Occidental Insurance Company Limited v Niti Distributors Limited (Civil Appeal 132 of 2019) [2025] KECA 74 (KLR) (24 January 2025) (Judgment)

Neutral citation: [2025] KECA 74 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 132 OF 2019

SG KAIRU, F TUIYOTT & GWN MACHARIA, JJA

JANUARY 24, 2025

BETWEEN

OCCIDENTAL INSURANCE COMPANY LIMITED ..... APPELLANT

AND

NITI DISTRIBUTORS LIMITED ..... RESPONDENT

(Being an appeal from the judgment and decree of the High Court of Kenya, Commercial & Tax Division at Milimani –Nairobi (Makau, J.) delivered on 7th February 2019 in High Court & Tax Division Case No. 396 of 2014)

JUDGMENT

1. On the night of 29th and 30th May 2013, there was a break in at the Godown of Niti Distributors Limited (Niti or the respondent) standing on L.R. No. 209/15662 (Godown No. 1) and property stolen. At the High Court, it was the case for Niti that the property stolen had a value of Kshs.23,013,842.00.

2. At the time of the theft, Niti had taken out a Burglary Policy, number OLG/BP/10/64640/09, with Occidental Insurance Company Limited (Occidental or the appellant) and had hoped tobe paid for the value of the stolen property but it was not to be as the insurer repudiated liability on the basis that the godown was not protected by a Burglar alarm installed by a professional security firm and kept in working order. This triggered the filing of the suit which has led to this appeal.

3. In holding in favour of Niti, Makau, J. held:

> "In the instant suit, the plaintiff having called evidence in support of existence of Burglar alarm protecting the premises and having produced document to that effect it discharged it (sic) burden and the burden shifted to the defence, who had alleged that the plaintiff had breached the terms of the policy document, in that it had failed to install a Burglary Alarm

back-up in the premises by failing to adduce evidence from the alleged investigator in respect of the status of the premises. In absence of such evidence, the defence remains a mere denial, that no alarm back-up system has been installed."

4. The learned trial judge entered judgment in favour of the insured in the sum of Kshs.23,013,842.00 with interest at court rates from the date of the filing of the suit until payment in full. Costs were also awarded to Niti.

5. The judgment aggrieved Occidental who rally this appeal under four headlines:

   i. That as there was an arbitration clause in the insurance policy, the matter ought to have been referred to arbitration and that the judge erred in holding that the matter had abated.

   ii. The trial judge erred in holding that Niti had proved that it had installed a burglary alarm system when it did not marshal evidence to that effect.

   iii. The respondent did not prove the claim for specific damages.

   iv. Last, that under the terms of the contract, the insurer was only liable to pay 25% of the claim and that the learned judge erred in not considering that provision of the policy.

6. The appellant submits that the suit had abated by virtue of an arbitration clause in the burglary policy that was executed between the parties. The policy had terms and conditions including limitation of actions under clause 14. The respondent ought to have had the liability claim dated 16th August 2013 by the appellant referred for arbitration within 12 months from the date of the said letter. Therefore, by failing to do so the respondent rendered the suit stale and the same had abated. As such, by the time the respondent instituted the suit in court on 15th September 2014, the claim was not maintainable by virtue of the limitation clause. However, the learned judge, while pronouncing himself on the issue of jurisdiction, held that theappellant had never pleaded the court's lack of jurisdiction and that no preliminary objection was raised during the hearing and that having participated fully in the proceedings without any objection, the appellant was estopped from doing so for the first time in its submissions. The appellant argues that the learned trial judge erred as jurisdiction being a matter of law, an objection can be raised at any stage and relies on the case of Tononoka Steels Ltd v The Eastern and Southern Africa Trade and Development Bank [2002] 2 EA. That similarly, clause 14 of the policy document imposed a 12 months' time limit within which the matter was to have been referred to arbitration. The case of Dhanjal Investments Limited v Kenindia Assurance Company Ltd [2018] eKLR is cited.

7. The appellant further contends that it was not in dispute that there was a condition precedent to the policy requiring the respondent's Godown to be secured by a burglar system. That it was a condition of the policy also that:

   a. The burglar alarm/electric fence be installed by a security firm.

   b. Such alarm(s) are inspected, maintained and kept in thorough working order by the said security firm under contract during the continuance of the policy.

8. In that event, the burden of proof of compliance with the said terms lay with the respondent. In purporting to discharge the burden, the respondent produced a letter dated 17th October 2013 which showed that Erro Holdings Ltd, the respondent's landlord, serviced and maintained an alarm. However, there was no mention of the alarm back up system being maintained and kept in good working condition as per the policy terms. In addition, the burglary policy was never issued on the basis of the letter of offer between the respondent and its landlord but on the strength of the information

filled by the respondent in the proposal form. It is further submitted that the term of the policy was that the alarm be installed by a security firm which the landlord was not. Furthermore, the alarm back up system was to be thoroughly maintained and kept in good working condition by the said security firm under contract; no such contract was adduced and there was no evidence that the alarm back up system was regularly maintained and in working condition at the time of the burglary. That in the absence of such, the respondent thus failed to discharge its initial burden of proof. It relies on the cases of Mbuthia Macharia v Anah Mutua Ndwiga & Another [2017] eKLR and BKN & Another v TNW [2019] eKLR which cited with approval the decision of the Supreme Court in Gatirau Peter Munya v Dickson Mwenda Kithinji & 3 Others [2014] eKLR.

9. Training its guns on the special damages awarded, appellant submits that the claim of Kshs.23,013,842 by the respondent was alleged to be the loss sum for the items stolen and was thus for special damages which the respondent needed to specifically prove. That in relying on the journal vouchers, summary of goods and summary of stock all presented by the respondent, the learned trial judge found that the respondent had specifically proved the stolen goods and all that was left for purposes of assessing the amount was to comply with the terms of policy. It was therefore erroneous for the learned trial judge to then hold that the appellant did not establish the quantum of the loss. In addition, it is asserted, the contents of the evidence of loss proved by the respondent was never explained and the said documents did not correspond with the particulars of goods said to have been stolen. Similarly, there was no proof of existence of the goods and there was no proof of the value of the goods stolen. Cases relied on are: Satwant Singh Dhangal & 2 Others t/a Paramount Hauliers v Kenya Revenue Authority [2017] eKLR, Amalo Company Limited v Smithkline & Beecham Consumer Health Care Ltd [2015] eKLR, and Viktar Maina Ngunjiri v Jack and Jill Supermarket Limited [2019] eKLR.

10. Further, in relying on clause 5(c) of the policy, the learned judge awarded the special damages. The appellant however submits that the said clause required the respondent to deliver a detailed statement availing proof of loss with an estimate value of the property insured. The respondent however failed to do so and was not only in breach of the policy but also failed to prove the special damages claimed.

11. Lastly, the appellant makes the argument that in the renewal notice, there was a term for first loss limit with respect to the Godown where the burglary took place and agreed at 25% of the sum assured of Kshs.50,000,000 which would amount to Kshs.12,500,000. It follows that for a first claim, the loss limit payable to the respondent was Kshs.12,500,000 and was subject to compliance with the terms of the contract. The learned trial judge is faulted for ordering the respondent to pay a sum in excess of the agreed first loss limit which was tantamount to rewriting the terms of the policy document contrary to the principles of interpretation of contracts.

12. The respondent, in response, submits that, on the issue of jurisdiction, the appellant relied on clause 14, yet the same ought to have been read together with clause 12 which provides:

> " 12. If any dispute shall arise as to whether the Company is liable under this Policy or as to the amount of its liability the matter shall if required by the Company be referred to the decision of two neutral persons as Arbitrators one of whom shall be named by each party or of an Umpire who shall be appointed by the said Arbitrators before entering on the reference; and in case the insured or his legal personal representatives shall neglect or refuse for the space of two calendar months after request in writing from the Company so to do to name an Arbitrator of the Company may proceed alone and no action or proceeding shall be brought or prosecuted on this Policy until the award of the Arbitrators, Arbitrator or Umpire has been first obtained. The costs of and connected

with the arbitration shall be in the discretion of the Arbitrators, Arbitrator or Umpire."

13. The respondent posits that the appellant did not raise any defence on the issue of jurisdiction and no application was filed pursuant to section 6 of the *Arbitration Act* to seek an order of stay of the proceedings before the High Court pending determination of the matter by an arbitral tribunal. It cited the case of Eunice Soko Mlagui v Suresh Parmar & 4 Others [2017] eKLR. Further, a reading of clause 14 together with clause 12, confirms that the responsibility of referring a dispute and appointing an arbitral tribunal is on both parties and any failure cannot be construed as against the respondent. The respondent's position is that, in so far as the said clause 14 seeks to oust the jurisdiction of the court or limit time within which the respondent could resort to court action, then the said clause amounts to an illegal contract for it goes contrary to *the Constitution* and the *Limitation of Actions Act*. It cites the case of Niazons (K) Limited v China Road & Bridges Corporation Kenya [2011] eKLR.

14. On the question whether the burden of proof was shifted to the appellant, the respondent argues that the learned trial judge correctly interpreted the law by making a finding that the evidential burden shifted to the appellant to prove its allegation that a Burglary Alarm back-up had been installed in the premises. It is on record that the respondent adduced evidence to the effect vide a letter dated 17th October 2013 and therefore shifting the burden to the appellant. In asserting that there was no burglary alarm back-up in place at the time of the theft, the appellant bore the evidential burden of proof which it failed to discharge. The respondent relied on the case of Johnson M. Mburugu v Fidelity Shield Insurance Company Ltd [2006] eKLR.

15. On whether the special damages of Kshs. 23,018,842 were proved, the respondent recalls that PW1, in support of the evidence of loss, produced books showing purchases of stock, stock movement and delivery of the goods as follows:

    a. Copies of stock journal vouchers for the period 12th January 2013 to 30th May 2013 showing movement of goods/stock from the warehouse/Godown which warehouse is named WH-Ghathika to the Head Office (HO).

    b. Summary of goods and their respective cost/price per unit which were held at the Godown between 1st January 2013 and 3rd June 2013.

    c. Summary of the stock that came in and stock that went out between 1st January 2013 and 3rd June 2013.

    d. Invoices and Delivery Notes for goods that had been imported by the respondent

    That the evidence proved the particulars and costs of the goods stolen as pleaded under paragraph 5 of the plaint.

16. The respondent further submits that, for purposes of assessing the amount payable following theft or damage, paragraph *2* and clause 9(1) of the policy document are relied upon. The point sought to be made by the respondent is that the documents listed above satisfy the said terms of the policy. The appellant however having established that that there was breach of the conditions of the policy document, was not bothered to establish the quantum of the loss by inspecting the books.

17. Lastly, on the issue of the first limit loss, the respondent contends that the sum insured was Kshs.264 million. Equally, the Schedule to the policy provided the sum insured as Kshs.264 million with the first loss sum insured as being Kshs.76,500,000. That upon lapse of the policy, the same was renewed for a further 12 months and the terms under the Schedule provided that the sum insured as Kshs.286 million with the first loss sum insured being given as Kshs.98,500,000. We are told that the total sum

insured is based on the 5 different premises in which the goods were held or stored. In respect to the subject matter of the suit,the sum insured was Kshs.50,000,000 on account of the goods stored in the premises. It being so, the claim of Kshs.23,013,842 was within the limit of the sum insured for the premises and within the first loss sum limit of Kshs.98,500,000. The respondent contends that it is a wrong interpretation of the contractual documents for the appellant to seek to rely on a policy renewal advice which seems to break down the first loss sum insured into seven items. Therefore, the same is not a contractual document but advice to the respondent to renew the policy. Secondly, having contradicted the schedule, the contents of the schedule take precedence because the schedule is the constitutive document.

18. The role of the Court in a first appeal is to re-evaluate the evidence afresh and to draw our own conclusion having regard to the fact that, unlike the trial court, we did not see or hear the witnesses testify. This position was stated in the case of Selle & Another vs. Associated Motor Boat Company Ltd. & Others [1968] EA 123 as follows:

> "I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled.
>
> Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Ali Mohamed Sholan (1955) 22 EACA 210)."

19. Clause 14 of the policy reads:

> "If the company shall disclaim liability to the insured for any claim hereunder and such claim shall not within twelve calendar months the date of such disclaimer have been referred to arbitration under the provisions herein contained and no notice of action shall have been received by the Company from the insured within the said period of twelve calendar months then the claim shall for all purposes be deemed to have been abandoned and shall not thereafter be recoverable hereunder."

20. The insurer raises two issues regarding the clause: that as the appellant disclaimed liability on 16th August, 2013, failure to have the suit filed within 12 months of that date rendered the suit stale; and second, the court lacked jurisdiction to hear the matter. On the question of jurisdiction, a complete answer to the appellant's argument is that there was express admission of jurisdiction in paragraph 11 of the statement of defence and the insurer cannot be permitted to resile from it and we endorse the following holding by the learned trial judge;

> "I have very carefully perused the defendant's defence, witness statements, and issues for determination and it is clear that the issue of the court's lack of jurisdiction to determine this matter has not been raised. The court's jurisdiction has not been challenged in the defendant's pleadings. The issue of existence of arbitration clause is only raised for the first time in the defendant's submissions and as such I find the same has not been pleaded and the

defendant having freely and voluntarily taken part in the hearing of this suit, without any objection or filing a preliminary objection or raising the issue of existence of an arbitration clause is stopped from raising the issue for the first time in its submission."

21. Regarding the limitation of time imposed by clause 14, this is akin to a plea taken by a defendant that an action is time barred under the *Limitation of Actions Act* which is a defence to be raised by the party who seeks to draw from it. (See Order 2 Rule 4 of the Civil Procedure Rules). Yet if not pleaded, like here, then it is taken to have been waived. See the decision in American case of American Nat. Bank v. Federal Dep. Ins. Co., 710 F.2d 1528 (11th Cir. 1983) where the Court of Appeal Eleventh Circuit in Florida found:

> "In any case, we need not consider these points since SFC waived its right to advance the statute of limitations defense by its failure to assert this affirmative defense in any pleading filed below in compliance with Fed.R.Civ.P. 8(c). Jones v. Miles, 656 F.2d 103, 107 n. 7 (5th Cir., Unit B, 1981) ("an affirmative defense that is not asserted in a responsive pleading is generally deemed waived."); Funding Systems Leasing Corp. v. Pugh, 530 F.2d 91, 95 (5th Cir. 1976) ("we look to the clearer principle embodied in Fed.R.Civ.P. 8(c) that affirmative defenses must be set forth in a responsive pleading or be deemed waived.

22. Not dissimilar is the Supreme Court in Mississippi in Pruitt by and Through Brooks v. Sargent (2022) No. 2021-CA-00511- SCT which opined that:

> " We have stopped short of holding that failure to plead operates strictly as a waiver in all circumstances, describing it as a "factor" to consider if compelling policy considerations are present to permit the defense to be asserted late. Id. at 1033. Yet we have consistently enforced the general rule that affirmative defenses must be pled adequately and timely pursued. See Horton, 926 So. 2d 167 (affirmative defense of arbitration waived through defendant's active participation in litigation for eight months, even though defense was initially pled); Woodard v. Miller, 326 So. 3d 439, 450 (Miss. 2021) (affirmative defense of release and waiver were waived even though "generically asserted" in answer).....
>
> .... We find that the defendants waived the statute of limitations defense by failing to plead it in accordance with Mississippi Rule of Civil Procedure 8(c) and without reasonable explanation for that failure. Because we find the defense was waived, we do not reach the question of whether the minors' saving statute continues to operate when a case filed on behalf of a minor is dismissed for reasons other than the merits."

23. In repudiating the claim, the insurer invoked the provisions of the Burglar Alarm/Electric Fence clause which reads:

> " It is a condition of this policy that the premises are protected by a Burglar Alarm/Electric Fence installed by a professional security firm and that such Alarm/Electric Fence are inspected, maintained and kept in thorough working order by the said security firm under contract during the continuance of this policy and that the Alarm/Electric Fence are always set before the premises are closed against customers and callers and that the said security and the company be informed immediately if any defect be discovered. It is also a condition that if alarm comes on, the insured shall immediately arrange to open the premises for physical checkup if burglars/thieves are hiding there. Violation of above shall make insurer free from liabilities."

24. Liability was disclaimed under this clause prior to the filing of the suit and maintained in the course of the proceedings. We think that the insurer, having positively asserted breach of the provisions of the clause bore a duty of proving the breach oncethe insured had led some evidence that there was no breach. Giving evidence on behalf of the insured, Mr. Manish Shah (PW1), its finance director, produced a letter of 17th October 2013 from the Landlord confirming that the insured premises were protected 'both day and night with electric fence which is regularly served, and an alarm backed services'. In addition to that letter, the insurer produced a letter of offer dated 1st March 2012 in regard to the lease of the godown occupied by Niti which indicated that part of the services provided by the landlord was security including alarm back-up.

25. There was sufficient evidence for the evidential burden to shift to the insurer to prove the positive assertion it had made of breach. This shift in responsibility is explained in Mbuthia Macharia v Annah Mutua Ndwiga & another [2017] eKLR as follows:

> "The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence."

26. So what evidence, if any, did the insurer provide? In its defence Occidental produced a letter dated 6th June 2013 from Akshar Team Security limited in which the security company recommends for installation of alarm system and back-up services in the subject premises of Niti. When asked about this letter PW1 responded:

> "I never saw the letter. I am not aware of any report from the company which purported to be the report."

27. To be noted is that the author of that letter, just as the author of the letter produced by Niti to which we alluded to earlier, was not called to testify.

28. In a bid to prove the breach Bernard Ayuko (DW1), a legal and claims manager with Occidental, testified through his written statement:

> "Following the reports of the break in, the defendant instructed Mclarens Young International to investigate the claim.
>
> The defendant was advised by Mclarens Young International that there was no alarm on the premises insured namely Godown 1.
>
> Based on the information received from Mclarens Young International the defendant formed the opinion that there was a breach of the condition of the policy requiring a burglar alarm protecting the specific premises insured namely Godown 1."

29. In that testimony is the important information that the basis of repudiation of liability was the information received from Mclarens Young International. Surprising, the information itself was not produced before trial Court nor did the appellant find it necessary to call the maker as a witness. The very basis for the repudiation was not part of the defence evidence and it is little wonder that the learned trial judge concluded that without that evidence, the defence was a mere denial. It is not a conclusion that can be faulted.

30. We now turn to consider the last two grievances, both of which touch damages and are connected.

31. We start by observing that the damages claimed by Niti were in the nature of special damages and has been said time without number, once specifically pleaded, special damages ought to be specifically proved. Important in this matrix is the degree of certainty in which special damages must be proved. In this regard, this Court in Gulthamed Mohamedali Jivanji t/ a Jivanji Agencies v Sanyo Electrical Company Ltd [2003] eKLR relying on the unreported case of Coast Bus Service vs Murunga & Others Nairobi *CA No. 192 of 1992* (UR) stated as

follows:

> "Bearing those principles in mind, we have stated above that we are persuaded that paragraph 8 of the plaint pleaded special damages. The quarrel was that they were not particularized before proof thereof was offered. But the degree of certainty and particularity depends on the circumstances and the nature of the acts complained of. This Court in CA 192/92 Coast Bus Service Ltd v Sisco E Murunga Ndanyi & 2 others (UR) has this to say:-
>
> "It is now trite law that special damages must first be pleaded and then strictly proved. There is a long line of authorities to that effect and if any were required, we would cite those of Kampala City Council v Nakaye [1972] EA 446, Ouma v Nairobi City Council [1976] KLR 297 and the latest decision of this Court on this point which appears to be Eldama Ravine Distributors Ltd and Another v Samson Kipruto Chebon, Civil Appeal No 22 of 1991 (unreported). In the latest case, Cockar, JA who dealt with the issue of special damages said in his judgment:-
>
> "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] KLR 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 from Bowen, LJ's judgment on pages 532, 533 in Ratcliffe v Evans (1892) 2 QB 524, an English leading case of pleading and proof of damage:
>
> 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 particularly 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. At the trial, it was proposed by Niti, accepted by the trial judge and reiterated before us that for purposes of assessing the amount payable, we should refer to paragraph 2 of the policy document which reads:

> " Now this policy witnesseth that if at any time during the said period or during any other period to which the Company may accept payment for the renewal of this Policy:-
>
> a. The Property described in the Schedule hereto or any part thereof shall be lost destroyed or damaged by Theft following upon an actual forcible and violent breaking into or out of the premises or any attempt thereat.

b. Any damage falling to be borne by the insured shall be done to the Premises described in the Schedule hereto following upon or occasioned by an actual forcible and violent entry of the Premises or any attempt thereat by the person or persons committing or attempting to commit such theft

Then the Company will subject to the terms exceptions and conditions contained herein or endorsed hereon pay or make good to the Insured such loss to the extent of the intrinsic value of the property so lost or such damage to the amount so sustained. Provided that the liability of the Company shall in no case exceed in respect of each item the sum expressed in the Schedule hereto to be insured thereon or in the whole the total sum insured hereby."

That further Clause 9(1)

" Notwithstanding anything stated to the contrary in Condition 5 of this policy, it is hereby understood that no claim will be admitted unless books showing all purchases of goods for stock and particular of articles or goods, manufactured or processed, and of all goods or stock or otherwise disposed of shall have been duly and correctly kept and available to the Company for inspection at all times."

33. Poring over the documents that were produced by Niti in support of the claim for special damages we find this category of documents: copies of stock journal vouchers; delivery notes; invoices; and what is headed 'Godown Summary'. The delivery notes show goods delivered from third party suppliers, namely Redington, showing delivery of certain goods on various dates between 9th January 2012 and 25th February 2013. The stock journal vouchers show movement of goods from a warehouse known as Wh-Ghathika to the warehouse where the theft occurred. These show movement of goods and stocks on various dates spread from 12th January 2013 to 30th May 2013. What the delivery notes and stock journals show is goods received on various dates at the warehouse which suffered the break-in. They are important in part establishing one aspect of the claim; that at one point or other goods were received at the warehouse. The invoices produced are just as crucial as they give prices of the certain goods and perhaps a ballpark of value.

34. What was suggested by Niti, no less, to be critical in proving its claim for special damages was the 'Godown Summary'. It was contended by Niti that it showed the summary of goods held at the Godown between 1st January 2013 and 3rd June 2013. It also shows the cost/price per unit.

35. In submissions before, us Niti invited us thus:

" We wish to take the court through the documentary evidence as follows:-

iii) At pages 55 to 58 is shown a summary of the stock that came in (see the word inwards) and stock that went out (see the word outwards) between 1st January 2013 and 3rd June 2013 (this is the next date immediately after the theft). We invite the court to read the said document vis-à-vis the particulars of the items that were stolen as they appear at paragraph 5 of the plaint. For instance, see page 55 and note corresponding particulars of item number one (H.P. Desktop 600B) of paragraph 5 of the plaint as follows: Inwards Quantity is 800 Nos with a rate of Kshs.24,764.40. Outwards Quantity is 339 Nos. while the Closing Balance gives a Quantity of 461 Nos at a rate of Kshs.24,762.40 giving a total of Kshs.11,415,465 as the Value. The same page 55 gives the particulars of H.P. Desktop 8300 series and H.P. Desktop 3500. At page 56

the particulars of H.P. TFT 18.5" (250 and 30 units) and H.P TFT 20" are given. (emphasis ours) "

36. From a purely common-sense point of view, so as to establish the goods stolen, one would have to know the goods in the warehouse just before the theft happened and those just after the theft. Both at trial and before us, Niti placed much reliance on the 'Godown Summary' to prove this point. Yet, it is a summary of Goods from 1st January 2013, five months before the theft. It does not give a summary of the stock on specific dates between 1st January 2013 and the day after the theft. Put differently, its efficacy in establishing what was stolen is severely weakened because we do not now the stock held at the Godown just before the theft. But we think that there are other documents that would have brought greater certainty to the claim and we must return to Clause 9(1) of the policy.

37. For its importance to the matter at hand, we reproduce it verbatim:

> "9
>
> (1) Notwithstanding anything stated to the contrary in Condition 5 of this policy, it is hereby understood that no claim will be admitted unless books showing all purchases of goods for stock and particular of articles or goods, manufactured or processed, and of all goods or stock or otherwise disposed of shall have been duly and correctly kept and available to the Company for inspection at all times."

38. Alluding to the documents it produced and relating them to the above clause, Niti in the submissions before us, contends that the "documents at paragraph 37 to 79 of the record satisfy the above terms of the policy". It is an acceptance by Niti that the task of keeping of the Books set out in Clause 9(1) is not onerous and is a reasonable expectation of it as the insured. One of the books required by the clause to be kept was a book showing "goods or stock or otherwise disposed of". No such book or books was or were produced before the trial court. Nor was the court told whether or not they indeed kept. Had such books been kept and produced then, alongside the delivery notes, invoices and the stock journal, the stock held in the warehouse just before the theft could have been easily established. We are afraid, and so hold, that the summary of stock prepared after the theft, covering a period of 6 months and without entry as to the stock at the close of business on 29th May 2013 could not be relied on to specifically prove the claim for special damages in the circumstances of this case.

39. Further, we are unable to endorse the holding by the trial judge:

> " Having taken the position that there was a breach of the conditions of policy document, the defendant does not seem to have bothered to establish the quantum by inspecting the books."

40. A repudiation had been made by the insurer and it is the insured who moved the court with a claim. The duty of proving of quantum of loss was upon the insured who had the privilege of keeping the books upon which it could, with the degree of certainty required by the facts of the case, prove the special damages. We think that the insured failed in that duty.

41. Having reached a conclusion that special damages was not proved, it is moot for us to consider whether or not the insurer was liable to pay the entire claim or just 25% of it.

42. The upshot is that the appeal is hereby allowed and the judgment of the High Court dated 7th February 2019 set aside. The respondent's claim at the High Court is dismissed with costs to the appellant. Regarding the costs in the appeal, the appellant shall only have half costs as the success of the appeal was only based on one limb of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JANUARY 2025.

S. GATEMBU KAIRU, FCIArb.

.....

JUDGE OF APPEAL

F. TUIYOTT

.....

JUDGE OF APPEAL

F. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original,

Signed

DEPUTY REGISTRAR