



Akamai Freight Forwarders Limited v Mayfair Insurance Company Limited (Civil Appeal E315 of 2021) [2023] KEHC 21720 (KLR) (23 August 2023) (Judgment)

Neutral citation: [2023] KEHC 21720 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL APPEAL E315 OF 2021
AN ONGERI, J
AUGUST 23, 2023

BETWEEN

AKAMAI FREIGHT FORWARDERS LIMITED APPELLANT

AND

MAYFAIR INSURANCE COMPANY LIMITED RESPONDENT

(Being an appeal from the judgment and decree of Hon. A. N. Makau (PM) in Milimani CMCC no. 10567 of 2018 delivered on 19/3/2021)

JUDGMENT

1. The appellant was sued by the respondent in Milimani CMCC no 10567 of 2018 by plaint filed on November 30, 2018 seeking Ksh 1,004,500/= in respect of general bonds allegedly issued by the appellant but not paid for.
2. The respondent averred in the plaint that they were approached by the appellant to issue the bonds as security on liability that may arise in relation to duties that may be imposed on various goods that were to be exported by the appellant to countries including Kenya, Uganda, Rwanda, Burundi and Tanzania.
3. The bond was arranged by Symax Insurance Agencies and was to run for a period between September 6, 2017 to September 5, 2019 for an annual fee of Ksh 502,250.
4. The respondent further stated that the appellant failed to remit the annual premium amounting to kshs.1,004,500/= which it was claiming with interest from September 6, 2017 until payment in full.
5. The appellant filed a defence dated 28/1/2019 denying the respondent's claim and stating that contrary to the false allegations contained in the plaint, they had obtained a customs guarantee from Hajes Insurance Agencies for the period 11/8/2016 and they paid premiums of Ksh 1,406,340 prior to issuance of the same.



6. The trial court found that the amount was owing and entered judgment in the sum of Ksh 1,004.500 plus costs from the date of filing suit.
7. The appellant is aggrieved and has filed this appeal on the following grounds;
8. That the honorable principle magistrate erred in law and fact when she failed in her judicial obligation to address all the issues, legal provisions and authorities referred to in the appellant's submissions in her judgement which resulted in mistrial.
9. That the honorable principle magistrate erred in law and fact by erroneously finding that the appellant obtained the general bond/custom Transit Guarantee through Symax Insurance Agencies as the agent of the respondent whereas this is contrary to the weight of evidence adduced by the appellant that demonstrated that there was no contractual relationship between the appellant and Symax Insurance Agencies with regard to issuance of the General Bond and/or at all
10. That the honorable Principle Magistrate erred in law and Fact by ignoring the appellant's evidence that the General Bond/Custom transit Guarantee was procured form the respondent through Hajjes Insurance who the respondent admitted was its agents
11. That the honorable Principle Magistrate erred in law and fact by ignoring the appellant's evidence that proved that the appellant has paid the full premium of Kshs. 1,406,340 to the respondent's agents Hajjes Insurance Agencies as per their invoice prior to the issuance of the General Bond/Custom Transit Guarantee.
12. That the Honorable Principle Magistrate erred in law and fact when the erroneously made a finding that the General Bond/Custom Transit Guarantee is renewed annually whereas the General Bond/Custom Transit Guarantee has a 3 year term upon being issued as admitted by the respondent whose full premium is invoiced and paid upfront prior to its commencement.
13. That the honorable principle magistrate erred in law and in fact by failing to address her mind to the provisions of Section 156 of the *Insurance act* cap 487 of the Laws of Kenya that made it a condition precedent for the respondent to ensure premium is paid to the issuance of General Bond/Custom Transit Guarantee which had a 3- year term and it was therefore not legally possible for the respondent to have issued the said General Bond/Custom Transit Guarantee to the appellant prior to payment of the full 3 years premium.
14. That the honorable principal magistrate erred and misdirected herself in law and fact by failing to establish that respondent failed to adduce any documentary evidence of any communication or demand for payment of premium between the skymax Insurance Agencies and/or the respondent with the appellant between 2016 when the General Bond/Customs Transit Guarantee was issued all the way prior to 15/9/2018 when the general Bond/Customs Transit Guarantee was in its 3rd year which confirms that the General Bond/Customs Transit Guarantee was not arranged by Symax Insurance Agencies and further there is no outstanding annual renewal premium owed to the respondent.
15. That the honorable principal magistrate erred and misdirected herself in law and fact by failing to establish that respondent failed to adduce any documentary evidence of any communication or request by the appellant to Symax Insurance Agencies and/or the respondent requesting for the General Bond/Customs Transit Guarantee to be issued in 2016 and/or to be renewed in 2017 or 2018 at ahh and there is therefore no basis for the respondent to have issued the renewal advices dated 14th June and September 2018 purportedly for two different years without the appellant's request or instructions.
16. That the honorable principle magistrate erred in law and by disregarding and failing to consider that the respondent did not prove having issued any debt notes/invoices for the alleged annual premium to



the appellant on the due date in the years 2017 and 2018 and further the respondent could not also validly have issued renewal advices after the due date of year 2017 for the expired period of cover and without instructions or request by the appellant.

17. That the honorable principal magistrate erred and misdirected herself in law and fact by disregarding the appellant's documentary evidence of paying the full premium of Kshs. 1,406,340 for the General Bond/Customs Transit Guarantee to Hajjes Insurance Agencies as agents of the respondent in 2016 prior to the issuance of the General Bond/Customs Transit Guarantee as required by law which was corroborated by the invoice that specifically referred to the Bond and the RTGs payment swift that was in any event confirmed by Hajjes Insurance Agencies witness in court as having been received as payment for the General Bond/Customs Transit Guarantee.
18. The parties filed written submissions as follows; the appellant submitted that the evidence adduced by the appellant during trial was that the General Bond/Custom Transit Guarantee was for a 3 year term and this was admitted by both Ms. Emma Mwangi the respondent's legal manager and Mr Mutungi the Principal Officer of Symax Insurance Agencies and hence pursuant to section 156 (1) of the Insurance Act it was a condition precedent that the full premium not just for the first year was required to have been paid before the Bond/Guarantee with a 3 year term could be issued.
19. The appellant submitted that without payment of the full premium there would have been no contractual obligation for the respondent to issue the General Bond/Custom Transit Guarantee with a three-year term since it is trite law no contract is capable of binding a party where there is no consideration given as a fundamental requirement for a contract.
20. The appellant submitted that it paid the full premium through Hajes Insurance Agency as they produced an invoice dated 11/8/2016 from Hajes Insurance Agency to the Appellant which specifically quoted RCTGS in the amount of Kshs, 50,000,000. The content of the invoice was sufficient to indicate that it sought payment for the premium for the General Bond/Custom Transit Guarantee that the appellant had requested Hajes Insurance agency to procure. The appellant also produced the RTGS payment that showed the amount of Kshs. 1,406,340 being paid by the appellant to Hajes Insurance Agency on 26/8/2016 15 days after the invoice received from Hajes Insurance Agency.
21. The appellant submitted that the General Bond/Customs Transit Guarantee was for a 3-year term paid up front not annually. It contended that the respondent failed to produce any annual renewal notices and further an insurer cannot be compelled to issue a bond to a party who has not paid the premiums as required.
22. The respondent submitted that there was a contractual relationship between Skymax Insurance Agency and the respondent as indicated by the evidence produced. PW@ adduced evidence that the 1st Payment was made in cash by Hammerton Mukhana and that the receipt which the appellant submitted was produced does not exist. The respondent argued that the appellant opted to pay annually as the only payment they made was to cover an annual premium and not the full three years.
23. The respondents submitted that the insurance business that took place between the appellant and the respondent happened in 2016 which was before the amendments of the Insurance Act vide the Insurance (amendment) Act 2019. The respondent argued that if Hammerton Mukhana acting as agent received payments, he did so illegally as agents are not supposed to receive payments on behalf of insurers. The respondent argued that the appellant was liable for the actions of its agent and is therefore liable to settle the debts that arose out of the agents failure to remit insurance premiums to the respondent.



24. This being a first appeal, the duty of the 1st appellate court is to re-evaluate the evidence adduced before the trial court and to arrive at its own conclusion whether 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 v 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.”

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

- i. Whether the respondent proved its case to the required standard.
- ii. Whether the trial court decided the case against the weight of evidence adduced.
- iii. Who pays the costs of this appeal?

26. On the issue as to whether the respondent proved its case, the respondent relied on Section 156(1) of the *Insurance Act* which states as follows;

Advance payment of premiums

“(1) No insurer shall assume a risk in Kenya in respect of insurance business unless and until the premium payable thereon is received by the insurer”.

27. The respondent submitted that they had a custom guarantee from Hajes Insurance for which he paid Ksh 1,406,340 and further that the appellant had no obligation to renew the general bonds in the absence of payment.

28. In the case of *Virani t/a Kisumu Beach Resort v 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”.



- 29. I find that in this case, the respondent did not prove that there was contractual relationship with the Appellant since the Appellants had another guarantee from Hajes Insurance for which he paid Ksh 1,406,340.
- 30. The law requires that he who alleges a fact must prove the same. The Evidence Act, places the burden of proof of any fact on the person who wishes to rely on the same.
- 31. Section 107 of the Evidence Act provides as follows;
 - “Burden of proof
 - (1) Whoever desires any court to give judgment as to any legal or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”
- 32. In the current case, I find that there was no evidence that the parties had a contractual relationship and the Trial court ought not have entered judgment in favor of the respondents.
- 33. I find that this case was decided against the weight of evidence adduced.
- 34. I set aside the trial court’s judgment and substitute it with an order dismissing the respondent’s case with costs to the appellant.
- 35. Each party to bear their own costs of this appeal.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 23RD DAY OF AUGUST, 2023.

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A. N. ONGERI

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent

