercial interest can be awarded. The learned judge stated:

> *"The Plaintiff has argued that the circumstances of this case warrant order for interest to be computed on the basis of compound interest because they would have made investments of the adjudged sum herein and earned income. They argued further that the failure by the 1st Defendant to promptly recompense the Plaintiff gave rise to circumstances which the court would consider awarding interest on a compounded basis. I agree that the time element and the possibility that the funds held by the 1st Defendant would have been otherwise utilized as re-investment, should be considered by the court when awarding interest on the decretal sum on a compounded basis. This is to recompense the party who has been denied use of money and has as a consequence lost investment opportunities too. That will not be a punishment in any sense but a fair equitable compensation."*

22. The plaintiff's business is the transportation of petroleum products. The accident occurred and caused loss of those products that were being transported. The plaintiff would undoubtedly have put the compensation, which the defendant should have paid, to use to generate more income. The plaintiff has been denied by the defendant the opportunity to generate interest on that amount since 2013 to date. It is in my view entitled to commercial rate of interest.

23. Having succeeded in its claim the plaintiff is entitled to the costs of this suit.

CONCLUSION

24. In the end the court enters judgment for the plaintiff as follows:

a. Judgment for ksh 6,109,132 plus interest at commercial rate from the date of filing suit until payment in full.

b. The plaintiff is awarded costs of the suit which shall be taxed at the lower court scale.

25. Before the plaintiff can execute the judgment hereof the plaintiff shall file and serve on the defendant a resolution ratifying the filing of this suit.

26. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 5TH DAY OF NOVEMBER 2019.

MARY KASANGO

JUDGE

Ruling Read *in* ***Open Court*** *in the presence of:*

Sophie..... **COURT ASSISTANT**

..... **FOR THE PLAINTIFF**

…… **FOR THE DEFENDANT**