



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & ADMIRALTY DIVISION**

**HCCC NO. 714 OF 2012**

**GULF AFRICAN BANK LIMITED.....PLAINTIFF**

**VERSUS**

**JUBILEE INSURANCE COMPANY**

**OF KENYA LIMITED.....DEFENDANT**

**JUDGMENT**

1. Gulf African Bank Ltd (Gulf or the Plaintiff) makes a claim of Khs.7,500,000/= against Jubilee Insurance Company of Kenya Limited (Jubilee or the Defendant).

2. At all times material to this Suit, Gulf and Jubilee had a relationship of Insured (or Assured) and Insurer. Although during the period, Gulf had taken out three Insurance Policies, two of those feature in the Dispute under discussion in this Suit. Policy number P/MSA/2525/2009/5891 was a Fidelity Guarantee Policy and was a cover for the periods 18<sup>th</sup> September 2009 to 31<sup>st</sup> December 2009 and 1<sup>st</sup> January 2010 to 31<sup>st</sup> December 2010. The second is Policy number P/MSA/4545/2009/5937 being a Comprehensive Crime Insurance Policy and covering the periods 18<sup>th</sup> September 2009 to 31<sup>st</sup> December 2009 and 1<sup>st</sup> January 2010 to 31<sup>st</sup> December 2010.

3. It is common ground that Gulf, vide a Claim dated 3<sup>rd</sup> November 2010, made a claim under the Fidelity Guarantee Policy in respect of a theft of cash amounting to Khs.22,881,153.10 on 29<sup>th</sup> October 2010 perpetrated by one of its employees Hussen Adnan Hussein (Adnan). Adnan was the Operations Manager of Gulf at its Lamu Branch. His name features in this decision from time to time for reasons that will be apparent shortly. That claim was settled and is not the controversy herein.

4. The claim by Gulf which is the subject of this Suit hinges on another loss of Kshs.7,500,000/= which happened sometime in December 2009 to January 2010 but discovered in December 2010. Crucial to note is that this incident of loss of Khs.7,500,000/= happened earlier than the loss of Khs.22,881,153.10 but was discovered later. For purposes of this decision, the loss of Khs.7,500,000/= is referred to as the first loss while that of Khs.22,881,163.10 as the second loss.

5. Gulf made a claim of the loss of Khs.7,500,000/= but Jubilee declined to settle it. The reasons for the refusal to settle were contained in an email dated 13<sup>th</sup> January 2012 of Isaac Kuria, a Claims Manager of Jubilee. This is what that email reads,

***“I hope you are well,***

***We have reviewed the claim afresh in line with our meeting held in our office in mid December 2011.***

***We wish to advise as follows:-***

- 1. That the incidence of this claim was discovered after the previous loss (discovered on 29.10.2010) by the same perpetrator.***
- 2. That the Fidelity Guarantee Policy cover was exhausted after payment of the initial claim upto the limit.***
- 3. That our fidelity guarantee policy did not provide for any reinstatement of loss. However even if it were provided, it could not be reinstated to cover a loss for the same perpetrator after paying the above loss.***
- 4. In view of the above, the Bankers Blanket Bond Policy would not take up the claim perpetrated by the same person. General***

Conditions 2 and 12 under the Bankers Blanket Bond Policy applies in the instance. That even if the claim was to be admitted the BBB Policy the loss was outside the discovery period of six months provided under the policy.

*We therefore regret the claim is inadmissible under the policy.*

*We thank you for your indulgence, the delay to reply to the issues raised were necessitated by a review of several documents and discussions with various relevant parties". (my emphasis)*

The Comprehensive Crime Insurance Policy is also known as The Bankers Blanket Policy.

6. Noteworthy is that General conditions 2 and 12 of the Comprehensive Crime Insurance Policy are invoked. As well is that the loss was allegedly outside the discovery period of Six months required by that Policy. However, the latter stance was subsequently abandoned by Jubilee. The stalemate persisted in the other respects and ended up in this Suit. The Defendant continues to rely on the two General conditions as reasons for not admitting the Claim.

7. The Court heard the evidence of three witnesses on behalf of the Plaintiff. They are Abdalla Salim (PW1), Edgar Mwandawiro (PW2) and Ben Shichenga (PW3). For Jubilee was Elizabeth Moraa (DW1). After the taking of evidence, Counsel for Parties filed their respective written submissions which were supplemented by some oral highlights. It is fairly clear to this Court that its duty is to review the relevant portions of that evidence and submissions so as to resolve the rather narrow issue of whether Jubilee were entitled to decline the claim under the General conditions 2 and 12 of the Comprehensive Crime Insurance Policy.

8. In doing so the Court frames the following issues (noting that parties were not able to agree on a common set of issues):-

**1. What is the legal effect of General conditions 2 and 12 of the Comprehensive Crime Insurance Policy?**

**2. Do these conditions relate to the Fidelity Guarantee Policy in any way?**

**3. Upon answering these questions, was the declined Claim in respect to a loss attributed to Adnan?**

**4. Special condition 2 reads as follows:-**

**Discovery – “This Policy applies to loss discovered by the Assured during the Policy period. Discovery occurs when the Assured becomes aware of facts which would cause a reasonable person to assume that a loss covered by the Policy has been or will be incurred, even though the exact amount or details of loss may not then be known. Notice to the Assured of an actual or potential claim by a third party which alleges that the Assured is liable under circumstances which, if true, would create a loss under this Policy constitutes such discovery”.**

The parties do not seem to have any difficulty in construing this Special Condition. And because it is plainly worded and without ambiguity, it presents no problem. There was therefore consensus that the loss of Khs.7,500,000/= which may have happened much earlier (between December 2009 to January 2010) was discovered in December 2010 during the subsistence of the Policy.

9. What about Special Condition 12. It reads:-

**“This Policy (and the Policy Period stated in the Schedule) shall terminate with or without the tender of unearned premium**

**1. Immediately in the event of the Underwriters refusing to continue cover following change in ownership or control of the business as set forth in General Condition 11 above or**

**2. Assured failing to report any consolidation, merger or change in ownership or control of the business or of the Assured as set forth in General Condition 11 above within the time required under General Condition 11 above.**

**3. Immediately as to any Employee of the Assured, as soon as the Assured or any partner, director or officer thereof not in collusion with such Employee shall have knowledge or information that such Employee has committed any dishonest or fraudulent act in the service of the Assured or otherwise, whether such act be committed before or after the date or employment by the Assured but without prejudice to any claim for loss of Property then in transit in the custody of such Employee before or after the date of employment by the Assured.**

**4. Upon written receipt by the Underwriters or a written request from the Assured to terminate this Policy.**

10. Sixty days after receipt by the Assured of notice in writing from the Underwriters of their decision to terminate this Policy. Such notice shall be deemed to be duly received in the course of post if sent by prepaid registered post properly addressed to the Head Office of the Assured.

**The Underwriters shall refund any unearned premium computed at short rate of the Annual premium if terminated by the Assured or pro rata of the Annual premium if terminated by the Underwriters or cancelled as provided in subparagraphs (i) and (iv) above”. (my emphasis)**

For purposes of this Dispute General Condition Sub-condition (ii) is relevant.

11. For a start, this Court accepts that the three Policies issued by Jubilee were distinct and stood alone and separate. One does not therefore construe one Policy by reference to another. So, Condition 12 (ii) must be understood as applying strictly to the circumstances of the Comprehensive Crime Insurance Policy and its interpretation can only be within the four corners of the Policy.

12. If I attempt to unpack clause 12(ii), I understand its highlights to be:-

- 1. There is an immediate termination of the Policy as to any employee of the Assured as soon as the Assured has knowledge or information that such employee has committed any dishonest or fraudulent Act in the service of the Assured or otherwise.**
- 2. The termination is not in respect to the entire Policy but as to the dishonest or fraudulent employee.**
- 3. Knowledge and information is in respect to a dishonest or fraudulent Act whether or not committed before or after the date of employment by the Assured.**
- 4. Termination does not extend to any Claim for loss of property in transit in the custody of such Employees before or after the date of employment by the Assured.**

13. It is the knowledge and information of dishonesty or fraud of the Employee by the Assured (or Partner, Director or Officer thereof) that terminates the Comprehensive Crime Policy. That is what is critical and has nothing to do with whether the dishonesty or fraud is in the context of other existing Policies. Indeed it would not matter that the Assured has not taken out other Policies. Thus the fulcrum of Jubilee's Defence is that in respect to Adnan the Comprehensive Crime Insurance Policy terminated when Gulf had Information of Adnan's dishonesty or fraudulent nature, never mind that the knowledge or information became available on 3<sup>rd</sup> November 2010 when Gulf lodged a claim under the Fidelity Guarantee Policy. The viability of that Defence has to rest on whether Adnan was responsible for the loss in the claim lodged under the Comprehensive Crime Insurance.

14. This Court turns its attention to the evidence that may unlock this decisive question. I begin by noting that Mr. Fraser for Jubilee was quick to submit that his Client did not lead any evidence on this Defence because Gulf's own evidence was conclusive. Is that so?

15. PW1 is the Managing Director of AMS Insurance Brokers (AMS). These are the Brokers for Gulf Bank. His evidence as to who may have been responsible for the loss was based on information he received from his Client (Gulf). This second hand information would be hearsay and is not admissible. It would therefore be unhelpful to discuss his evidence.

16. Ben Shichenga (PW3) held the position of Security Services Officer responsible for Security and Fraud Management and Investigation at Gulf. He investigated the loss of Khs.7,500,000/- and this is what he says in his written statement:-

**“Upon fixing Kes 30M on a fixed term deposit, investigation revealed that Adnan Hussein embarked on unlawful withdrawal of the balance Kes 7.5M from account 00330012107. All withdrawals were ordered by Adnan based on alleged telephone and email instructions from Debra to Salahaddin. Debra disputed the transactions and argued that she never gave such instructions to the Bank. Suleiman Salahaddin also disputed copies of emails attached to transaction vouchers which were printed by Adnan and handed over to tellers as express instructions to debit Debra's account. In all circumstances, Adnan Hussein used to sign for and collect cash on behalf of Debra Fay. Furthermore, Debra had not signed an indemnity with the bank to allow her transact her accounts based on email and telephone instructions.**

**Investigations pointed to Adnan Hussein as the main culprit who issued fake instructions that led to withdrawal of Kes 7.5M debited on Debra's account and converted the same to his own use. There was no evidence that Debra gave instructions or withdrew cash from her account and neither did the bank establish whether Adnan handed over the cash to her. By the time the fraud was discovered, Adnan Hussein had taken off in fear of arrest for another fraud he had committed in the branch (Lamu Branch). He is still at large.**

**I completed investigations and recommended the arrest of Adnan Hussein as the main suspect to face charges of stealing by servant in that he stole a total of Kes 7.5M from Gulf African Bank”.**

17. The witness also produced his Investigation Report of 14<sup>th</sup> December 2010. The overall tone of the Report was that the loss occurred because procedures were flouted. He then concludes:-

**“3.0 There is no doubt that Adnan gave instructions to tellers to carry out the disputed transactions. This is evident from the vouchers which he personally wrote, authorized and later checked at the close of business of each day.**

**3.1 Adnan flouted the GAB procedures regarding transaction of activities on fixed deposits.**

**3.2 Suleiman is expressly responsible for the questioned transactions because he was the Branch Manager at the time.**

**3.3. Suleiman contravened the procedures by transacting with a customer based on e-mail and telephone instructions while there was no indemnity signed by the customer exempting the bank from any adverse consequences arising from such transactions.**

3.4 There is no doubt that both Adnan and Suleiman were on duty during the period within which this transactions were done as evidenced by vouchers collected from the branch.

3.5 There was no evidence that the customer either issued instructions to break the Kes.37.5M fixed deposit, fix Kes. 30 million or even receive the alleged Kes 7.5 million from which was withdrawn from her account.

3.6 The letter written by Adnan to the customer acknowledging Kes.37.5 million fixed deposit was written on a forged Gulf African Bank letter head. This one reason why Debra Fay must come over and hand in the original letter which can be used as evidence to incriminate Adnan.

3.7. If indeed the customer did not give instructions, the Bank is at risk of losing Kes.7.5Mil in refunding the customer and the Bank has to revert to either insurance or responsible staff for recovery.

3.8. Despite Abdulhakim being deployed to cash, he is on one year Contract ending November 2010.

3.9 It is highly suspected that Suleiman could have been reporting on duty and then leaving the branch for business or personal missions without coming back to ensure the end of day close of business. This is one opportunity that Adnan took advantage to carry out the disputed transactions”.

In the end, he names Adnan as the prime suspect;

**“4.0 unless otherwise revealed by IT e-mails analysis report, this an internal fraud by Adnan. We recommend that the case should be referred to BFID for further investigations.**

**4.1 Owing to the fact that our prime suspect Adnan is still as large, Debra Fay from whose account the cash was withdrawn an also the principle complainant in this matter is required to formalize her complaint before the decision is reached to compensate her or otherwise. Her statement which should be obtained by BFID is crucial as the basis of her complaint. This binds her to any BFID case as a prosecution witness”. (my emphasis)**

18. In re-examination PW3 told Court that just as Adnan was responsible for the loss, so was Suleiman. He also emphasised to Court that his Report was not conclusive. In other words the findings were interim in nature.

19. Edgar Mwandawiro’s (PW2) testimony was that although Suleiman was responsible for the loss and should have been prosecuted, this was not possible because Adnan who would have to give evidence against him was at large. In cross-examination he said,

**“The person responsible for the 2<sup>nd</sup> claim is Mr. Suleiman. Adnan was involved in the 2<sup>nd</sup> Claim but was not responsible for the 2<sup>nd</sup> claim”.**

20. PW2 accepts that he reviewed the Report prepared by PW3 but in his oral testimony places more blame on Suleiman than Adnan. This is not consistent with the Report that leaves no doubt that Adnan was the main suspect. That was the conclusion reached at the end of the investigation. Indeed PW2S’ written statement is fairly emphatic:-

**“All the disputed transactions were ordered by Adnan Hussein (“Adnan”) based on alleged telephone instructions between Debra and Suleiman Salahaddin (“Suleiman”). Suleiman and Adnan were then based at our Lamu Branch as the Branch Manager and Operations Manager respectively.**

**Upon fixing Kes 30M on a fixed term deposit, investigation revealed that Adnan Hussein embarked on unlawful withdrawal of the balance Kes 7.5M from account 00330012107. All withdrawals were ordered by Adnan based on alleged telephone and email instructions from Debra to Salahaddin. Debra disputed the transactions and argued that she never gave such instructions to the Bank. Suleiman Salahaddin also disputed copies of emails attached to transaction vouchers which were printed by Adnan and handed over to tellers as express instructions to debit Debra’s account.....**

**Investigations pointed to Adnan as the main culprit who issued fake instructions that led to withdrawals of Kes.7.5 M from Debra’s account. There is also sufficient evidence to prove that Adnan collected a total of Kes.7.5M debited on Debra’s account and converted the same to his own use. There was no evidence that Debra gave instructions or withdrew cash from her account and neither did the bank establish whether Adnan handed over the cash to her. By the time the fraud was discovered, Adnan had taken off in fear of arrest for another fraud he had committed in Lamu Branch. He is still at large todate.**

**Our Security Officer, Ben Shichenga completed investigations and recommended the arrest of Adnan as the main suspect to face charges of Stealing by Servant in that he stole a total of Kes 7.5M from Gulf African Bank. The matter was reported to Central Bank Banking Fraud Investigations Unit – BFID.” (my emphasis)**

21. On an analysis of this evidence, Gulf through its employees, one being an Investigator blame Adnan as the main suspect for the fraud. The late attempt to place Criminal culpability on Suleiman is not consistent with the Investigation Report and does seem to be an afterthought. Yes, there was some blame on Procedural failures and lapses on the part of Suleiman that enabled Adnan steal the money but the Report impeaches Adnan as the thief. The recommendation of both PW2 and PW3 was that Adnan be arrested as the main suspect to face charges of Stealing by Servant ‘in that he stole a total of Khs.7.5 m from Gulf African Bank’. This was not a half-hearted recommendation. The language suggests that PW2 and PW3, through their investigations, had come to the conclusion that Adnan bore the Criminal

responsibility for the loss. That was the position of the Bank. It is a position which Gulf should not be allowed to resile from.

22. An attempt to blame the Police for not charging Suleiman is rather insincere because the Bank's Report and unequivocal position was that Adnan was the main suspect yet was at large and on the run.

23. There is however an Email of 21<sup>st</sup> December 2010 which forwarded the Report to Jubilee which reads;-

**“Dear Abdalla,**

**We spoke last week regarding the subject matter.**

**After finalizing our investigations, we have not been able to conclusively determine who was involved in the theft/fraud whether it is our customer- Debra Rodman trading as Man-rod Academy or our staff- former Branch Manager Suleiman Salahaddin or immediate former Acting Branch Manager – Hussein Adnan. Therefore, the Bank has decided to forward this case to BFID for independent investigations.**

**I have attached our confidential report on the case which you can go through to give you insights into this matter. This is for our internal use only.**

**We would like to lodge a claim to the Insurance Company for this loss as our customer is claiming that she was not the one who gave instructions to break the fixed deposit.**

**Please review and let us know under which policy cover we shall use to make the claim.**

**I will be away on leave from tomorrow (22/12) until 5<sup>th</sup> January but my colleagues Abubaker Mukira and Ben Shichenga will be in the office during this time to assist you with any queries.**

**Regards,**

**Edgar**

In this mail Gulf gives the impression that it is unsure as to the person who caused the loss yet that really contradicts the findings of the very report the mail was forwarding.

24. From the totality of the evidence, Gulf had taken the position that the Employee responsible for the loss of Ksh.7,500,000/= was Adnan. This position would have been serious ramification as to whether the Claim could be settled under the Comprehensive Crime Insurance Policy. This is because at least by 3<sup>rd</sup> November, 2010, Gulf had knowledge or information that Adnan had committed an Act of dishonesty or fraudulent in the loss of Khs.22,881,153.70 while in the service of the Bank.

25. Now it being common ground that the loss of Khs.7,500,000/= (being a loss for which the Comprehensive Insurance Policy would otherwise be applicable) was discovered on a date after 3<sup>rd</sup> November 2010, then Jubilee were entitled under the explicit terms of General Condition 12(ii) to treat the Policy as terminated in respect to Adnan. This Court is unable to fault Jubilee for declining to admit the Claim as there was no cover in respect to that particular Claim. Unfortunately for Gulf, it could not find shelter under the Fidelity Guarantee Policy because the Policy (in respect to Adnan) had been exhausted when the Claim of Khs.22,881,153.70 had been settled.

26. As I close, I have had to ponder as to the object of clause 12(ii) of The Comprehensive Crime Insurance Policy and whether it works out an injustice in situations like here where the Loss under the Policy happens earlier but is Discovered on a date after the Employee has already been implicated for a subsequent loss that occurred before the discovery.

27. One of the losses that the Comprehensive Crime Insurance Policy covers is the loss suffered as a result of the 'infidelity' of an Employee. Section A clause 1 describes the loss covered as follows:-

**“Loss resulting solely and directly from dishonest or fraudulent acts by Employees of the Assured committed with the manifest intent to cause the Assured to sustain such loss or to obtain a financial gain for themselves wherever committed and whether committed alone or in collusion with others, including loss of property through any such acts by Employees.”**

28. My reading of the Policy is that whilst contracting to take up such a loss, the Insurer does not accept responsibility when the Employee is already know to be dishonest or fraudulent by his Employer (the Assured). The risk (perhaps high risk) of taking up a loss that may be caused by an Employee who is already know to be dishonest or fraudulent is not envisaged under this particular Policy. That does not seem to be an unreasonable position for the Insurer to bargain for in the Contract. It is from this perspective that one should read condition 2 (on Discovery) with condition 12(ii), so that Jubilee does not have to meet a Claim in respect to an Employee who was responsible for an earlier loss but which for some reason was not discovered timeously. In this way the very objective of General condition 12(ii) is not negated simply because of the late Discovery of an early loss by the affected Employee.

29. The Policy may not have been the best bargain for Gulf, yet Gulf does not complain that it is unconscionable or against Public Policy or otherwise illegal. For that reason it is the Contract that this Court is duty bound to give effect.

30]. The Suit is without merit and is hereby dismissed with costs.

**Dated, Signed and Delivered in Court at Nairobi this 12<sup>th</sup> day of October, 2018.**

**F. TUIYOTT**

**JUDGE**

Present:-

Olbara for Defendant

N/a for Plaintiff

Nixon - Court Assistant