



REPUBLIC OF KENYA



**Cannon Assurance Limited v Stanley Mugacha, Eliud Kingara, Peter
G Waweu t/a Pangani Auction Centre & another (Civil Appeal
75 of 2020) [2024] KEHC 9757 (KLR) (Civ) (25 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9757 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 75 OF 2020

DKN MAGARE, J

JULY 25, 2024

BETWEEN

CANNON ASSURANCE LIMITED APPELLANT

AND

**STANLEY MUGACHA, ELIUD KINGARA, PETER G WAWEU T/A PANGANI
AUCTION CENTRE 1ST RESPONDENT**

GRANTOM BABZ SERVICES LIMITED 2ND RESPONDENT

*(Being an appeal from the Judgment of Hon. L.L. Gicheha (CM) in
Nairobi CMCC No. 1170 of 2016, delivered on 21st January, 2020)*

JUDGMENT

1. This is an appeal from the Judgment of the Hon. L.L. Gicheha, CM given on 21/1/2020 in Milimani CMCC 1170 of 2016. The Appellant was a defendant in the matter.
2. The Appellant filed a Memorandum of Appeal dated 19/1/2020 and set out the following grounds:-
 - a. The subordinate court erred in the analysis of facts relied on by the parties and thereby arrived at an erroneous decision by the holding the appellant liable to pay the 1st respondent the sum of Kshs 690,313/= together with interest and costs.
 - b. The learned magistrate misdirected herself in law in holding the appellant liable for breach of the contract of insurance as between herself and the 1st respondent when the evidence adduced in court proved the contrary.



- c. The subordinate court failed to consider the evidence adduced to the effect that the appellant did not at any time concede to the claim by the 1st defendant and thereby arrived at a wrong conclusion.
 - d. The subordinate court erred in law in imposing a non-contractual obligation on the part of the appellant when the evidence adduced pointed to lack of proof on the part of the 1st respondent.
 - e. That the learned trial magistrate erred in law and fact and in disregarding the submissions by the appellant.
3. The plaintiffs are auctioneers who took insurance for Burglary under contract No 0101/10/102/000626/04. The cover was first taken on 17/2/2004.
 4. The 2nd Respondent was the provider of security. The insurance covered goods held on trust or commission in 3 offices at 500,000/= per office for Kshs 20,000,000/= and future annual premium 144,600/=. They stated that goods were insured for Kshs 20,000,000/=.
 5. On night of 13.9.2014/14.9.2014 there was theft/probably burglary and the insured goods were stolen.
 6. The 2nd Respondent's guard/thief was missing while the plaintiff's guard and another from GCM Security was rendered unconscious. The goods stolen were valued at Kshs 6,459,450/=. Particulars of breach were set out.
 7. The Appellant agreed to compensate Kshs 690,000/= and not Kshs 6,459,450/= as claimed. They stated that they agreed to compensate goods within the office and not in stores within the plaintiff's premises. They set out particulars of breach. They prayed for Kshs 6,459,450/=.
 8. The renewal documents indicated the loss covered as follows:-
 - i. On office equipment and various repossessed goods whilst contained in the insured's three offices as detailed:
 - a. Galaxy Auction Office @ Kshs 500,000/=
 - b. Ideal Office@ Kshs 500,000/=
 - c. Starline Auction Office @ Kshs 500,000/=
 - ii. On goods held in trust or on Commission (goods in stores) for which the insured is responsible – (i) Galaxy Auction Office (ii) Ideal Office (iii) Starline Office @ 500,000.00. Kshs 1,500,000.00
 - iii. On goods held in trust or on commission consisting of customers motor vehicles for which the insured is responsible – Kshs 6,000,000.00
 - iv. On stock in stores – Kshs 11,000,000.00
 9. The 1st Respondent filed suit and stated that they had a policy but the firm insured was not a recognized professional security firm. They state that the policy did not cover risks identified. They stated that the 1st Respondent was in breach of granted conditions or brought themselves within the exceptions. No particulars of breach were however set out.
 10. They stated that the past conduct must be isolated. The defence fell far short of the requirements of Order 2 Rule 10 of the *Civil Procedure Rules* which provides:



10. (1) Subject to subrule (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing —
- (a) particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies; and
 - (b) where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies.
- (2) The court may order a party to serve on any other party particulars of any claim, defence or other matter stated in his pleading, or a statement of the nature of the case on which he relies, and the order may be made on such terms as the court thinks just.
- (3) Where a party alleges as a fact that a person had knowledge or notice of some fact, matter or thing, then, without prejudice to the generality of subrule (2), the court may, on such terms as it thinks just, order that party to serve on any other party —
- (a) where he alleges knowledge, particulars of the facts on which he relies; and
 - (b) where he alleges notice, particulars of the notice.
- (4) An order under this rule shall not be made before the filing of the defence unless the order is necessary or desirable to enable the defendant to plead or for some other special reason.
- (5) No order for costs shall be made in favour of a party applying for an order who has not first applied by notice in Form No 2 of Appendix B which shall be served in duplicate.
- (6) Particulars delivered shall be in Form No 3 of Appendix A which shall be filed by the party delivering it together with the original notice and shall form part of the pleadings.”
11. The court entered judgment against the Appellant and 1st respondent.

Analysis

12. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.
13. In the case of *Mbogo and another v Shab* [1968] EA 93 where the Court stated:

“...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”



14. The duty of the first appellate Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of *Selle and another v Associated Motor Board Company and others* [1968]EA 123, where the law looks in their usual gusto, held by as follows;-

“.. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally.”

15. The Court is to bear in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

16. In the case of *Peters v Sunday Post Limited* [1958] EA 424, court therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

17. The main question is what was insured. The Respondents maintain it is everything in their offices including cars while the Appellant maintains it is the things inside the office only. The consolation is that it is the same insurance in situ since 2004. It is also through the use of common sense.

18. At the back of my mind I must recall that the contract of insurance is based on the doctrine of *ubberimae fidei*. It is therefore the risk that was sought to be covered that is covered under a specific policy. The pleading in paragraph 16 is specific that there were previous compensation for various losses.

19. The second aspect, will be whether by insuring motor vehicles, it is expected that they will be kept together with office equipment and computers. The third aspect, is that I have perused the entire record, and cannot find a pleading seeking a declaration that they are not bound to pay.

20. Burglary as understood in Section 304 of the *Penal Code* provides that: -

1. Any person who—

2.

(a) breaks and enters any building, tent or vessel used as a human dwelling with intent to commit a felony therein; or

(b) having entered any building, tent or vessel used as a human dwelling with intent to commit a felony therein, or having committed a felony in any such building, tent or vessel, breaks out thereof, is guilty of the felony termed housebreaking and is liable to imprisonment for seven years.

(2) If the offence is committed in the night, it is termed burglary, and the offender is liable to imprisonment for ten years.

21. The insurance was 4 fold:



- i. Office equipment and various goods whilst contained in the three insured's offices at Kshs 500,000/= per office.
 - ii. Goods in trust (in stores) – 500,000/=
 - iii. Goods held in trust or on commission, constituting of vehicles – 6,000,000/=
 - iv. Stocks in stores – 11,000,000/=
22. This is to say that though insurance is for 20,000,000/=, it is segmented up to a maximum. In other words, if loss occurs only in one office, the maximum payable is
- a. Kshs 500,000/= for office equipment
 - b. Kshs 500,000/= for goods in stores
 - c. Kshs 6,000,000/= for motor vehicles
- These are subject to exceptions, terms and conditions.
23. The burglary insurance covered;-
- a. Loss or damage of the insured's property following actual forceful and violent entry or exit from the premises.
 - b. Damage caused by actual forceful and violent entry into the premises or any attempt thereat.
24. The damage to domestic goods and securities was excluded. For some reason the print on the policy is on font 6, to avoid reading. I had to read the same using magnifying glass. In future the insureds may easily plead and succeed that the terms are not legible.
25. The exclusion included loss due to or in connection with a member of staff. In this case no member of staff was involved. The 2nd Respondent filed defence but the same is of no interest in this matter.

Proceedings

26. Simon Kamau Mbuthia testified on 23/8/2018 and adopted his witness statement on theft of goods, being a Nissan Pick-up and Toyota Alphard. He was stood down to amend the final plaint. He stated that losses have occurred in the past and compensated in full. He was cross examined and maintained that the 2nd defendant offered services for 4 years.
27. PW2 Kenneth Khaemba was a security guard. He stated how he was poisoned and taken to hospital. He stated that he took tea though it was tasteless.
28. PW3 Eliud Mungai was an auctioneer. He produced documents. He stated that the insurance declined payment.
29. On closure of their case Evans Ratemo Onsongo testified that he is a Senior Claims Officer. He had a BA degree COP Insurance. They stated that the adjusted loss was 690,613/=. He stated that he had no clue that other goods were not covered. He stated that an investigator visited the scene but did not meet guards.
30. another defence witness testified. Raphael Ochieng is an Underwriter. He stated that they appointed a loss adjustor and they declined to settle due to collusion. They stated that theft started from a person allowed by the insured in the premises. He could not explain why Kshs 690,000/= was payable yet it was a collusion.



31. PW2 produced his statement. He produced the contract. He stated that they suspected the employee one Maina. He stated he did not know what happened that night.
32. The court analyzed the evidence and entered judgment as follows:-
 - a. Liability – 50%
 - b. 1st defendant – 50%
33. The Appellant was to compensate Kshs 696,513/=. Amount is the same loss that they had adjusted. The court was plainly wrong to find the 1st Respondent liable. The evidence the court relied on was not supported by pleadings. Nevertheless there is no cross appeal to that effect.
34. The loss incurred is the same loss that was adjusted. I am surprised the keenness in which the Appellant looks at the premiums due and the record including in payment. There was no defence to the claim by the Appellant. Had there been a cross appeal the court could have found the Appellant liable to settle the entire amount.
35. There was no breach of insurance in the contract. In the circumstances I find no merit in the appeal. The court was right in attributing liability to the Appellant.
36. As regarding cross Appeal, the respondents raised the following grounds: -
 - a. The learned magistrate erred in fact in finding that there was no assessment or valuation of the lost goods despite the 1st respondent having produced an itemized inventory of the lost goods with values thereto and which values were never disputed a fact corroborated by the police report and the Appellant’s testimony.
 - b. The learned magistrate erred in fact and in law in finding the 1st respondent partially liable for its claim of lost money against the appellant and by so doing assumed facts not in evidence.
 - c. The learned magistrate erred in fact and in law in finding the 1st respondent partially liable for its lost money despite having found that the appellant’s employee orchestrated the theft and by so doing disregarded the facts and evidence on record proving that the stolen money was safely stored under the circumstances of the case.
 - d. The learned magistrate erred in fact and in law in finding the 1st respondent partially liable for its lost money despite no evidence having been tendered that the appellant was party to the theft orchestrated by the appellant hence partially to blame for it.
37. The cross appeal relates to exclusion of goods stored by other auctioneers. Whether or not the goods were covered, it is irrelevant as the respondent has no insurable interest. If the said auctioneers had claimed, that is the only time the court could consider whether the claim is payable.
38. The storage by other auctioneers is not part of the auctioneering business. The goods do not belong to the respondent’s customers, vis-a-vis the auctioneer business. In *Lion of Kenya Insurance Company Limited v Edwin Kibuba Kihonge* [2018] eKLR, Justice L. Njuguna held as follows: -

“Insurable interest is a basic requirement of any contract of insurance unless it can be and is lawfully waived. At a general level this means that the party to the insurance contract who is the insured or policy holder must have a particular relationship with the subject matter with the insurance whether that be “a life or property or a liability to which he might be exposed. Every insurance contract requires an insurable interest to support it, otherwise it is



invalid. This was the holding in the case of *Anctol v Manufacture Life Insurance Company* (1899) AC 604.

Insurable interest is essentially the pecuniary or proprietary interest which is at stake or in danger should the insured opt to take out an insurance policy on the subject matter. It is the interest that the insured stands to lose if the risk attaches. This classical definition of insurable interest was given by Lawrence J in *Lucena v Crawford* 1806 2 BOS PNR 269 at 302.

This definition was partially adopted in the *marine insurance Act* 1906 in which a person is deemed to have an insurable interest in the subject matter if he is likely to suffer prejudice in the event of its loss, damage or destruction. Courts of law have abstracted the following rules as the determinants of insurance interest.

- a. A direct relationship between the insured and the subject matter.
- b. The relationship must have arisen out of a legal or equitable right or interest in the subject matter.
- c. The interest bears any loss or liability arising in the event the loss or risk attaches.
- d. The insured's right or interest in the subject matter must be capable of pecuniary estimation or quantification.

As a general rule, insurable interest must have a pecuniary value. A right to a future interest of possession is insurable.”

39. Further in the case of *AIG Insurance Company Limited v Benard Kiprotich Kirui* [2022] eKLR, R. Lagat-Korir J held as follows: -

50. In order to receive compensation from an insurance company, an insured person must demonstrate to the court that he indeed had an existing contract (Insurance policy) with the insurance company. Secondly, such a person must demonstrate that they had an insurable interest in the particular thing that they seek compensation for. The concept of insurable interest was defined in the case of *Lucena v Crawford* (1806) 2 BOS PNR 269 at 302 where Lawrence J. stated that an insurable interest is essentially the pecuniary or proprietary interest that the insured stands to lose if the risk attaches. Similarly, in *Anctol v Manufacture Life Insurance Company* (1899) AC 604, it was defined as:-

“That basic requirement of an insurance contract unless waived, that it generally means that the party to the insurance contract who is the insured or policy holder must have a particular relationship with the subject matter with the insurance whether that be ‘a life or property or a liability’ to which he might be exposed. Every insurance contract requires an insurable interest to support it, otherwise it is invalid.”

40. The question to ask ourselves is whether, the customers of the said goods could sue the Respondent for the goods. The plain answer is No There was also no suit for indemnity filed by those with insurable interest. Ipso facto, there was no basis for being paid for goods they have no insurable interest in.

41. I adopt the above criteria for this case. The Respondent failed to meet all the parameters for insurable interest.



42. Further, it is the duty of parties claiming to show some serious evidence of loss. Proclamations are not the best evidence of value of the goods. The goods must have been purchased or there could have been prior valuations. In the case of *David Bagine v Martin Bundi* [1997] eKLR, the Court of Appeal stated as follows: -

“It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of *Mariam Maghema Ali v Jackson M. Nyambu t/a Sisera Store*, Civil Appeal No 5 of 1990 (unreported) and *Idi Ayub Sahbani v. City Council of Nairobi* (1982-88) IKAR 681 at page 684: “....special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in *Bonham Carter v Hyde Park Hotel Limited* [1948] 64 TLR 177 thus:

“Plaintiffs must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, 'this is what I have lost, I ask you to give me these damages.' They have to prove it”

43. The losses were not specifically proved. In the circumstances the cross appeal is dismissed with costs of costs of Kshs 105,000/=.

44. The net effect is that each party will bear their own costs.

Determination

45. The upshot of the foregoing is that I make the following orders:-

- a. The Appeal and cross appeal are dismissed. Each party to bear their own costs
- b. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 25TH DAY OF JULY, 2024.

Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of:

Makumi for the Appellant

Mr. Ooko for the Respondent

Court Assistant – Jedidah

