



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
CORAM: F. MUGAMBI, J
CIVIL SUIT NO. E044 OF 2024

BETWEEN

QUICK MART LIMITED
PLAINTIFF

VERSUS

WELLS FARGO LIMITED
DEFENDANT

JUDGMENT

Background and introduction

1. The dispute before Court arises from a contractual relationship, as contained in the **Valuables in Transit and Service Level Agreement** dated 8th February 2021 (hereinafter the Agreement). Pursuant to the said agreement, the defendant undertook the responsibility of transporting the plaintiff's monies and other valuables from the plaintiff's various business outlets to its designated bank, Family Bank.

- 2.** The plaintiff avers that on or about the 4th and 5th days of November 2023, the defendant collected a total sum of Kshs. 94,918,750/= from its various outlets, which monies were, in the ordinary course of business, to be deposited at Family Bank. The plaintiff asserts that the said monies were unfortunately never deposited as required, and upon enquiry the defendant confirmed that the monies had been lost while in transit. The defendant promised the plaintiff that efforts were being undertaken to remedy the situation.
- 3.** As a consequence of the loss, the plaintiff states that it was compelled to secure a loan facility of Kshs. 95,000,000/= from Family Bank to bridge the sudden cash flow deficit. The plaintiff further contends that attempts to resolve the matter amicably with the defendant had proved futile, as the defendant had demonstrated no commitment to addressing the issue. The plaintiff maintained that it continued to suffer financial prejudice, including additional losses occasioned by the loan facility. It therefore took issue with the defendant

for breach of contract, arising from its failure to deliver the monies to the designated banker.

4. For these reasons, the plaintiff prays that this Honourable Court enters judgment against the defendant for the sum of Kshs. 94,918,750/= as special damages, together with interest thereon from 6th November 2023, costs of the suit, and interest on costs.
5. In support of its case, the plaintiff called one witness, **Simon Waiguru Macharia**, the Plaintiff's Chief Finance Officer who admitted that out of the total claim of Kshs 94,918,750/=, the defendants had paid the sum of Kshs. 80,000,000/= and that what was in issue was whether the defendant was liable to pay the balance of Kshs 14,918,750/= as well as the amount claimed for services rendered.
6. In opposition to the plaintiff's claim, the defendant filed an Amended Statement of Defence and Set-off dated 4th April 2024. At the outset, the defendant raised a preliminary objection, contending that the suit was premature for this Court's determination, in view of the contractual

provisions which stipulated mediation as the first avenue for dispute resolution.

- 7.** The defendant further avers that the monies in question were stolen while in transit, and attributes fault to the plaintiff for failing to procure an insurance cover to safeguard against such eventualities. In addition, the defendant maintains that its liability was contractually capped at Kshs. 80,000,000/=, pursuant to **Clause 4** of the Agreement, which expressly limited indemnity in the event of loss. On this basis, the defendant's case was that it could not indemnify the plaintiff for any sums exceeding the contractual limit.
- 8.** By way of set-off, the defendant contended that the plaintiff was indebted to it in the sum of Kshs. 15,738,747/= for services rendered as at 26th March 2024. The defendant therefore urges this Honourable Court to set off the said sum against any award that may be made in favour of the plaintiff. To fortify its position, the defendant called one witness, **Peter Wathers**, its General Manager.

Analysis and Determination

- 9.** Having considered the pleadings as well as the written submissions filed by the parties, the first preliminary issue that arises for determination is whether this suit is prematurely before the Court. The defendant contends that the parties had agreed to mediation as an initial forum for dispute resolution. This position is clearly confirmed in **Clause 9** of the Special Provisions to the Agreement and is not disputed by the plaintiff.
- 10.** It is trite that where parties have, by contract, stipulated a specific mechanism for dispute resolution, the Court is ordinarily bound to respect and give effect to such provisions, unless it is demonstrated that the mechanism has been exhausted or is incapable of yielding a resolution. Mediation, by its very nature, is a voluntary process that requires the concurrence and participation of both parties. The defendant has not shown that it invoked the mediation clause or took any steps to initiate the process. On the contrary, the record shows that upon being served with the Plaint, the defendant proceeded to file pleadings and participate in these proceedings.

11. In the circumstances, the defendant, by its conduct, acquiesced to the jurisdiction of this Court. The mere existence of a mediation clause in a commercial agreement does not, in and of itself, oust the jurisdiction of the Court, particularly where one party has elected to approach the Court and the other has not insisted on referral to mediation. Accordingly, the objection that the suit is premature is without merit.

12. Moving now to the substantive issues, the contractual relationship between the parties is not in dispute. Equally undisputed is the fact that the defendant collected a total sum of Kshs. 94,918,750/= from the plaintiff's various outlets, and that the said monies were stolen while under the defendant's custody. It is further acknowledged that the defendant paid to the plaintiff an amount of Kshs. 80,000,000/=, which it asserts represents the contractual limit of its liability under **Clause 4** of the Agreement. The central question is whether the defendant's liability is strictly confined to the contractual limit of Kshs. 80,000,000/=, or whether the defendant remains liable for the balance.

- 13.** It has long been held by the Courts, notably in **National Bank of Kenya Ltd V Pipeplastic Samkolit (K) Ltd & Another, [2001] KECA 362 (KLR)**, that a court of law cannot rewrite a contract between parties. The Court's duty is confined to enforcing the contract as executed, unless it is demonstrated that the same is illegal, unconscionable, or otherwise unenforceable. The principle is clear that parties are bound by the terms they freely negotiated, and the Court must refrain from importing obligations or liabilities not expressly provided therein.
- 14.** Similarly, in **Centurion Engineers & Builders Limited V Kenya Bureau of Standards, [2023] KECA 1289 (KLR)**, the Court of Appeal reaffirmed that the sanctity of contract is paramount, and that judicial intervention is limited to giving effect to the clear and express provisions agreed upon.
- 15.** The import of these decisions is that commercial certainty requires parties to be held to their bargains, and that contractual limitation clauses, where freely entered into, must be respected unless they offend public policy or statutory law.

Guided by these authorities, I am persuaded that the liability of the defendant must be construed strictly within the four corners of the Agreement of 8th February 2021.

- 16.** The plaintiff argues that each consignment that was collected by the defendant gave rise to a separate contractual transaction and as such, the liability limit of Kshs 80,000,000/= applied to each and every one of them. It relied on **Clause 1(e)** of the Agreement which provides that:

'The period of The Company's responsibility" shall mean, in relation to each consignment of valuables or individual part thereof, the period commencing the moment such consignment or individual part thereof is physically handed over to the representative of The Company at the relevant collection point and the receipt thereof is signified in writing by such representative and terminating the moment such consignment or individual part thereof is physically handed over to The Client's relevant representative at the relevant delivery point and the delivery thereof is

signified in writing by The Client's relevant representative'.

17. Clause 4(a) of the Agreement went further to stipulate the parameters of the defendant's liability in the following terms:

*'If, pursuant to the provisions set out herein and subject to the following sub-clauses set out hereunder, any liability on the part of the Company shall arise (whether under the express or implied terms of this Contract, or at Common Law, or in any other way) to the Client for any loss or damage of whatever nature directly arising out of, or connected with the provision of, or purported provision of, or failure in provision of the service covered by this Contract, **such liability shall be limited to the payment by the Company by way of damages of a sum which shall not in any circumstances exceed a total of Kenya Shillings 80,000,000 in respect of any loss that may occur during any one period of the Company's responsibility**'. (emphasis mine)*

- 18.** It is my considered opinion that the contractual provisions in question ought not to be construed in isolation. Rather, they must be read as an integrated whole, with due regard to the text and context of the Agreement in its entirety. Only through such a holistic construction can the true and overarching intention of the parties be discerned, and each clause thereby accorded its proper and harmonious efficacy.
- 19.** I note that the Agreement opens with a clause of considerable significance, which is expressly styled as an **'Important Notice'**. It states as follows:
- 'The conditions set out below determine the extent to which the liability of the company, its servants and agents is limited and/or excluded. The client is advised to ensure that it obtains insurance cover that provides it with adequate protection against any potential losses excluded or limited by this contract'.*** (emphasis mine)

20. The effect of the clause was to place the plaintiff on clear and unequivocal notice that the ensuing conditions are intended to delineate, and in certain respects curtail, the scope of liability attaching to the defendant company, its servants, and agents. In substance, therefore, the paragraph established the contractual framework within which liability was to be understood, and emphasized the parties' intention that limitation and exclusion of liability were to be treated as a central feature of the Agreement.

21. The first issue for determination is whether the parties intended to segregate compensation such that the maximum recoverable amount of Kshs. 80,000,000/= would apply to each individual transaction. The plaintiff has argued that because monies were collected from more than 150 outlets, each charged separately, the defendant's liability should be assessed per outlet or per collection.

22. Upon a proper construction of the Agreement, I am not persuaded that such was the intention. **Clause 4(a)** of the Agreement expressly stipulated that liability would be **a total of Kenya Shillings**

80,000,000/=, which clearly means that the parties intended to place an aggregate monetary ceiling to the defendant's liability.

- 23.** When this provision is read in conjunction with the qualifier that the indemnity would apply "**in respect of any loss**", and further confined to losses arising within "**any one period**" the textual and contextual import is unmistakable and it is that the parties did not contemplate a replication of the ceiling for each and every collection or transaction. Additionally, the inclusion of the words "**shall not in any circumstances exceed**" emphasizes the absolute nature of the limitation. Against this background, if indeed the parties had intended that the ceiling of Kshs. 80,000,000/= should apply afresh to each transaction, nothing would have been easier than to articulate that intention in express terms. The omission to do so is telling, particularly given that the parties contracted with full knowledge that collections would be undertaken across multiple branches.
- 24.** In fact, the Agreement also defined the 'period of the Company's responsibility' to mean:

'In relation to each consignment of valuables or individual part thereof, the period commencing the moment such consignment or individual part thereof is physically handed over to the representative of the Company at the relevant collection point'.

25. Even if I was wrong in my pronouncement on the interpretation of **Clause 4(a)**, the above definition is important in the circumstances of this case. It is not disputed that the monies collected from the plaintiff's various branches were consolidated into a single consignment, which was intended to be delivered as one whole. The loss occurred during the subsistence of that singular period of responsibility. Both PW1 and DW1 testified that the monies that were collected were transported together in a single consignment.

26. Had the collections been treated as separate consignments, perhaps a different conclusion might have been warranted. Since the period of liability for the single consignment was tethered to the moment of physical handover, and the loss

occurred within the same defined period of the defendant's responsibility, I would agree with the defendant's submission that that the contractual ceiling under **Clause 4(a)** must be construed as applying to the consignment in its entirety.

27. The defendant has urged this Court to adopt an interpretation of **Clause 4(a)** that is commercially viable and consistent with the principle that contracts should not be construed in a manner that renders them unconscionable or unreasonable. My interpretation of **Clause 4(a)** within the broader context of commercial practice and the principle of freedom of contract is that parties are at liberty to allocate risk as they deem fit. Limitation of liability clauses in an agreement such as the present one serves the legitimate purpose of ensuring that a carrier is not burdened with unlimited exposure for losses that may occur in transit.

28. The plaintiff, being a corporate entity just like the defendant, cannot be said to have been coerced or misled into accepting the terms. On the contrary, the plaintiff was fully aware of the liability cap and had the contractual option to procure insurance to

cover any excess risk beyond the agreed limit.

Clause 4(a) went further to stipulate that:

'The Client shall indemnify and keep indemnified The Company against any claims, demands or legal action arising from any third party where the loss that has occurred is over and above the liability limit set out in this clause'.

29. PW1 confirmed during cross examination that the plaintiff did not seek additional cover as provided for in the agreement. The plaintiff's failure to obtain such cover cannot be laid at the defendant's door as it reflected the plaintiff's own risk management choices. I am equally persuaded that **Clause 4(a)** cannot be impugned as unconscionable nor unreasonable. The loss, insofar as it exceeded the contractual cap, is properly attributable to the plaintiff's failure to mitigate its risk, rather than to any inequity in the Agreement itself.

30. The other issue for determination is whether the defendant is entitled to the sums of Kshs.15,738.00/= as claimed in the set-off. The

sums allegedly arose from unpaid monies for services rendered to the plaintiff by the defendant. The defendant bore the burden of proving its claim. There was however no evidence produced to support that claim and it must therefore fail.

Disposition

- i. Accordingly, and for the reasons set out above, I find that the defendant's liability was contractually capped at Kshs. 80,000,000/= in respect of the loss arising from the single consignment in question. It is admitted that this sum has already been paid to the plaintiff. The plaintiff's further claim for Kshs. 14,918,750/= is therefore dismissed to the extent that it exceeds the contractual limit.***
- ii. Equally, the defendant's claim for set-off in the sum of Kshs. 15,738/= is dismissed for want of proof.***
- iii. In the circumstances, since both parties have failed in their respective additional claims, I make no order as to costs.***

**DATED, SIGNED AND DELIVERED IN NAIROBI
THIS 23RD DAY OF MARCH 2026.**

**F. MUGAMBI
JUDGE**

Delivered in presence of:

Mr Mwendwa HB for Ms Kirimi for the defendant
Court Assistant: Lillian

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