Mburu v Britam General Insurance Company Limited & another (Civil Appeal E1007 of 2022) [2023] KEHC 21726 (KLR) (Civ) (25 August 2023) (Judgment)

Neutral citation: [2023] KEHC 21726 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E1007 OF 2022

AN ONGERI, J

AUGUST 25, 2023

BETWEEN

MARY NYOKABI MBURU ..... APPELLANT

AND

BRITAM GENERAL INSURANCE COMPANY LIMITED ..... 1ST RESPONDENT

STEPHEN NJOROGE T/A FAST TARGET INSURANCE AGENCY ..... 2ND RESPONDENT

(Being an appeal from the judgment and decree of Hon. A. N. MAKAU (PM) in Milimani CMCC No. 1929 of 2019 delivered on 10/12/2021)

JUDGMENT

1. The appellant was the plaintiff in CMCC no 1929 of 2019 where she sued the respondents claiming compensation for loss of motor vehicle registration no KCL 350D which was stolen when it was insured by the 1st respondent through the 2nd respondent who was the agent of the 1st respondent.

2. When the appellant lost the motor vehicle she placed a claim with the 1st respondent through the 1st respondent but the 1st respondent declined to compensate the appellant on the ground that the premium had not been fully paid.

3. The plaintiff had arrangement with the 2nd respondent to pay the premiums in 4 instalments of kshs 18,000 each and she had paid two instalments when the motor vehicle was stolen. The trial court held that 1st respondent was not liable to indemnify the appellant.

4. The appellant appealed against the judgment and decree of the trial court on the following grounds.

i. Thatthe learned trial magistrate erred in law and in fact in failing to evaluate the whole evidence on record and before her, thereby reaching a wrong decision on whether the 1st respondent was liable to indemnify the appellant on the loss of her motor vehicle in question.

ii. Thatthe learned trial magistrate erred in law and in fact in that whereas she rightly found that the 2nd respondent was an agent of the 1st respondent, she failed to appreciate that the terms and conditions in the policy document that "the insurer (1st respondent) would not assume any risk until the whole premium was fully paid" were varied by the 2nd respondent's action of allowing the appellant to pay the premium by instalments.

iii. Thatthe learned trial magistrate erred in law and in fact in ignoring the evidence that the appellant had been issued with insurance cover of 30 days by the 1st respondent when the vehicle was stolen.

iv. Thatthe learned trial magistrate erred in law and in fact by ignoring the evidence of DW 1 that once you are issued with an insurance cover, you are covered for the risks insured for the period stated in that cover note.

v. Thatthe learned trial magistrate erred in law and in fact in strictly and solely relying on the terms of the policy and ignored the rest of the evidence before her.

5. The parties filed written submissions as follows; the appellant submitted that Learned Magistrate erred whereas she rightly found that the 2nd Respondent herein was an agent of the 1st Respondent, she failed to appreciate that the terms and conditions in the policy document that "the insurer would not assume any risk until the whole premium was fully paid" were varied by the 2nd Respondent's action as an agent of the 1st Respondent by allowing the Appellant to pay the premium by installments. The appellant argued that the acts of an agent squarely binds the principle as long as the agent acts within the scope of his actual or apparent authority even if the agent was acting fraudulently and in furtherance of his own interests. That the agent arranged with the appellant to pay in installment regardless of what the insurance policy indicated which was acted upon by the appellant by paying two monthly instalments of Kshs 18,000.

6. The appellant further submitted that that in the lower court that the original contract contained in the policy document was varied by the mutual agreement of the parties where the annual cover was reduced to one month cover notes which were fully paid for before the individual cover notes were issued. That therefore the Appellant with the consent of the 2nd Respondent was allowed to pay for the premium by monthly instalments and was indeed as a consideration of payment by instalments issued with monthly Certificates of Insurance, she would definitely have found that the terms of the insurance policy had been varied by the parties and reduced from an annual premium to monthly premiums fully paid for.

7. The appellant submitted that it is not in dispute that the Appellant was issued with three monthly cover notes or insurance certificates covering the period between July 22, 2017 to September 21, 2017. It is also not in dispute that the Appellant paid two instalments of Kshs18,000 amounting to Kshs 36,000 which is more than half of the assessed annual premium of Kshs 64,830. For each particular period of coverage the Appellant was issued with a distinct Certificate of Insurance which indicated that the motor vehicle was comprehensively insured for that particular period indicated on the Certificate. That therefore as at September 19, 2017 when the motor vehicle was stolen it was comprehensively insured by the 1st respondent under the Certificate of Insurance No C 15566433 which was due to expire on September 21, 2017.

8. The 1st respondent submitted that Insurance Stickers cannot be the binding Agreement. The terms of the engagement are contained in the Insurance Policy. The 1st respondent argued that the alleged variation of the Policy Document in the requirement for full premium is negated by the email dated September 21, 2017 where the officials of the 2nd respondent indicated to the appellant that the claim is not payable because the underwriter only assumes risk upon payment of full premium. That the appellants own agent in a letter dated June 22, 2017 confirmed the aforementioned.

9. The 1st respondent argued that the insurance Stickers did not override the Insurance Policy and Risk Debit Note which all informed the Appellant that Risk will be assumed by the 1st Respondent upon payment of the Full Premium. That it is settled law that the Appellant cannot seek to present extrinsic evidence when her relationship with the 1st Respondent is already spelt out in the written Policy Document.

10. The 1st respondent argued that the position that the terms of the Policy requiring payment of Premium in Full were varied by the 2nd Respondent's action of allowing the Appellant to pay the premium by installments lacks merit. The 1st respondent contended that the policy document was written and it is expected that any variation could only be in writing.

11. The 1st respondent argued that all evidence presented before the trial court was considered against the centrality of the insurance policy document therefore the trail court was correct in its findings.

    1. This being a first appeal, the duty of the 1st appellate court is to re-evaluate the evidence before the trial court and to arrive at its own conclusion whether or not to support the findings of the trial court while bearing in mind that the trial court had the opportunity to see the witnesses. In *Selle Vs Associated Motor Boat Co* [1968] EA 123 it was held in the following terms: -

        > " An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.
        >
        > 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 demeanor of a witness is inconsistent with the evidence in the case generally."

12. The issues for determination in this appeal are as follows;

    i. Whether the 2nd respondent as the agent of the 1st respondent was right in varying the terms of the policy document.

    ii. Whether the 1st responder was liable to indemnify the appellant for loss of her motor vehicle.

    iii. Who pays the costs of this appeal?

13. On the issue as to whether the 2nd respondent was right in varying the terms of the policy document, I find that the 2nd respondent and the Appellant entered into a valid contract.

14. I find that the trial court was not right in holding that the appellant was bound by the terms of the policy document. As an agent of the 1st respondent, the 2nd respondent had implied authority to vary the terms of the contract.

15. The premium payable was ksh 64,830. The 2nd respondent allowed the appellant to pay the same in instalments of 18,000 each and the appellant had only paid two instalments when the motor vehicle was stolen.

16. There is evidence that the motor vehicle had a valid one month cover at the material time.

17. The Risk/debit note which the court relied on carried the following clause;

> " Pursuant to deletion of section 156 subsection (2) of the *insurance act* cap 487, premium is required to be paid on or before the inception/renwal date of the policy, please note that the company shall only assume risk upon receipt of the full premium"

18. However, I find that this clause was not brought to the attention of the Appellant at the time of entering the contract with the 2nd respondent who was an agent of the 1st respondent.

19. In the case of *Securicor Courier (K) Ltd vs Benson David Onyango & Another* [2008] eKLR the court held that;-

> " That notwithstanding, the statement of the law by the superior court to the effect that a party cannot be bound by a contract which has not been brought to his attention is no doubt correct. Indeed, where clauses incorporated into a contract contain particularly onerous or unusual condition, the party seeking to enforce that condition has to show that he did what was reasonably sufficient to bring it to the notice of the other party, otherwise, the condition does not become part of the contract. (See *Thornton vs Shoe Lane Parking Ltd*. [1971] 2 QB 163; *Interfoto Picture Library Ltd vs Stiletto Visual Programmes Ltd*. [1989] 1 QB 433)".

20. I find that the trial court having found that the 2nd respondent was the agent of the 1st respondent ought to have held that the contract between the 2nd respondent and the appellant was valid.

21. I find that the actions of the 2nd respondent in granting the appellant time to pay the premiums was binding upon the 1st respondent in view of the agent/principal relations between the 1st and 2nd respondents.

22. On the issue as to whether the 1st respondent was bound to indemnify the appellant for the loss, I find that in view of the above the answer is in the affirmative.

23. In the case of *Virani t/a Kisumu Beach Resort Vs Phoenix of East Africa Assurance Company Limited* [2004] 2 KLR, the Court of Appeal held that the policy of insurance is not invalid merely for non-payment of premiums unless the policy itself so provides. The Court of Appeal stated as follows;

> " Ordinarily, a policy of insurance remains valid once issued and liability attached despite non-payment of premiums, so that non-payment of a premium does not amount to a failure of consideration vitiating the contract of insurance. There is not rule of law to the effect that there cannot be a complete contract of insurance concluded until the premium is paid and the courts will not normally imply a condition that the insurance is not to attach until payment".

24. The 1st respondent's agent having issued the appellant with piece mill cover notes for each month, the 1st respondent as the agent was bound by the contract between its agent and the appellant under the doctrine of apparent authority of the agent.

25. I accordingly set aside the judgment and decree of the trial court and I substitute the same with judgment in favor of the appellant against the 1st respondent in the sum of ksh 1,200,000 together with costs of the suit and interest from the date of filing the original suit until payment in full.

26. The 1st respondent also to pay the appellant's costs of this appeal.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 25TH DAY OF AUGUST, 2023.

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A. N. ONGERI

JUDGE

In the presence of:

.....for the Appellant

.....for the 1st Respondent

.....for the 2nd Respondent