**Phoenix of E.A. Assurance Co. Ltd v Samar Technical Services Limited (Civil Appeal E331 of 2020) [2023] KEHC 24093 (KLR) (Civ) (26 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24093 (KLR)

**REPUBLIC OF KENYA**

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

**CIVIL**

**CIVIL APPEAL E331 OF 2020**

**CW MEOLI, J**

**OCTOBER 26, 2023**

**BETWEEN**

**PHOENIX OF E.A. ASSURANCE CO. LTD ..... APPELLANT**

**AND**

**SAMAR TECHNICAL SERVICES LIMITED ..... RESPONDENT**

***(Being an appeal from the judgment of Mmasi, SPM. delivered on 30th October 2020 in Nairobi CMCC No. 7552 of 2010)***

## JUDGMENT

1. This appeal emanates from the judgment delivered on 30th October, 2020 in Nairobi CMCC No. 7552 of 2010. The suit in the lower court was commenced by way of the plaint dated 16th November, 2010 and filed by Samar Technical Services Limited the plaintiff in the lower court (hereafter the Respondent) against Phoenix of E.A. Assurance Co. Ltd, the defendant in the lower court (hereafter the Appellant). The claim was for damages in the sum of Kshs. 436,950/-, a declaration that the Appellant is liable to compensate the Respondent pursuant to the insurance contract, costs of the suit and interest thereon.

2. The Respondent averred that at all material times it had taken out an insurance policy with the Appellant in respect of the motor vehicle registration number KAN 577K Mitsubishi Pick-up (the subject motor vehicle) vide policy number OICV8666/51 (hereafter the insurance policy). It was further pleaded that sometime on or about the 18th of December 2005 the subject motor vehicle was involved in an accident along Mathare-ini Road resulting in extensive damage to the said vehicle, particularized as follows:

> "Particulars of loss to the Plaintiff

Repair costs Kshs. 408,752/-

Police abstract Kshs. 200/-

Loss of user 14 days Kshs. 28,000/-

Total Kshs. 436,950/-"

3. That as a result, the Respondent suffered loss to the tune of Kshs. 436,950/- and upon which he sought compensation from the Appellant to no avail.

4. The Appellant upon entering appearance, filed the statement of defence dated 15th February, 2011 denying the key averments in the plaint and liability. The Appellant inter alia, denied the particulars of loss set out in the plaint and further denied that the loss allegedly suffered was covered under the insurance policy.

5. The suit proceeded to full hearing with the Respondent calling two (2) witnesses. The Appellant on its part relied on the testimonies of three (3) witnesses. The trial court delivered judgment in favour of the Respondent and against the Appellant, as prayed in the plaint. Aggrieved with the outcome, the Appellant preferred this appeal which is based on the following grounds:

> " 1. The learned Magistrate erred in law and fact by finding that the Appellant was 100% liable for the injury on the Respondent.
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> 2. The learned Magistrate erred in law and fact by failing to take into account the submission by the Appellant in the Lower Court on the issue of liability.
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> 3. The learned Magistrate erred in law and fact in finding that the Plaintiff/ Respondent proved the circumstances of the accident on a balance of probability.
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> 4. The learned Magistrate erred in law and fact by delivering a judgment in favour of the Plaintiff/Respondent and failed to take into consideration the evidence adduced by the Appellant.
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> 5. The learned Magistrate erred in law and fact by making a decision on quantum that was against the weight of evidence.
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> 6. The learned Magistrate erred in law by taking into account irrelevant factors in awarding damages." (sic)

6. The appeal was canvassed by way of written submissions. Counsel for the Appellant anchored his submissions on the decisions in *Linus Fredrick Msaky v Lazaro Thuram Richoro & another* [2016] eKLR and *Co-Operative Insurance Company Ltd v David Wachira Wambugu* [2010] eKLR to argue that there was an absence of good faith and a concealment of material facts on the part of the Respondent in describing the manner in which the material accident occurred, and hence the Appellant was entitled to avoid its contractual obligations under the insurance policy.

7. On damages, it was the contention by counsel that in the absence of any documentary proof of loss of user, the trial court ought to have declined to make an award thereon. For the above reasons, the court was urged to allow the appeal accordingly.

8. The Respondent naturally defended the trial court's judgment. Counsel for the Respondent premising his submissions on the decisions in *John Kanyungu Njogu v Daniel Kimani Maingi* [2000] eKLR and *Christine Kalama v Jane Wanja Njeru & another* [2021] eKLR. To submit that the standard of

proof in civil cases is a balance of probabilities. Counsel argued that the Respondent had tendered sufficient proof regarding the events surrounding the occurrence of the accident the trial court's finding on liability was well grounded. Counsel further cited the decisions offered in *Patrick Muturi v Kenindia Assurance Company Ltd* [1993] eKLR and *Gianfranco Manenthi & another v Africa Merchant Assurance Company Ltd* [2018] eKLR on the duty of the insurer to make compensation for loss suffered by its insured.

9. Counsel further asserted that the circumstances in which a court sitting on appeal can disturb an award by a lower court are settled, citing *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR. And referring to the case of *Josephat Waithaka Wangungu v Kenindia Assurance Company Limited* [2015] eKLR, the Respondent's counsel submitted that an insurer is obligated pursuant to an insurance contract, to compensate its insured for losses incurred in repairing a damaged motor vehicle following an accident. In the premises, the court was urged to dismiss the appeal with costs, and to uphold the decision of the trial court.

10. The court has considered the record of appeal, the pleadings and original record of the proceedings as well as the submissions by the respective parties. This is a first appeal. The Court of Appeal for East Africa set out the duty of the first appellate court in *Selle v Associated Motor Boat Co.* [1968] EA 123 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 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."

11. An appellate court will not ordinarily interfere with a finding of fact made by a trial court unless such finding was based on no evidence, or it is demonstrated that the court below acted on wrong principles in arriving at the finding it did. See *Ephantus Mwangi & Another v Duncan Mwangi Wambugu* [1982 – 1988] IKAR 278.

12. Upon review of the memorandum of appeal and submissions by the respective parties before this court, it is evident that the appeal is essentially challenging the decision by the trial court on two (2) limbs, namely liability and quantum.

13. Concerning liability, the legal position is that the burden of proof in civil cases rests with the plaintiff at all material times, while the standard of proof is held on a balance of probabilities. In *Wareham t/a A.F. Wareham & 2 Others v Kenya Post Office Savings Bank* [2004] 2 KLR 91, the Court of Appeal stated in this regard that:

> "We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are

impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the *Civil Procedure Rules*. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail." (Emphasis added).

14. In its judgment, the trial court having earlier summed up the pleadings relied on by the parties, and after restating and analyzing the evidence concluded as follows regarding the Respondent's suit:

> " Contracts, when undertaken within the realms of private law are binding as between the parties so entered and to the exclusion of everyone else through the doctrine of privity.
>
> There is no doubt that the Certificate of Insurance giving rise to the insurance relationship herein was in place at the time of the accident. In contention as relates to the instant suit is whether or not the accident occurred in the manner pleaded by the Plaintiff or that it did not as such the claim by the Plaintiff would be fraudulent one the accident details having been inconsistent, as claimed by the Defendant.
>
> Section 10 of the *Insurance Act* as highlighted above mandates Insurance Companies such as the Defendant herein to pay claims in respect of any liability which may be incurred by their insured or such persons as may be covered under a policy of insurance in respect of the death of, or bodily injury to, any person caused by or arising out of the use of the vehicle on a road. That injury anticipated in law indeed occurred and the Plaintiff vehicle got damaged the said accident having been confirmed by PW1 and his production of the Abstract dated 5th March 2006 does not help the Defendants case that its loss assessors went to the scene of the accident 3 months after the occurrence only to find that there was no debris as the said location as was reported by DW2 herein. On the basis of having been a valid policy in place on the date of the accident and the suit vehicle having been insured, then this suit inevitable succeeds. This Court has been persuaded on a balance of probability to have it find in the manner that I have." (sic)

15. The applicable law as to the burden of proof is set out under Sections 107, 108 and 109 of the *Evidence Act*. The Court of Appeal in *Mumbi M'Nabea v David M. Wachira* [2016] eKLR while discussing the standard of proof in civil liability claims in our jurisdiction had this to say:

> " In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not. Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya provides as follows:
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> > "Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist." The above provision provides for the legal burden of proof.

However, Section 109 of the same *Act* provides for the evidentiary burden of proof and states as follows:

> "The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

The position was re-affirmed by the Court of Appeal in *Maria Ciabaitaru M'mairanyi & Others v. Blue Shield Insurance Company Limited* -Civil Appeal No. 101 of 2000 [2005] 1 EA 280 where it was held that:

> "Whereas under section 107 of the *Evidence Act*, (which deals with the legal evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same *Act* recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence."

16. The latter statement alludes to the position that the legal burden of proof, unlike the evidentiary burden of proof, does not shift. In reiterating the standard of proof, the Court of Appeal in *Palace Investment Ltd v Geoffrey Kariuki Mwenda & Another* [2015] eKLR held that:

> " Denning J, in *Miller v Minister of Pensions* [1947] 2 All ER 372 discussing the burden of proof had this to say;-
>
> > "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.
> >
> > This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties... are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained."

17. From the foregoing guiding authorities, the duty of proving the averments contained in the plaint lay squarely with the Respondent. In *Karugi & Another v Kabiya & 3 Others* (1987) KLR 347 the Court of Appeal stated that:

> " [T]he 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." (Emphasis added)

18. The Respondent's case rested on the testimonies of three (2) key witnesses. CPL Daniel Chebor, who was PW1 confirmed the occurrence of the accident on the date and place set out in the plaint and proceeded to produce the relevant police abstract as P. Exhibit 1. PW1 then testified that the investigating officer listed in the police abstract was one PC Mburu but that he had been unable to trace the Occurrence Book (OB). During cross-examination, the police officer testified that he never visited the scene of the accident and in re-examination, confirmed inability to trace the OB.

19. The Respondent's second witness John Maingi Wambugu (PW2) stated that he was at all material times the Managing Director of the Respondent and proceeded to produce the Respondent's list and bundle of documents, and further list and bundle of documents filed on 16th June, 2011 and 20th April, 2016, respectively, as exhibits. The witness testified that on the material date, he had authorized his driver to use the motor vehicle which vehicle was insured by the Appellant at all material times. That following the accident, the Respondent incurred expenses being repair costs inter alia, which they claimed from the Appellant. However, compensation was denied by the Appellant on the basis of doubts as to the manner of occurrence of the accident.

20. In cross-examination, the witness stated that the subject motor vehicle was not in use for a period of 5 months thereafter and that on the material date, the driver was undertaking official duties. This was echoed during re-examination. That marked the close of the Respondent's case.

21. For the defence, Michael Ndungu who was DW1 stated that he was at all material times a motor vehicle assessor with Fineland Motor Assessors Training and that he received instructions from the Appellant to undertake an assessment of the subject motor vehicle following the accident. That upon complying, he prepared a report dated 24th January 2006 documenting his findings that the damages on the vehicle were inconsistent with the narration given by the Appellant and further recommending that independent investigations be conducted to ascertain the events leading to the accident and the resultant damage.

22. During cross-examination, he stated that he undertook the assessment of the subject motor vehicle at a garage and restated his recommendations. This was reiterated during re-examination.

23. Victor Karago Kagwe (DW2) testified that his company, namely Loss Adjusters and Assessors received instructions from the Appellant to conduct investigations in respect to the material accident upon which he prepared a report. That the investigations revealed no dent on the subject motor vehicle or a point of impact thereon, to suggest the occurrence of an accident in the manner pleaded by the Respondent. In cross-examination, the witness testified that although he did not personally visit the scene of the accident, his assistant did so, about 2 ½ months following the accident. The witness further testified that the subject motor vehicle had suffered damage.

24. The final defence witness was Lilian Simiyu (DW3). Identifying herself as Deputy Legal Manager of the Appellant she adopted her signed witness statement dated 3rd August, 2018 as part of her evidence-in-chief. Her evidence was that following the accident, the Appellant received a report from the Respondent and that the latter proceeded to undertake repairs on the subject motor vehicle before the former could repudiate the claim. During cross-examination, the witness said that although she did not personally handle the Respondent's claim, she was aware of the doubts that had arisen regarding the validity of the claim, following further investigations done at the behest of the Appellant. In re-examination, she stated that the Appellant's repudiation of the claim was not merely based on the assessor's report. This marked the close of the defence case.

25. The court has considered the evidence at the trial. There is no dispute that a contract of insurance existed between the parties herein at all material times, the Appellant acting as insurer of the

Respondent's motor vehicle. The court however noted that neither of the parties availed a copy of the said contract before the trial court for consideration. Be that as it may, it is also apparent from the pleadings and material tendered at the trial that an alleged self-involving accident was reported to have occurred involving the subject motor vehicle, on the material date and place. This is confirmed by the police abstract which was tendered as P. Exhibit 1.

26. That notwithstanding, it is noteworthy that the circumstances surrounding the accident were not illuminated before the trial court, in the absence of any evidence by the investigating officer or the driver of the subject motor vehicle or any other first-hand witness. Neither PW1 nor PW2 witnessed the material accident. Rendering it difficult if not impossible to ascertain the manner in which the accident occurred, if at all. In any event, the police abstract merely confirms that a report was made regarding the occurrence of the accident. In the absence of direct corroborating evidence, the abstract does not and cannot shed light on the manner in which the said accident happened, if at all.

27. From the pleadings and record, it is apparent that the key issue in contention was whether in the circumstances, the Respondent was entitled to receive compensation from the Appellant for any damage occasioned to the subject motor vehicle and which would answer the question whether the trial court arrived at a correct finding on liability.

28. As earlier stated, the Appellant being dissatisfied with the account given on behalf of the Respondent, set out to conduct separate investigations as to the circumstances surrounding the accident in question, the outcome of which revealed inconsistencies in the narration given by the Respondent's representatives on the occurrence of the accident.

29. While the trial court declined the production of the investigation report which was prepared by DW2, it is noted that DW1 who undertook an assessment on the subject motor vehicle disclosed his concerns that the nature and extent of damage occasioned thereto appeared inconsistent with the narration of the occurrence of the accident by the Respondent's driver. That on that basis, he recommended the undertaking of independent investigations. The courts have acknowledged the importance of good faith and transparency in insurance contract relationships and in the absence of which an insurer may be entitled to avoid its obligations under the policy. See for instance the case of *Co-Operative Insurance Company Ltd v David Wachira Wambugu* [2010] eKLR where the Court of Appeal held that:

> " The learned authors of *Bullen & Leake, Precedent of Pleadings, 14th Edition, Vol. 2 states at page 908*:
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> > "Contracts of insurance are contracts of the utmost good faith. This gives rise to a legal obligation upon the insured, prior to the contract being made, to disclose to the insurer all material facts and circumstances known to the insured which affect the risk being run. Lord Mansfield's words in *Carter v Boehm* (1766) Burr. 1905 have stood the test of time:
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> > > "Insurance is a contract of speculation. The special facts upon which the contingent chance is to be computed lie most commonly in the knowledge of the assured only; the underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge to mislead the underwriter into a belief that the circumstance does not exist and to induce him to estimate the risqué as if it did not exist. The keeping back such circumstance is a fraud, and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent

> intention, yet still the underwriter is deceived, and the policy is void; because the risqué run is really different from the risqué understood and intended to be run at the time of the agreement... The policy would be equally void against the underwriter if he concealed... The governing principle is applicable to all contracts and dealings. Good faith forbids either party, by concealing what he privately knows to draw the other into a bargain from his ignorance of the fact and his believing the contrary..."

30. The court is of the view that on its part, the Respondent did not call any credible evidence to establish the circumstances in which the accident occurred in order to demonstrate that the circumstances were such that the Appellant was obligated to meet its contractual obligations under the insurance policy. Moreso in view of the fact that the narration of facts pertaining to the accident had been disputed by the Appellant prior to the institution of the suit and in the defence statement. Nor was the insurance policy produced at the trial to enable the court to ascertain the obligations of the parties and circumstances in which the said obligations would take effect.

31. There appear to be fundamental gaps in the Respondent's case. In the premises, the court is of the view that the trial court erred in finding liability against the Appellant when the Respondent clearly failed to prove its case to the required standard. Consequently, the trial court's finding on liability cannot stand.

32. Regarding the Appellant's complaint that the trial court ignored the evidence and submissions by the Appellant, this court upon perusing the impugned decision did not find any justification. The trial court only erred in law regarding the evidentiary burden and in fact in its consideration of the evidence. Hence arriving at a wrong finding on liability. Having so found, the court is of the view that no useful purpose would be served by a consideration of the issue of quantum.

33. The upshot therefore is that the appeal succeeds. Consequently, the judgment delivered by the trial court on 30th October, 2020 in Nairobi CMCC No. 7552 of 2010 is hereby set aside and the court substitutes therefor an order dismissing the Respondent's case in the lower court, with costs to the Appellant. The Appellant shall also have the costs of the appeal.

**DELIVERED AND SIGNED AT NAIROBI ON THIS 26 TH DAY OF OCTOBER 2023.**

**C.MEOLI**

**JUDGE**

In the presence of:

For the Appellant: Mr. Opundo h/b for Mr. Michuki

For the Respondent: Mr. Macharia