Kerario v Monarch Insurance Co. Ltd (Civil Appeal 81 of 2022)
[2023] KEHC 22735 (KLR) (26 September 2023) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CIVIL APPEAL 81 OF 2022

RPV WENDOH, J

SEPTEMBER 26, 2023

BETWEEN

ATHANAS MWITA KERARIO ..... APPELLANT

AND

THE MONARCH INSURANCE CO. LTD ..... RESPONDENT

(An Appeal from the judgement and decree of Hon. M. Obiero (P.M.) Migori Law Courts in Migori Civil Suit No. 130 of 2019 delivered on 4/11/2021)

JUDGMENT

1. The appellant herein, Athanas Mwita Kerario preferred the instant appeal dated 2/3/2022 against the judgement and decree of Hon. M. Obiero (PM), dated and delivered on 4/11/2021. The firm of Kerario Marwa & Co. Advocates is on record for the appellant while the firm of Nishi Pandi & Co. Advocates is on record for the respondent.

2. The facts giving rise to this appeal are contained in the plaint dated 22/7/2019. The appellant pleaded that on or about the month of October 2017, the respondent insured his motor vehicle registration number KCM 274U Toyota Axio (suit motor vehicle) valued at 1.2 million; that the cover was a comprehensive insurance class policy no. KSM/0700/008291/2017 COMP after the appellant paid the premiums of Kshs. 58,000/=. The appellant further pleaded that on or about 19/8/2018 the suit motor vehicle was involved in a road traffic accident where it was damaged beyond repair.

3. The appellant filed a claim form where he called upon the respondent to replace the suit motor vehicle as per the insurance policy but it refused; thus, the respondent was in breach of their contract. The appellant prayed for a declaration that the respondent is in breach of the contract of insurance, compensation for motor vehicle KCM 274U at Kshs. 950,000/=, costs of the suit and interest at court rates since October 2018.

4. The respondent entered appearance and filed a statement of defence dated 13/8/2019. The respondent denied the contents of the claim by the appellant including payment of the insurance premiums, and the occurrence of the accident which allegedly happened on 19/8/2018. The respondent further denied that the appellant filed a claim form and that it was in breach of the contract of insurance.

5. The respondent in particular averred that the insurance policy does not cover among others, incidents of carjacking, damage to motor vehicles in the course of carjacking, intentional damage to motor vehicles in the course of carjacking, damage occasioned by an unauthorized driver and malicious damage to property. The respondent reiterated that it was not in breach of the terms of the insurance policy and asked the trial court to dismiss the suit with costs.

6. The suit was heard. The appellant testified in support of his case. He produced the several documents and marked them as PEXH1 - PEXH8 in support of his case. The respondent did not call any witness to support its case.

7. After the hearing, the trial Magistrate found that since the appellant had not produced the policy document and a valuation report, the suit was nonsuited and dismissed it in favour of the respondent.

8. Aggrieved by the outcome, the appellant filed the instant appeal and preferred five grounds of appeal as follows:-

    a. The learned trial Magistrate erred in law and in fact by making a finding that the plaintiff did not prove his case on a balance of probabilities;

    b. The trial court erred in law and in fact when he failed to evaluate the weight of evidence on record which was neither controverted nor challenged by the defendant;

    c. That the trial court erred in law and in fact when he dismissed the plaintiff's suit for failing to produce the insurance policy when it is on record that the plaintiff requested the same from the defendant but the defendant failed and/or refused to supply him with a copy;

    d. That the trial court erred in law and in fact when he failed to find that the premium which was paid at the time of taking out of the policy was based on the value of the vehicle and if the defendant was opposed to the said value, then it was upon it to do a valuation;

    e. That the trial court erred in law and in fact when he held that the plaintiff should have filed an assessment report of the vehicle when it is clear that the plaintiff had insured the vehicle comprehensively for a particular sum.

9. The appellant prayed:-

    a. This appeal be allowed.

    b. The judgement and decree of the lower court be set aside and substituted with suitable orders to the appellant.

    c. Costs of this appeal be granted.

    d. Interest at court rates since the date of filing be allowed.

10. Directions on the appeal were taken. On 9/5/2023, when both parties were represented in court. This court directed that the matter would be mentioned on 4/7/2023 to confirm filing of submissions by the respondent. On 4/7/2023 the respondent was absent. It is only the appellant who complied.

11. On grounds 1, 2 and 3 the appellant submitted that evidence had been produced which was not challenged by the respondent; that the respondent did not file any document to disapprove those of the appellant or even present the policy document to court nor did it bring to the attention of the court the clause in the policy document which disallowed the claim. The appellant further submitted that in the case of *Jupiter General Insurance Ltd v Kasanda Cotton Co. Ltd* (1966) EA 252 where the court upheld an oral insurance contract and non-availability of the policy document was not a bar to the claim. The appellant also relied on the case of *Peterson Gutu Ondiek v Daniel Gichohi* Nairobi HCCA No. 4018 of 1990 where the court held that where evidence exists and a party withholds it, the presumption is that it is unfavourable to the party withholding it.

12. On grounds 4 and 5, the appellant submitted that the court erred in finding that the valuation report was necessary; that the trial Magistrate imported the principles of the law of torts in proof of damages as opposed to contract law; that in the law of contract, the parties are at liberty to agree on the measure of damages to be paid; that in this case, the value of the vehicle was Kshs. 1,200,000/= at the time of payment of the insurance premiums; that in *John Njoroge Michuki v Kenya Shell Ltd* CA No. 227 of 1999 the court held that the courts should maintain the performance of contracts according to the intention of the parties and should not overrule the expressed intention on the basis that judges know the business of the parties better than the parties themselves.

13. This being the first appellate court, the court has a duty to re-evaluate and analyse all the evidence tendered in the lower court and arrive at its own conclusions but bearing in mind that it neither saw nor heard the witnesses testify. It has to establish whether the decision of the lower court was well founded. See the decision in *Selle & Another v Associated Motor Boat Co. Ltd* (1968) EA 123.

14. It is also settled that an appellate court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or on demonstrably wrong principles not supported by evidence or on wrong principles of the law. This was the finding of the Court of Appeal in *Mbogua Kiruga v Mugecha Kiruga & another* [1988] eKLR where the Court of Appeal held: -

> " An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but his is a jurisdiction which should be exercised with caution."

15. I have certainly read, understood and considered the grounds of appeal, the proceedings in the trial court and the submissions by the appellant. The main issue in contention is whether the trial court rightly dismissed the appellant's suit.

17. The respondent did not call any witnesses to support its defence case and/or rebut the appellant's case. Pleadings are mere allegations. They remain to be of no probative value unless they are subjected to the required test of cross examination. In *North End Trading Company Limited (Carrying on the Business under the registered name of Kenya Refuse Handlers Limited vs City Council of Nairobi* (2019) eKLR it was held:-

> " A defence in which no evidence is adduced to support it cannot be used to challenge the plaintiff's case. The failure to call evidence means that the evidence adduced by the plaintiff remain uncontroverted and therefore unchallenged. In such a situation the plaintiff is taken to have proved its case on balance of probability in absence of the defendant's evidence."

18. However, there is also a duty imposed by the law for the plaintiff to prove his case on a balance of probability as per Sections 107 and 108 of the *Evidence Act*. In Evans Nyakwana vs. Cleophas Bwana Ongaro (2015) eKLR it was held that:-

> " As a general proposition, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107(i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore the evidential burden ... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence."

19. The Court of Appeal in *Karugi & another vs Kabiya & 3 others* (1983) eKLR held: -

> " The burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof. We would therefore venture to suggest that before the trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities by reason of the defendants' failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant....The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim.

20. Even in the absence of evidence from the defendant, the plaintiff is required to prove his case on a balance of probabilities. The trial Magistrate dismissed the appellant's case on two broad arguments: -

    a. The unavailability of the policy document.

    b. Failure to produce a valuation report.

21. On the unavailability of the policy document, it was not among the documents produced by the appellant to support the appellant's case. However, the appellant produced PEXH2 - copy of the premium receipt for Kshs. 58,900/= dated 4/10/2017 and PEXH5 - copy of the insurance certificate valid from 3/10/2017 - 2/10/2018. This is enough evidence to prove that the appellant's suit motor vehicle was insured by the respondent. The argument of the respondent was that they could not settle the claim since the insurance policy did not cover the manner in which the damage was caused on the suit motor vehicle.

22. The trial court was of the view that the appellant should have issued a notice to compel the respondent to produce the contract of insurance. On the law of discoveries, Section 22 of the *Civil Procedure Act* provides:-

> Power to order discovery and the like
>
> Subject to such conditions and limitations as may be prescribed, the court may, at any time, either on its own motion or on the application of any party-
>
> a. Make such orders as may be necessary or reasonable in all matters relating to the delivery and answering of interrogatories, the admission of documents and facts, and the discovery, inspection, production, impounding and return of documents or other material objects producible as evidence.

23. Order 14 rule 6 (1) of the *Civil Procedure Rules* provides:-

> The court may of its own motion and may in its own discretion upon the application of any of the parties to a suit, send for, either from its own records, or from any other court, the record of any other suit or proceeding and inspect the same.

24. According to *Halsbury's Laws of England,* Volume 13 para 1, the learned authors wrote on the purpose of discovery: -

> " The function of the discovery of documents is to provide the parties with the relevant documentary material before the trial so as to assist them in appraising the strength or weakness of their relevant cases, and thus to provide the basis for the fair disposal of the proceedings before or at the trial. Each party is thereby enabled to see before the trial or to adduce in evidence at the trial relevant documentary material to support or rebut the case made by or against him, to eliminate surprise at or before the trial relating to the documentary evidence and to reduce the cost of litigation."

25. Flowing from the above, when making discoveries, the court on its own motion and/or in exercising its discretion, will order production of documents to assist it to meet the ends of justice whilst interrogating the issues of controversy at hand. In the alternative, a party may file an application asking for production of the documents.

26. The main reason why the respondent refused to settle the appellant's claim, was that the damage to the suit motor vehicle was not covered by the insurance policy. It therefore follows that the contract of the insurance policy would be use to assist the court reach a definite conclusion whether the respondent rightly declined to settle the claim. None of the parties produced the copy of the contract of the insurance policy. However, in its defence, the respondent did particularize the grounds in which it failed to settle the claim. It therefore follows that the respondent was the party which had in its possession, the copy of the contract of the insurance policy and it had the advantage of producing it in court to justify its repudiation of the claim. Section 112 of the *Evidence Act* provides:-

> " In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."

27. In certain proceedings where a person has special knowledge of the facts before the court, the burden of proof shifts to that particular person to prove or disprove the set of facts within his knowledge. In my view, the respondent having particularized the reasons why it did not settle the claim, it ought to have at least justified its stand, by producing the contract of the insurance policy to assist the court in determining the controversy between the parties. The actions of the respondent in withholding the contract of insurance policy is quite telling. Al the above said and done, it was the appellant who alleged and had the burden to prove his claim.

28. On the other hand, the appellant is partly to blame for not prosecuting its case diligently. The appellant knowing that the suit would have been determined on the basis of the terms of the contract of the insurance policy, should have filed a notice to produce to compel the respondent to produce the insurance contract. I appreciate that there is a letter dated 14/3/2019 (PEXH8) and the contents thereof is the appellant's Counsel urging the respondent to forward to them a copy of the policy document, proposal form and investigation report. This is not synonymous to a notice of production of documents which is used in the court of law during proceedings.

29. In *Michael Kinyua Njue vs Apa Insurance Company Limited* (2022) eKLR the court faced with the same set of facts as herein held: -

> The court notes that though the value of the vehicle as at 5th August, 2015 is shown as Kshs. 550,000 the Insurance Contract was not produced as an exhibit before the court. The Plaintiff's claim was based on that Contract which contains the terms and Conditions of the policy. The defendant having denied ever entering into any contract with the Plaintiff, the burden was on the Plaintiff to prove not only the existence of such a Contract but also the terms and conditions of the same and in particular the sum assured. Further, upon perusal of Prayer 1 in the Plaint, the declaratory Orders that are sought are as per the policy of Insurance number AV700/0045783. The only way the Plaintiff would have succeeded in his claim was by producing the Insurance Contract to proof to the court that the vehicle was indeed insured for Kshs. 550,000. The Certificate of Insurance that was tendered in evidence only proves that the Plaintiff had an Insurance cover with the Defendant and nothing more! In the circumstances of this case, and in the absence of the said contract, the declaratory Orders sought could not issue as the court could not have been in a position to tell what the terms and conditions of the Policy were. The evidence of the Plaintiff and the declaratory orders were based on that Contract and his evidence is of no value without it. This court cannot issue declaratory orders in a vacuum."

30. The police abstract and the statement taken by the police from the witness, indicates that the suit motor vehicle was stolen in a robbery incident and as a result, it became extensively damaged. Whether the damage and/or the manner in which the suit motor vehicle sustained the damage was covered by the insurance policy, this court just like the trial court, is unable to tell in the absence of the contract of the insurance policy and whether the respondent rightly avoided the claim.

31. I am alive to the findings in *Kenya Akiba Micro Financing Limited v Ezekiel Chebii & 14 Others* (2012) eKLR it was held:-

> Where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make adverse inference that if such evidence was produced, it would be adverse to such a party. In the case of Kimotho –vs- KCB (2003) 1 EA 108 the court held that adverse inference should be drawn upon a party who fails to call evidence in his possession."

32. The above notwithstanding, I reiterate that since there was no contract of the insurance policy produced, this court cannot tell whether or not the respondent correctly avoided the claim on the basis that the suit motor vehicle was damaged outside its terms and conditions. This court cannot also impute or imply that the terms in which the contract of the insurance policy was avoided were the same terms in the contract of the insurance policy. Such speculations would be a dangerous venture, something which a court of law should not do.

33. On the other hand, this being a declaratory suit, it was solely premised on the terms of the contract of the insurance policy and both parties did not produce it. The trial Magistrate was therefore arrived at a correct finding.

34. On the issue of the compensation amounting to Kshs. 950,000/=. Once again, the appellant should have been prudent enough to produce an assessment report. The claim for compensation was in the nature of special damages and an assessment report would have at least proved the post-accident value

of the suit motor vehicle. This court finds that the appeal is devoid of merit and it is hereby dismissed with no orders as to costs.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 26TH DAY OF SEPTEMBER, 2023.

R. WENDOH

JUDGE

Judgement delivered in the presence of;

Mr. Odero holding brief Mr. Marwa for the Appellant.

No appearance for the Respondent.

Emma & Phelix Court Assistants.