



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 1807 OF 1999

PANAFRICA INSURANCE.....PLAINTIFF

VERSUS

KENYA N ALLIANCE INSURANCE COMPANY LTD.....DEFENDANT

JUDGEMENT

1. The plaintiff and the defendant had a contract pursuant to which the defendant provided a policy of re-insurance to the plaintiff for the insurance cover which the plaintiff provided to the Kenya Ports Authority.
2. Whilst the policy of insurance was in force, an accident occurred, resulting in substantial damage to 2 bogies.
3. The goods in the said bogies were also substantially damaged.
4. As a consequence of the damage, **MEDITERRANEAN SHIPPING Co. SA** sued the **KENYA PORTS AUTHORITY**, at the High Court of Kenya, Mombasa. The case was **Hccc No. 628 of 1993**.
5. After a full trial, Wambilyangah J. delivered his judgement on 7th November 1995. The learned Judge held that the defendant had totally failed to discharge their duties. Consequently, the court granted the Kenya Ports Authority in the sum of US \$ 257,064.96, plus interest and the costs of the suit.
6. The plaintiff called upon the defendant to meet its obligations under the policy of re-insurance.
7. Before calling upon the defendant, the plaintiff paid to **KENYA PORTS AUTHORITY** the sum of Kshs. 8,030,000/-, for onward transmission to the **MEDITERRENEAN SHIPPING Co. SA**.
8. According to the plaintiff, the sum of Kshs. 8,030,000/- was inclusive of the interest, legal fees and auctioneers charges.
9. It is common ground that pursuant to the terms of the re-insurance Policy that the defendant would reimburse to the plaintiff 37.5% of the Policy Limit.
10. It is also common ground that the Policy Limit was Kshs. 6,000,000/-.
11. Notwithstanding that Policy Limit, the plaintiff paid to the Kenya Ports Authority the sum of Kshs. 8,030,000/-. In effect, the sum which the plaintiff paid to the Kenya Ports Authority exceeded the Policy Limit by Kshs. 2,030,000/-.
12. It is the plaintiff's case that the said extra sum was a necessary incidental towards safeguarding the interest of both the Kenya Ports Authority and also of the plaintiff. As far as the plaintiff was concerned, when the defendant undertook to cover the risk of the plaintiff, the costs and interest connected to the claims made, were incidental to the cover provided by the defendant.
13. In this case, the plaintiff had other reinsurers, namely Kenya Reinsurance Corporation and Africa Reinsurance Corporation. Both those reinsurers are said to have paid to the plaintiff, their full share of the claim, inclusive of legal fees, interest and auctioneers charges.

14. However, the defendant failed to pay the sum of Kshs. 761,250/-, which was said to constitute its share of the interest amount payable.
15. As interest and costs were deemed to be an integral part of the judgement which the court delivered against the plaintiff, it was the contention of the plaintiff that the defendant cannot be permitted to pay only a portion of the sums due under the judgement.
16. The basis of the plaintiff's submission was the following clause in the policy document;

“To cover the legal liability of the Assured as Stevedores and/or their assumed and/or contractual liability as Stevedores as hereinafter provided EXCEPT AAS MAY HEREINAFTER BE EXCLUDED AND to pay on behalf of the Assured any such sum or sums as they may be liable to pay as the result of an accident or occurrence in respect to or in connection with work and/or operations and/or activities and/or business of the assured as Stevedores....”

17. My understanding of the defendant's case is that it does not dispute its obligations to pay legal fees, costs or interest.
18. The defendant says that any such legal fees, auctioneer's charges and interest, when payable, must be within the set Policy Limit for which the defendant was liable.
19. As already pointed out, the Policy Limit was Kshs. 6,000,000/-. Out of that total sum, the defendant was liable to meet upto 37.5%.
20. The plaintiff submitted that even though the defendant's liability was limited, the

“liability extended to cover any other matters that were incidental to the Policy”

21. The plaintiff relied on the decision in **MACBETH & Co. LIMITED Vs. MARITIME INSURANCE Co. LIMITED [1908] 24 T.L.R 559**, to back up its claim for interest. In that case, it was held as follows;

“It was an ordinary practice in cases of this kind to allow interest from a date which would have given reasonable time for adjustment and payment if there had been no dispute as to liability. If no question of liability arises, interest may be allowed from the date of the claim”.

22. This court was told that the plaintiff's power to charge interest was, therefore, unquestionable.
23. The plaintiff's further contention was that if there were a controversy about, say dates of computation of interest or even the applicable rates of interest, such a controversy might have been understandable.
24. The plaintiff went on to say that;

“...a Policy does not bear interest as a matter of course from the time when the policy money becomes payable. Interest is only awarded as damages for the wrongful detention of money which ought to have been paid”.

25. In this case, the principal sum of Kshs. 761,250/- is the balance of the sums which the plaintiff deems to have been payable by the defendant, following the grant of the judgement in Mombasa Hccc No. 628 of 1993.
26. The claim is not in relation to interest which is payable to the plaintiff, arising from a separate substantive claim for which judgement had been granted in favour of the plaintiff.
27. Indeed, if the court was to find the defendant liable to pay that sum or any part of it, the plaintiff asks the court to order the defendant to pay interest on the sum awarded. It is in that respect that the interest, (if any is awarded), would be deemed to be “damages for the wrongful detention of money which ought to have been paid”.
28. That would explain why the plaintiff was asking the court to order the defendant to pay interest from the date when this suit was filed.
29. The plaintiff also submitted that the contract between it and the defendant was in respect to Marine Property.

30. Its position is that Marine Insurance Policies usually contain a “*suing and labouring clause*”, pursuant to which the engagement entered into is deemed to be supplementary to the contract of insurance.
31. Therefore, the plaintiff believes that it may recover the sum claimed on account of it being expenses which the plaintiff had properly incurred when it settled the decretal amount.
32. Finally, the plaintiff submitted that the defendant cannot duck its responsibility, by refusing to pay their portion of the incidentals.
33. It is clear that the plaintiff is basing its claim on the express terms of the contract between the parties.
34. The said contract had not yet been the subject matter of a court case between the parties. Therefore, until now, there is no judgement which has been pronounced in respect to the contract between the plaintiff and the defendant.
35. The case in respect to which there was a judgement, which was pronounced by Wambilyangah J. on 7th November 1995, was **MEDITERRENEAN SHIPPING Co. SA Vs KENYA PORTS AUTHORITY Hccc No. 628 of 1993**. Neither of the parties to that suit is a party to this suit. Therefore, the judgement in that suit cannot be executed in this suit.
36. The judgement in that suit gave rise to a compulsion directed at the defendant to pay the decretal amount.
37. However, the defendant in that case had taken out a policy of insurance, in respect to the kind of incident which gave rise to the suit against it.
38. It is on the basis of that policy of insurance that the plaintiff herein reimbursed the Kenya Ports Authority.
39. Pan Africa Insurance Company Limited reimbursed the Kenya Ports Authority on the basis of the policy of insurance which was in force.
40. Kenya Ports Authority did not have to sue the Pan Africa Insurance Company Limited.
41. As the said Pan Africa Insurance Company Limited was reinsured by the defendant, Kenyan Alliance Insurance Company Limited, (*together with 2 other companies*), the plaintiff expected the defendant to meet its obligations under the policy of reinsurance.
42. In principle, the defendant indicated a readiness to discharge its contractual obligations under the policy of re-insurance.
43. The obligation arose from the contract.
44. However, the amount of money which the defendant’s insured had been ordered to pay, arose from a judgement of the High Court.
45. The real question for determination is whether or not the defendant was obliged to pay to the plaintiff 37.5% of the money which the plaintiff had paid to the Kenya Ports Authority.
46. The defendant says that its obligation was to pay 37.5% of the Policy Limit; not of the amount which the plaintiff paid out.
47. But the plaintiff points out that the other 2 reinsurers paid their respective portions, calculated on the basis of the sums which the plaintiff paid out to the Kenya Ports Authority. I understand the plaintiff to be saying that the defendant should not, therefore, be treated any differently.
48. What the plaintiff has not demonstrated to the court is the basis upon which the other co-reinsurers made their payments. In other words, it has not been shown that the said reinsurers were compelled by courts, to make payment.
49. If there had been such a compulsion pursuant to a decision of the court, it would have been useful for the plaintiff to have shown this court that the contractual terms pursuant to which the courts made their decisions, were similar to the one in the contract in issue in this case.
50. I take note of the fact that whereas 37.5% of the Policy Limit was Kshs. 2,250,000/-, the defendant paid to the plaintiff the sum of Kshs. 2,568,750/-. That means that the defendant paid Kshs. 318,750/- more than the Policy Limit.
51. Having made that payment, the defendant says that any sum in excess of Kshs. 2,250,000/-, should be paid back by the plaintiff. However, there is no counter-claim in this case. Therefore, it is not the role of this court to give consideration to any claim by the defendant, for a refund.
52. The defendant paid money which it now says was in excess of its legal obligation; should it be told that that implies that it was well aware that its actual obligation exceeded the amount of Kshs. 2,250,000/-?
53. In my considered opinion, the liability of the defendant is to be determined by reference to the

- terms of the contract between the parties to this suit.
54. Secondly, it is an express term of the said contract that there was a Policy Limit of Kshs. 6,000,000/-.
55. Therefore, when the court gave a judgement whose value exceeded the Policy Limit, the amounts over and above the said Policy Limit were not recoverable from the reinsurers.
56. It was for the insured to settle the decretal amount.
57. But just because the insured (*Kenya Ports Authority*) paid the decretal amount, did not increase the extent to which its insurer or the reinsurers would be liable to reimburse the insured.
58. When a policy of insurance specifies a limit of the liability to be borne by the insurer, the said liability cannot be extended either because the insured has had to meet a liability exceeding the limit, or because the insurer may have remitted to the insured a sum exceeding the policy limit.
59. Claims in respect to legal fees, auctioneers costs, interest or any other incidentals, would have to fall within the Policy Limit, for the court to compel the insured to pay them. That means that when such incidentals were in excess of expressly stipulated Insurance Policy Limits, the court cannot compel the insured to pay them.
60. The courts only enforce the contracts which the parties had written. It is not the function of the courts to write or to re-write any terms of the contract between parties.
61. In the event, the plaintiff's claim fails, and is therefore dismissed with costs.

DATED, SIGNED and DELIVERED at NAIROBI this 7th day of April 2016.

FRED A. OCHIENG

JUDGE

Judgement read in open court in the presence of:

Maina for Miss Matu for the Plaintiff

Thuranira for Gichima for the Defendant

Collins Odhiambo – Court clerk.