LAW OF CONTRACT

- Validity of contractual limitation periods in a policy of insurance.
- Interpretation of Section 3 (1) of the Law of Contract Act.
- Whether a party can be estopped from relying on contractual limitation clauses if estoppel is not pleaded.
- Whether contractual limitation clauses are unfair, unreasonable and unconscionable.

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL CASE NO. 1882 OF 1999

AGRICULTURAL FINANCE CORPORATION

AGRICULTURAL DEVELOPMENTCORPORATION……..PLAINTIFFS

VERSUS

KENYA ALLIANCE INSURANCE COMPANY LIMITED

PAN AFRICAN INSURANCE COMPANY LIMITED..... DEFENDANTS

RULING

Agricultural Finance Corporation and Agricultural Development Corporation, the plaintiffs herein, aver in a plaint filed in court on 15th December, 1999 as follows: They are the joint owners of the property known as Development House, Nairobi. Under a co-insurance policy number 060004904W dated 8.2.1996, Kenyan Alliance Insurance Company Ltd and Pan African Insurance Company Limited, the 1st and 2nd defendants herein, jointly with American Insurance Company (Kenya) Ltd (ALICO) agreed to co-insure the aforesaid property in the proportions of 30%, 20%, and 50% respectively. Alico was at all times understood to be the lead insurer. The respective policies under which the defendants co-insured the plaintiffs' property were policy numbers 02FD007338 and FIR02859B. On or about 7th August 1998 a bomb blast occurred in Nairobi at the Embassy of the Government of the United States of America. As a direct result of the said bomb blast, the plaintiffs' property was extensively damaged and due notice was given to all the three co-insurers. The rehabilitation cost was assessed at Khs.85, 226,520/=. The contribution of each con-insurer based on its proportionate cover was Khs.25, 567,956/=, Khs.17, 045,304/= and Khs.42,613,260/= for first defendant, the second defendant and Alico respectively. Alico as lead co-insurer has accepted liability on its behalf and on behalf of the defendants and has paid or agreed to pay its proportion of the co-insurance to the full extent of Khs.42,613,260/=.The defendants, on their part, have despite demand and notice of intention to sue having been given refused to settle

their respective percentages of the assessed loss and purported to disclaim their respective liabilities. None of the Insurance policies aforesaid included any exclusion clause that would entitle any of the co-insurers to disclaim liability and the lead co insurer agreed to settle its part of the co-insurance on the ground that there was no entitlement to a disclaimer. As a result of the bomb blast and the extensive damage caused to Development House, the plaintiffs have over and above the cost of rehabilitation suffered loss of rent. Moreover, by reason of the unlawful disclaimer of liability by the defendants, the plaintiffs have suffered loss of interest on money which they have had to take from their other investments for purposes of meeting the cost of rehabilitation of the property. In those premises, the plaintiffs pray for Judgement against the defendants for Khs.25,567,956 and Khs.17,045,304/= being their respective shares of the costs of rehabilitation together with further special damages for consequential loss of rental income and interest and the costs of the suit.

In identical defences filed on 27th January 2000, both defendants aver that the suit is incompetent by virtue of condition 19 of the policy in that, if they were ever liable to the plaintiff under the policy which is denied, such liability ceased to exist upon the expiry of 12 months from 7th August, 1998 being the date of the explosion. They also aver that their liability under the policy in respect of the plaintiffs' claim was rejected by letters dated 1.4.99 and 8.3.99 respective addressed to Kabage & Mwirigi Insurance Brokers Ltd as agents of the plaintiff and, accordingly, as the suit was not commenced within three months of the rejection of liability any claims which the plaintiffs may have had against them, the existence of which are denied, were forfeited pursuant to condition 13 of the policy. Without prejudice to those two averments, the defendants do admit the plaintiffs' ownership of the property damaged and that the said property was co-insured by them as pleaded by the plaintiffs but contend that their obligations under the co-insurance policy were several and not joint. They also admit the respective policies pleaded by the plaintiffs and that Alico was the lead insurer. They further admit the bomb blast of 7.8.98 and that as a result thereof the plaintiffs' property was extensively damaged and they were duly notified of the said damage. Also admitted is the fact that they have refused to settle their respective percentages of the assessed damage and that they have purportedly disclaimed their respective liabilities. The defendants deny that Alico has purported to accept liability on their behalf and contend that, if Alico has done so, Alico had no authority to make any such admission on their behalf and they are not bound by any such acceptance of liability. They also aver that contrary to the plaintiffs' claim that the policy did not include any exclusion clause that would entitle the defendants to disclaim liability, the standard explosion clause as read with special condition 1 to that clause exempted them from liability in the circumstances that occurred. The defendants also make no admission as to the alleged loss of rent by the plaintiffs. They also deny that their disclaimer of liability was unlawful or that the plaintiffs are entitled to any interest as claimed. They pray that the suit be dismissed with costs.

There was no reply to the statements of defence. After the close of the pleadings, the parties on 30th May 2001 filed an agreed statement of issues for trial. Subsequently, they entered into a consent which was made an order of the court on 20.6.2001. That consent was that issues 1 and 2 of the agreed issues filed on 30.5.2001 be heard and decided as preliminary issues on the basis of documents and facts set out in the consent. Those documents and facts were: (1) the facts pleaded in the plaints which were admitted in the defence; (ii) the fact that the suit was filed on 15.12.99; (iii) the policy referred to in paragraph 6 of the plaint; (iv) the letter dated 1st April 1999 from the first defendant to Kabage Mwirigi Insurance Brokers Ltd as agent for the plaintiff and the fact that the said letter was so sent and received; (v) the letter dated 8th March 1999 from the second defendant to Kabage Mwirigi Insurance Brokers Ltd referred to in paragraph 3 of the defence of the second defendant and the fact that it was so sent and received; and (vi) any further documents which, by consent or after argument, the court may admit as relevant to the said issues 1 and 2. It was further agreed in the said consent that such consequential orders, if any, as the court thought fit be made.

The two issues agreed to be determined as preliminary issues were (a) whether the suit was incompetent by virtue of condition 19 of the policy, and (b) whether the plaintiffs had forfeited their claims against the defendants pursuant to condition 13 of the policy.

The matter was argued before me on 16th April, 2002. Mr. Deverell , counsel for the defendants relied on **CHITTY ON CONTRACTS, 27th EDITION VOL 1, PARAGRAPH** 28-084 and the House of Lords decision in **ATLANTIC SHIPPING AND TRADING CO. LTD V LOUIS DREYFUS & CO. [19221 2A.C. 250** for the proposition that it was open to the parties to a contract to stipulate in the contract that legal or arbitral proceedings shall be commenced within a shorter period of time than that provided in the statute of limitations. He submitted that that is what the parties here had done in clauses 13 and 19 of the contract of insurance. In his view the said clauses were clear and unambiguous and that since it was admitted that the suit had been filed 15 or 16 months after the event giving rise to liability and some 6 months after the denial of liability, the plaintiffs were non suited and the defendants had a complete defence to the action. He submitted that the two issues should be answered in the affirmative and consequently the suit should be dismissed with costs.

Mr. Kembi-Gitura, counsel for the plaintiffs, conceded that clauses 13 and 19 of the policy were clear and unambiguous but contended that the policy document in which they were contained was not a contract within the meaning of Section 3 of the Law of Contract Act, Cap. 23 of the Laws of Kenya, as it had not been shown that the same was executed by the person to be bound thereby, namely the plaintiffs. He submitted that the preliminary points should be rejected on that ground alone. He also submitted, obviously in the alternative, that the terms in conditions 13 and 19 were unreasonable, unfair and unconscionable and should not be enforced as a matter of public policy. In support of that argument, he sought to add to the documents which the court should have regard to when determining the preliminary issues. After hearing arguments, I admitted for consideration a fax message from the 2nd defendant to the plaintiffs' agent dated 28.9.99 and a quantum agreement dated 19.2.99 on the basis that they may be pertinent in determining whether or not, the defendants were estopped from relying on conditions 13 and 19. When Mr. Deverell pointed out that the plaintiffs had not pleaded estoppel and they could not therefore invoke the doctrine to stop the operation of clauses 13 and 19, Mr. Kembi submitted that since a pleading could be amended at any time before judgement, it would be just to allow the plaintiffs to amend their pleadings to raise estoppel if the court considered that on the documents before the court an estoppel was raised. He invoked the provisions of Section 39 (1) (b) of the Limitation of Actions Act, Cap. 22, to contend that as the estoppel could include equitable or promissory estoppel, the court had a wide discretion and could order whatever was necessary for the ends of justice. In his view the use of the word "equitable" in that provision conferred on the court an inherent power of the sort contemplated in Section 3A of the Civil Procedure Act. Counsel for the plaintiffs also argued that the letters of 1.4.99 and 8.3.99 from the first and second defendants respectively to the plaintiffs' Insurance broker indicated on a close reading that the defendants had not repudiated liability.

In reply to those submissions, Mr. Deverell submitted that Section 3 (1) of the Law of Contract Act did not assist the plaintiffs at all as the wording thereof had no application to the facts of the case. Further more, he contended, the plaintiffs could not approbate and reprobate the contract of insurance at the same time: they could not sue on it as they have done and at the same time deny the efficacy of some of the clauses in it which were inconvenient to them; the contract must be taken as a whole. On the invocation of the provisions of Section 39 (1) (b) of the Limitation of Actions Act, he submitted that there was nothing in it which would enlarge the limitation period in contracts: the Act only applied to periods of limitation prescribed by the statute. He also submitted that there was no difference between equitable and promissory estoppel and the word "equitable" did not give the court more powers than it otherwise has under the principles of equity and the common law. He further submitted that what was before the courts were agreed preliminary issues on which a decision was sought. Estoppel was not an issue which

the court was asked to deal with at this stage and the plaintiff had not pleaded it either in the plaint or reply to the defence. Lastly, Mr. Deverrel argued that estoppel could not be raised at this stage, and the court should only deal with the two issues as to the validity of clauses 13 and 19 of the policy. However, if the court was disinclined from dismissing the suit, it could give the plaintiffs time to make a formal application to enable them raise the defence of estoppel.

I have considered the above submissions. I think it is convenient to set out the two clauses in issue and the provisions of the Law of Contract Act and the Limitation of Actions Act which the plaintiffs invoke before expressing a view on the merits or otherwise of the rival arguments. Clause 19 of the policy provides as follows -

"in no case whatever shall the company be liable for any loss or damage after the expiration of twelve months from the happening of the loss or damage unless the claim is the subject of pending action or arbitration."

And clause 13 provides as follows -

"..... if the claim be made and rejected and an action or suit be not commenced within three months after such rejection ..... all benefits under this policy shall be forfeited."

Both parties agree that the two clauses are clear and unambiguous. lt is also indisputable that the suit herein having been filed on 15.12.99, it was filed after the expiration of twelve months from the happening of the loss or damage on 7th August 1998 and more than three months after the rejection of the plaintiffs' claims by the defendants vide the letters dated 1st April 1999 and 8th March 1999 addressed to the plaintiffs' insurance brokers by the General Manager and the Managing Director of the first and second defendants respectively. In those premises, it would inexorably follow that the plaintiffs' suit is incompetent by virtue of condition 19 and further that the plaintiffs claims against the defendants have been forfeited pursuant to clause 13 unless those clauses were either not binding on the plaintiffs, or, if they were binding, they were unenforceable for being unfair unreasonable or unconscionable, or the defendants were estopped from relying on them as contended by the plaintiffs' counsel.

Are the clauses binding on plaintiffs" Section 3 (1) of the Law of Contract Act provides -. .

"No suit shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person unless the agreement upon which the suit is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized."

The plaintiffs claim is that as they have not signed the fire policy in issue, they cannot be bound by clauses 13 and 19 thereof but the defendants are bound by the policy to indemnify them. They place reliance on the above provision of law. I agree with the submissions of Mr. Deverrel that the textual analysis of the provision does not support the plaintiffs stand. It is plain to me that the provision applies to suits founded on a contract of guarantee or surety and it has no application to the contract of insurance under consideration. The plaintiffs here are not sought to be charged upon any special promise to pay for the debt, default or miscarriage of another person. On the contrary, they seek to be indemnified for a loss under the fire policy and have been confronted with the defence that their claims are barred by the terms of the contract between them and the defendants. Furthermore, the plaintiffs cannot approbate and reprobate the Contract of Insurance in the same breath as they are seeking to do: It cannot be binding on the defendants for purposes of compensation to the plaintiffs but not binding on the plaintiffs for purposes of limitation periods. I therefore reject the submission by the plaintiffs' counsel

that clauses 13 and 19 of the contract are not binding on the plaintiffs.

Are the two clauses applicable to the plaintiffs suit" The plaintiffs first argument is that the clauses should not be applied because they are unfair, unreasonable or unconscionable when due regard is had to the event giving rise to the risk and the quantum of loss involved. I am constrained to reject this argument for three reasons. First, it is made in ***vacuo***. There is no pleading by the plaintiffs that the two clauses are unfair, unreasonable or capricious. The issue does not therefore arise for determination as part of the preliminary issues before the court. I hasten to add that had the matter been pleaded, it would have been one for investigation on the evidence. Secondly, I can see nothing unreasonable, unfair or unconscionable, in clauses limiting the time within which parties must make their claims on the contract between them or file suit as the case may be. If contractual limitation periods were held to be unfair, unreasonable or unconscionable, the statutes of limitation would fare no better. And I cannot see that the nature of the event or the magnitude of the claim has any bearing on the issue. The clauses would or would not be stigmatised as unreasonable, unfair or unconscionable irrespective of the magnitude of the claim or the risk that had materialized. In my view, legal principles are for application in insurance contracts irrespective of the nature of the risk or the magnitude of the loss. And I cannot help asking this. What was so difficult about the plaintiffs filing their suit within the time limited by the clauses in question" I did not hear of any reason save that they were lulled to sleep over their rights. To that, I shall shortly revert, but before I do so let me state the third reason for rejecting the plaintiffs' first argument. It is this: I am unpersuaded that the court ought to ignore certain stipulations in a contract freely entered into on the grounds of their alleged unfairness, unreasonableness or unconscionableness. I think the principle of freedom of contract ought to prevail over such subjective considerations as those articulated by the plaintiffs. Are there defendants estopped from placing reliance on the two conditions" The plaintiffs place reliance on Section 39 (1) (b) and (2) of the Limitation of Actions Act, which provides -

"(1) A period of Limitation does not run if-

(a) .....; or

(b) that the person attempting to plead limitation is estopped from so doing.

(2) For the purpose of subsection (1), “estopped" includes estopped by equitable or promissory estopped."

I agree with the submissions made on behalf of the defendants that the entire Section does not apply to contractual limitation periods. It obviously applies to periods prescribed by the Act itself. I also agree that even if it did there is no difference between equitable and promissory estoppel. The words are used interchangeably in the rather clumsy text of subsection (2) of Section 39. And they are also so used in the jurisprudence of the courts: see, for instance, the judgement of **SPRY J.A. in CENTURY AUTOMOBILES LTD V HUTCHINGS BIEMER LTD** [1965] E.A. 304 at P. 310, letter F. The employment of the word "equitable" in the text would not therefore extend the jurisdiction of the court in any respect. Be that as it may, I am of the opinion that as clauses 13 and 19 of the contract confer certain procedural rights on the insurer and impose correlative obligations on the insured, the two may not be relied upon under the common law if an estoppel of whatever nature operates in favour of the insured. So the real issue here is whether or not the plaintiffs may be permitted to invoke the doctrine of estoppel in their argument on the preliminary issues placed before the court. In that regard, I must observe that it is a cardinal postulate of procedural law that a party who seeks to rely on estoppel must plead it. In the matter at hand, it was incumbent on the plaintiffs to plead estoppel in their reply to the defence if they intended to rely on it to safeguard their position against the defendants' invocation of conditions 13 and 19 of the policy. That they did not do. Indeed, they did not file any reply to the defence. On the contrary,

the issue were joined on the defence and issues for trial were duly framed and filed. And in those issues, estoppel is not raised at all. In those circumstances, I am of the clear opinion that the plaintiffs' arguments on the possibility of the applicability of the defence of estoppel were misconceived and could not properly be canvassed in the arguments on the preliminary issues placed before the court. Indeed as Mr. Deverrel contended, if estoppel had been pleaded, then the matters raised in the first two issues framed for trial would not have been submitted for decision as preliminary points as evidence would have had to be led in support and in opposition to the estoppel pleaded. I have considered whether or not I should decline to make a ruling on the preliminary issues but instead give the plaintiffs time to raise the defence of estoppel. I have come to the conclusion that the parties having placed their matter before the court for determination on the basis of the preliminary issues agreed upon and having canvassed those matters vigorously to the end, it would be to shirk judicial duty to decline to determine one way or the other the matter placed before the court. I do not ever shirk my duty and I have no intention of doing so in this case. Last, but not least, the plaintiffs argued that the defendants had not quite repudiated their several liabilities under the policy. Again, the defendant’s non repudiation of liability was not an issue canvassed in the pleadings or framed for trial. Indeed the agreement to refer the matter to hearing and determination on the two preliminary issues could only have been predicated on the assumption - the correct assumption, if I may say so -that the defendants had rejected the plaintiff’s claims for compensation. The plaintiffs' argument that liability had not been repudiated is, to my mind, an afterthought which does not stand serious scrutiny of the pleadings and the letters which the parties had submitted, by consent, for the court's consideration.

In the result, I answer the issues submitted to me for hearing and determination in the affirmative and consequently it is ordered that the plaintiffs' suit be struck out with costs to the defendants.

DATED at NAIROBI this 17th day of December 2002.

A.G RINGERA

JUDGE