IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO. 86 OF 2009

(CORAM: NAMBUYE, KARANJA & KIAGE JJ.A)

BETWEEN

NZOIA SUGAR COMPANY LIMITED ………………………………..APPELLANT

AND

CAPITAL INSURANCE BROKERS LIMITED ……………………. RESPONDENT

(*Appeal from the judgment of the High Court of Kenya at Nairobi (G.B.M. Kariuki, J.)*

dated 31st May, 2006

in

HCCC NO. 671 of 1999)

****

JUDGMENT OF THE COURT

This appeal is against the judgment of the High Court (G.B.M Kariuki J, as he then was) delivered on 31.5.06 by which the appellant was ordered to pay the respondent various sums of money including Ksh. 14,515,067.50 unpaid premiums and commissions plus interest thereon; Ksh. 5,906,375.95 being penalties and further penalties as may be demanded by the Commissioner of Insurance and Costs.

The memorandum of appeal filed on behalf of the appellant raises a number of complaints against that judgment that may be summarized as follows;

a. the commissions allegedly owed by the appellant were not proved
b. the respondent did not prove obligation and fact of having paid premiums on the appellant's behalf
c. there was no proof that the respondent was obligated to and did pay penalties on the appellant's behalf
d. the claims for premiums and penalties were premature speculative and anticipatory the respondent not having paid them
e. The claims were legally in the nature of special damages unproved.

The background to the litigation is that by letters written in 1997 and 1998, the appellant appointed the respondent as its insurance broker in respect of several classes of insurance. The respondent duly took out

and arranged for insurance covers for the appellant with a number of underwriters at premiums agreed to be paid by the appellant. This the appellant did but soon fell into arrears which the respondent demanded but were not fully addressed.

In October 1998, in what the respondent called a breach of the agreement between the parties and "a violation of the prevailing practice, custom and trade of the insurance industry", the appellant entered into an agreement with Kenindia Insurance Company (Kenindia) the lead underwriter, under which the appellant started making part-payment of the outstanding premiums directly to Kenindia. The respondent contended that the appellant's unilateral and arbitrary action of dealing directly with Kenindia left the entitlements of the other underwriters unaddressed and the respondent exposed to its detriment for any liability to those underwriters.

The respondent demanded from the appellant some Ksh. 14,515,067 being the total outstanding premiums due for insurance policies effected plus a penalty charge of 5% per month with effect from 1st January 1999. The sum not being paid, the respondent filed a statement of claim for the same dated 18.3.99.

In answer to the respondent's suit, the appellant filed a statement of defence dated 27.5.99 by which it denied the respondents claim; alleged that the respondent was holding some Ksh. 2,252,896 paid in excess of what should have been paid and claimed full payment of outstanding premiums. The appellant also averred that the respondent's claim for penalties was ill-founded and had no standing, cause of action or justifiable claim on statutory penalties it had not in fact paid to form a basis for indemnification. On a proper computation, the appellant asserted, and on the assumption that premiums payments had been applied to premiums and penalties, the combined claims would not exceed Ksh. 5,906,375.95. It finally averred that it had paid some Ksh. 4,055,904 to Kenindia from which the respondent and other insurers should have recovered any commission and premiums due to them respectively.

The respondent on 15.6.99 filed a reply to the appellant's defence by which it reiterated its statement of claim and denied the averments in the statement of defence.

Lists and bundles of documents were filed by the parties and in time the matter proceeded to full hearing during which the respondent called one and the appellant two witnesses whose evidence is on record.

As a first appellate court over a judgment of the High Court, our power is spelt out in **Rule 29(1) (a)** as one of re-appraising the evidence and drawing our own inferences of fact. It means we proceed as if we are re-hearing the case but on the basis of the evidence and material that is captured on the record. With that power comes an obligation about which we have expressed ourselves in a long line of authorities. In the recent case of **<u>SUSAN MUNYI Vs. KESHAR SHIANI</u>** [2013]eKLR (NRB CIV. APPEAL NO. 38 OF 2002) for instance, we put it thus;

> ***"As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions.***
>
> ***In undertaking this task, however, we always bear in mind that unlike the trial court which had the advantage of hearing and observing the witnesses, we make our conclusions from the evidence as captured in the cold letter of the record. We therefore operate under a decided handicap as there is much to be gleaned from the demeanor and nuanced communication of a live witness that is inevitably unavailable, indeed lost, on the record. For precisely this common sense reason, an appeal court must accord due respect to the factual findings of the trial court and will be circumspect and slow to disturb them***."

This was but a modern echo of what first appellate courts in the common law tradition have done for over a century. In **<u>COGHLAN Vs. CUMBERLAND</u>** [1898]1 CH 704, the court had expressed the duty as follows;

> ***"….the Court of Appeal has to bear in mind that its duty is to re-hear the case, and the Court must reconsider the material before the Judge with such other material as it may have decided to admit. The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it and not shrinking from over-ruling it if on full consideration the Court comes to the conclusion that the judgment is wrong. When, as often happens much turns on the relative credibility of witnesses who have been examined and cross-examined before the Judge, the Court is sensible of the great advantage he has had in seeing and hearing them. It is often very difficult to estimate correctly the relative credibility of a witness from written depositions and when the question arises which witness is to be believed rather than another, and that question turns on the manner and demeanor of a witness the Court of Appeal always is and must be guided by the impression made on the Judge who saw the witness. But there may obviously be other circumstances quite apart from manner and demeanor which may show that a statement is credible or not, and these circumstances may warrant the Court in differing from the Judge even on a question of fact turning on the credibility of witnesses whom, the Court has not seen."***

We are enjoined to be slow to disturb the findings and conclusions of the trial court. Those findings are not sacrosanct however and we will not hesitate to disagree and reverse such findings in appropriate cases or, as was stated in **MAKUBE Vs. NYAMIRO** [1983] KLR 403;

> **" … a Court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did."**

The appeal before us was argued by Mrs. Wambugu, learned counsel appearing with Miss P. Olotch and Mr. Ashitiva Mandale for the appellant and opposed by Mr. Athuok learned counsel appearing with Mr. Gatheru Gathemia for the respondent. The appellant first complains that the learned Judge erred in finding that the appellant owed and proceeded to award the respondent commissions yet the respondent did not prove or demonstrate that it lost commissions and if so how much on account of the appellant's default. The judgment of the learned Judge is quite categorical that the respondent was awarded the sum of Ksh. 14,515,665.50 "towards unpaid premiums and commissions." In the body of the judgment the learned Judge had observed that **"the averments in the plaint [did] not specify what sum represent[ed] the premiums and what sum represent[ed] commissions."**

With respect to the learned Judge, it seems clear to us that he fell into error when he introduced commissions into his assessment of the matter before him and then proceeded to make an award on that item. We have anxiously perused the plaint as well as the reply to defence and nowhere did the respondent make mention of commissions. At paragraph 12 of the plaint it pleaded its claim thus;

> ***"The plaintiff's claim against the defendant is for the sum of Kshs. 14,515,067.00 being the total outstanding premiums due from the defendant for insurance policies effected plus the statutory 5% per month penalty which the said outstanding premiums attract under the Insurance Act until payment in full."***

It is trite law that in an adversarial system, parties are bound by their pleadings. It has to be so in order to avoid the possibility of unfair surprise or trial by ambush. What a party pleads is what his opponent or opposite party responds to and it would be imprudent were a court to introduce at the judgment stage an issue that the parties did not place before it by way of pleadings. It has indeed been stated, with justification we think, that pleadings bind not only the parties but the court as well. In the article titled the *Present Importance of Pleadings*, appearing in Current Issues of Law (1960) Sir Jack Jacob stated;

> ***"As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings…for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or***

fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice….

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called 'Any Other Business' in the sense that points other than those specific may be raised without notice."

In so far as the learned Judge introduced commissions into a claim that was exclusively for premiums and penalties due, we find and hold that he fell into error and therefore allow ground 1 in the memorandum of appeal.

Still on that sum of Ksh. 14,515,067 it is the appellant's contention that the learned Judge fell into error in finding that it owed premiums constituting that sum without proof by the respondent that it was obligated to and did pay the same on the appellant's behalf. Even though the learned Judge noted the want of specificity and clarity as to the composition of the sums that were claimed by the respondent, he went on to hold that the respondent had showed to his satisfaction that the appellant owed arrears of premiums before stating, in the next paragraph;

"After carefully perusing the documents filed by the parties and considering the evidence adduced by them, I think the claim for the unpaid premiums and commissions totaling to Ksh. 14,515,065.50 has been established on the balance of probabilities. But as it has not been shown what sum belongs to premiums and what sum belongs to penalties…."

On our own perusal and consideration of the evidence and the entire record, we come to the conclusion that the respondent's case on premiums was so mired in uncertainty and appeared so speculative that it could not form a firm or secure basis upon which the learned Judge could properly find as he did.

The foundation of the respondent's claim for outstanding premiums lies in paragraphs 9 to 11 of its plaint as follows;

"9. The plaintiff further avers that in October, 1998, the defendant, in breach of its agreement with the plaintiff and in total violation of the prevailing practice, custom and trade in the insurance industry, started making part payments of the outstanding premiums directly to the lead underwriter, Kenindia Assurance Company, purportedly as remittances for the most recent and current premiums while the previous premiums for prior years were outstanding thus attempting to avoid paying the old premiums.

10. The plaintiff avers that the defendant unilaterally and arbitrarily paid some of the current premiums of Kenindia Assurance without any regard to amounts due to other insurers and the plaintiff's commissions. The defendant's failure to pay the total outstanding premiums has not exposed the plaintiff to liability to the underwriters.

11. The plaintiff avers that under the provisions of the Insurance Act, the plaintiff is now directly liable to the Insurers for the payment of the outstanding premiums."

From the foregoing, what emerges is that the claim was not only lacking in specificity by way of breakdown showing how it was arrived at, but also appeared to be presented as a prior cushion for some apprehended future action against the respondent for the recovery of unpaid premiums by other insurers who provided cover for the appellant. We are not at all persuaded that such claims, which are in the nature of special damages, are maintainable before the feared claims have been made and paid. Indeed, they would form the perfect basis for a claim of indemnity by the respondent against the appellant but only if such payment has been made. The third party procedure in the Civil Procedure Rules is in fact designed to meet just such an eventuality. Exposure to legal liability in the event of a claim, before the claim itself crystallizes cannot, in our view, form the basis for an anticipatory compensatory or indemnifying judgment.

As to the penalties, the appellant criticizes the learned Judge for finding that the plaintiff owed these to the respondent without proof by the respondent that it was obligated to and did in fact pay such penalties on behalf of the appellant. The respondent did not in its plaint indicate what proportion of the global sum claimed related to penalties. The learned judge was alive to this when in his judgment he stated as follows;

> ***"The plaintiff did not in the plaint and in the reply to defence indicate in the figures the proportion of money paid towards penalties, if any, and the proportions paid towards premiums when the sum of Kshs. 20,835,165.95 was made good. As penalty relates to late payments of premiums, and as, the amounts relating to commissions, premiums and penalties, if any, from the said sum of (Kshs. 20,835,165.95) were not specified, it is difficult to tell what proportion in the sum of Kshs. 14,515,065.50 relates to premiums and what relates to commissions. As such, the penalties sought cannot be based on the figure of mixed premiums and commissions."***

The learned Judge also appreciated that liability to pay any penalties for late payment of premiums was governed by **Section 156** of the Insurance Act the relevant provisions thereof, and which he set out in his judgment, are as follows;

> ***"S. 156 (2) where a risk is placed with an insurer by a broker which the insurer has directly or by implication accepted, the insurer shall, for purposes of subsection (1) be deemed to have received the premium thereon on the date on which the risk is so placed with that insurer, but notwithstanding this subsection, the broker shall remit the amount of premium to the insurer before the last day of the month next following that in which the risk commences.***
>
> ***S. 156 (6) a broker shall prepare, as at the 31st March, 30th June, 30th September and 31st December of each financial year, a statement in the prescribed form showing the premium due to insurers from the broker for the prescribed durations and shall furnish each statement, duly signed in the prescribed manner, to the Commissioner within two months after the end of the period to which it relates.***
>
> ***S. 156 (7) if on examination of any statement prepared under subsection (6), it is found that the brokers in breaching of the provisions of subsection (2) he shall be liable to a penalty equal to five per cent per month of the amount of premium outstanding per quarter in excess of the period under section 156 (2) which shall be paid by a crossed banker's draft made in favour of the Permanent Secretary to the Treasury."***

The learned Judge after setting out those provisions, proceeded to make the analysis, correctly in our view, revealing that in order to succeed in its claim the respondent first had to prove or establish the following;

i. Having placed insurance covers on the appellant's behalf- as indeed it had.
ii. Having prepared and furnished the Commissioner with statements for the prescribed durations

It would seem to us that it is only after the statements were examined by the Commissioner and a determination made that penalties were due and the quantum thereof that a broker such as the respondent would bear liability to pay. Such liability could then be passed on, by legally recognized process, to the insured such as the appellant.

The manner in which the learned Judge dealt with this issue however appears contradictory amounting to a misdirection;

> ***"In this suit, the plaintiff did not adduce evidence to show whether or not it had complied with Section 156(6) of the Act and there was no evidence that the Commissioner of Insurance had found the plaintiff liable to a penalty or to penalties under Section 156(7). What is clear, however, is that the defendant did not make payment of the premiums regularly or as it should have and consequently once the plaintiff complies with Section 156 (6), it is clear the Commissioner shall be bound to find the plaintiff in breach of Section 156(2)."***

With respect to the learned Judge, once he found that the respondent had not established compliance with **Section 156(6)** of the Insurance Act, nor that it has been found liable to pay penalties and of what quantum, he could not properly proceed to make a futuristic and speculative finding that the Commissioner was bound to find the respondent liable once the respondent complied with the said provision. It only compounds the error that the said liability was transferred to the appellant even before it crystallized as against, and was satisfied by, the respondent. It is for that reason that the appellant also complains, and with justification, that the claims before the learned Judge were premature and the judgment based thereon amounted to an "imaginary or anticipated compensation."

The learned Judge appears to have been particularly impressed by what he considered to be an admission of liability in this respect which he dealt with as follows;

> ***"In this case, the plaintiff did not meticulously specify the exact penalties, how they had been calculated and the premiums to which they related. What was not in dispute however is that the defendant had agreed to indemnify the plaintiff in respect of penalties occasioned by lateness in payment of premiums. Specifically, the defendant admitted the sum of Ksh. 5,906,375.95 as being due by it. But the duty to specify the amount and show how it was computed under Section 156 (7) of the Act reposed on the plaintiff."***

We are not ourselves persuaded that the alleged admission in any way lessened the burden the respondent bore to specifically plead and strictly prove the alleged penalties. That duty, as the learned Judge correctly observed, reposed in the appellant. It did not discharge it.

The admission that the learned Judge placed some emphasis on was contained in a letter dated 11.5.99 from the appellant to the respondent. On a proper reading of the said letter, it becomes immediately clear that the sum of Ksh. 5,906,375.95 does not amount to an unambiguous or unequivocal admission. Instead, the figure is presented as an alternative figure and is the result of the appellant's own reconciliation and computation of the accounts between the parties in which it disputed the figure of Ksh. 14,514,065.50 said to be owing in the respondent's letter dated 28.4.99. The former figure is mentioned in the context of a number of 'anomalities' noted in the statement provided by the respondent including pre-mature penalties and overstated figures. It is at the end of the letter that the appellant stated as follows;

> ***"We hope the above clears any misunderstanding on the account due. Arrangements are being made to pay the above amount i.e 5,906,375.95 in due course <u>after verifications with the Commissioner of Insurance"</u>***

(our emphasis)

That last phrase appears to us to render the admission conditional upon verification. It was not an

absolute, straight-forward admission. Indeed, subsequent correspondence between the appellant and the Commissioner of Insurance brings this into sharp relief. On 28.10.02, the appellant wrote as follows;

"The Commissioner of Insurance

P.O. Box 30007

NAIROBI

Dear Sir,

RE: CAPITAL INSURANCE BROKERS LTD Vs. NZOIA SUGAR CO. LTD

Capital Insurance Brokers Ltd. were brokers for Nzoia Sugar Co. Ltd. for certain classes of Insurance between 1996 and 1998.

Nzoia paid an extra sum of approximately Kshs. 2,252,896/= which Capital Insurance Brokers Ltd claimed as the statutory 5% per month penalty for Nzoia late payment of premiums. Capital Insurance Brokers Ltd is still claiming Kshs. 5,906,375.95 in further alleged penalties from Nzoia Sugar Co. Ltd.

Kindly confirm to us whether Capital Insurance Brokers Ltd. ever complied with Section 156(6) and (7) of the Insurance Act and ever paid the collected penalties from Nzoia to the Treasury through your offices as prescribed in the Insurance Act.

We would be obliged to have your appropriate assistance.

Yours faithfully,

For and on behalf of

NZOIA SUGAR CO. LTD.,

J.P. ROMERA

GENERAL MANAGER.

In response to that enquiry the Commissioner of Insurance wrote on 5.12.02 and stated as follows; **"Kindly be advised that the above broker [the respondent] did not submit penalty payment amounting to this office."**

The learned Judge does not seem to have paid any attention to this aspect of this case at all. We are confident that had he done so, he would not have proceeded to categorically find that the sum of Ksh. 5,906,375.95 was admitted and to award it in his judgment. The most he could have done is find that the admission related to the difference between Ksh. 5,906,375/95 and Ksh. 2,252,896 which the respondent collected from the appellant but never paid over to the Commissioner of Insurance. The appellant's case in fact was that several other payments were made to the respondent as penalties but may not have been so paid over and that the respondent **"was holding sum Kshs. 2,252,896 paid in excess and appropriated as penalty and when in fact [the respondent had] not complied with the statutory requirements to entitle it to indemnity on the penalty."**

What we have stated with regard to the award of penalties, that is that it can only be based on sums actually paid over by a broker to the Commissioner is in tandem with the decision in **BENJAMIN ONKOBA NYAACHI & ANOR Vs. VICTORIA INSURANCE BROKERS** [2010] eKLR (Kisumu Civ. App. 75 of 2004) where the Court stated as follows;

> ***"Turning to the cross appeal in respect of the 5% penalty payable to the Commissioner***

of Insurance, an evaluation of the evidence indicates that there is no proof that the respondent did either pay the penalty or a demand of the payment of the penalty made by the Commissioner of Insurance. On this we agree with the appellant that the cross appeal is not supported by evidence."

The need for claims such as those comprising the respondent's claim against the appellant, (which were in the nature of special damages arising out of the appellant's alleged breaches of contractual obligation or of custom and usage) to be specifically pleaded and particularized has been pronounced upon in a long line of cases including **KAMPALA CITY COUNCIL Vs. NAKAYE** [1972] EA 446 and **OUMA Vs. NAIROBI CITY COUNCIL** [1976] KLR 297 and we need not restate them here. In the case before us, figures were claimed but were not particularized. They were disputed and in the end the evidence led did not quite prove the claims to the required standard of proof. We note that the learned Judge, while cognizant of the plain probative difficulties that the respondent's case had come into, allowed apprehended future objections in the nature of ***res judicata*** to its claims to weigh too heavily upon his judgment. With respect, we do not apprehend that such considerations should detract from the doing of justice to the case on the basis of established legal principles. At any rate, such fears are probably unfounded as claims based on indemnity would only mature and properly arise once the respondent is demanded of and makes payment of penalties to the Commissioner of Insurance. That had not occurred at the time the suit was before the learned Judge.

In the final analysis we find and hold that the appellant's grounds of appeal are well merited.

The upshot is that this appeal succeeds. The judgment of the High Court delivered on 21.5.06 is set aside and substituted by an order dismissing the suit with costs. The appellant shall also have costs of this appeal.

Orders accordingly.

Dated and delivered at Nairobi this 31st day of January, 2014.

R. N. NAMBUYE

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR

/mwn