Fidelity Shield Insurance Co.Ltd v Kineticar Auto Garage Limited & 2 others (Civil Appeal E193 of 2021) [2022] KEHC 12350 (KLR) (28 July 2022) (Judgment)

Neutral citation: [2022] KEHC 12350 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CIVIL APPEAL E193 OF 2021

RB NGETICH, J

JULY 28, 2022

BETWEEN

FIDELITY SHIELD INSURANCE CO.LTD ..... APPELLANT

AND

KINETICAR AUTO GARAGE LIMITED ..... 1ST RESPONDENT

MUSONI MICROFINANCE LIMITED ..... 2ND RESPONDENT

PIUS KARURI IBANGI ..... 3RD RESPONDENT

(Being an appeal arising from the Judgment and Decree of the Honourable Priscah Nyotah (R.M) delivered in Ruiru PMCC No. 164 of 2021)

JUDGMENT

1. This appeal arises from suit filed in Ruiru SPM court by the plaintiff, who is now 1st respondent. He was the plaintiff claiming repair and storage charges in respect to motor vehicle registration number KCS 105C to the 1st respondent's garage for repairs on instructions from the insurer Fidelity Shield Insurance Company Limited which the 3rd respondent delivered on November 7, 2019.

2. The appellant instructed their assessors, Safety Surveyors Limited to assess the accident damages of the said motor vehicle and advice on the costs of the repairs. By an email of the appellant on December 23, 2019 to the assessors, the appellant instructed them to authorize the repairs which were done *vide* an email dated December 24, 2019. The repairs were done and an inspection was done on February 4, 2020. A repair invoice was sent in the sum of kshs 392,929/=to the appellant for settlement. A compromise was reached with the 3rd respondent and paid out a sum 203,263/= on November 10, 2020, on request to pay the same to the 1st respondent.

3. The 2nd respondent took out a third party notice against the appellant who was enjoined as a party to the suit. The appellant responded to the claim and filed its documents.

4. At the trial, the plaintiff called 1 witnesses. Pw1 adopted the documents and witness statement, he states he was instructed by the appellant to repair the motor vehicle through email but was not paid after the completion of the work despite numerous requests. The motor vehicle was still in the garage at the time of filing the instant suit.

5. DW2 testified that the 2nd respondent was financier of the 3rd respondent, and joint co-registered for the interest of the loan advanced to the 3rd respondent. Their interest was captured in the insurance policy.

6. DW3 the witness of the appellant testified that instructions were sent out for the motor vehicle to be repaired at a garage picked up by the 3rd respondent. When the repairs were underway they realized some default in payment of premiums and called the 3rd respondent to regularize the failure to pay the premiums failure to repay the premiums, a release letter was not issued: the issue was considered ex-gratia and given the cash to repay at the garage and pick up the vehicle which he failed to.

7. The trial court entered judgment on October 7, 2021 in which judgment was entered against the appellant pursuant to the 3rd party notice in favour of the 1st respondent for:

   (a) Payment of Kshs 392,929/= being repair charges and Kshs 108,250/= being storage charges.

   (b) Costs as per prayer (b) of the plaint.

   (c) Costs of the suit.

   (d) Interest on (a) and (b) at 14% from the date of this judgment till payment in full.

8. The appellant being aggrieved by the decision of the trial court delivered on October 7, 2021 filed the memorandum of appeal citing seven (7) grounds, that the trial Magistrate erred in law and in fact:

   (a) In entering judgment in favour of the 1st respondent for the payment of Kshs 392,929/= being repair charges and Kshs 108,250/= being storage costs when there was no direct claim filed against the appellant.

   (b) By directing the appellant to indemnify the 2nd respondent against loss and damages that may result from disposal of the suit motor vehicle when there was no privity of contract between the parties.

   (c) Failing to appreciate that the agreement entered into by the appellant for the repair of the suit motor vehicle was frustrated by supervising events and therefore could not be fulfilled.

   (d) Failing to appreciate the tenor and meaning of ex-gratia payment and thereby faulting the appellant's action of extending the ex-gratia relief to the 3rd respondent.

   (e) Awarding the respondent special damages which were not specifically pleaded for and strictly proved and claimed in the plaint.

   (f) Failing to indemnify a proper question to be tried as to the liability of the third party if, any and issue directions in a manner in which such questions could be tried.

   (g) Arriving at its decision in a cursory and speculative manner full of conjecture and ignored the basic and fundamental principles of law and out rightly demonstrated bias in her decisions which caused injustice and hardship to the appellant and out to be reversed.

9. Directions were taken to have the appeal canvassed by way of written submissions.

Appellant's Submissions

10. Counsel submitted that in the trial court the 2nd respondent took out a third party notice but directions were not taken pursuant to order 1 rule 22 of the *Civil Procedure Rules*. The trial court failed to exercise its discretion to evaluate the 2nd respondent's allegation or the plaintiff's in terms of its legal claim and the reliefs sought.

11. Counsel submitted the interest of the 2nd respondent was based on financial interest. The contract between the 2nd and 3rd respondent was founded on the law of contract and the resultant agreement between the parties, while the appellant, insurance company's relationship with the 3rd respondent was guided by the provisions of the *Insurance Act* and the policy of insurance.

12. Counsel urged the court to re-evaluate the findings of the trial court and proceed to find that there were no common questions of law arising from the suit and strike out the third party notice.

13. Counsel further submitted that the respondent failed to adduce evidence as proof that the appellant instructed the motor vehicle to be taken for repairs to the 1st respondent, through an email correspondence which was not availed as evidence. There was no privy of the contract between the appellant and the 2nd respondent and therefore the parties cannot derive their rights to impose obligations on a document.

14. Counsel submitted that the 2nd respondent failed to adduce evidence to demonstrate it had taken out an insurance policy with the appellant. Thus the trial court misapprehended itself in shifting the burden of proof to the appellant and erroneously found that the 2nd respondent's name being in the logbook by extension, the policy issued to the 3rd respondent ought to have its financial interest.

15. The 2nd respondent was not insured and therefore had no legal obligation on the appellant to inform the 2nd respondent of the discussion between itself and the 3rd respondent. Therefore the trial court's findings were improper.

16. The trial court made an error in introducing new facts in the case that were not pleaded. The trial court erred in introducing the aspect of collision which was not pleaded and/or proved.

17. Further counsel contends the case between the appellant and the 3rd respondent was payment on ex-gratia to assist retrieve the suit motor vehicle from the garage. The ex-gratia was without any legal basis. The 1st respondent did not dispute the 3rd respondent was one of its members.

18. In addition counsel for the appellant submitted that the trial court erred in entering judgment against the appellant to settle liabilities owing to the 3rd respondent as the appellant was not privy to the contract between the 2nd respondent and the 3rd respondent.

19. In conclusion, Counsel submitted storage charges are specific damages which should be specifically pleaded and proven. The 1st respondent failed to prove the storage charges which were incurred and the trial court misapprehended itself in awarding storage charges of kshs 108,250/=. The 1st respondent failed to state how much was charged daily as storage charge.

20. Counsel for the appellant urged court to re-evaluate the trial court's findings and find the trial court misapprehended the evidence on record and urged the court to find the 2nd respondent did not prove its case per the notice against the appellant and dismiss the case.

21. In the supplementary submissions, counsel submitted that the insurance policy had been cancelled for non-payment/remittance of the insurance premiums and the appellant was not therefore obligated to assume the liability of the respondent as stipulated under section 156 of the *Insurance Act*.

1st Respondent's Submissions

22. In the submissions filed on June 14, 2022, Counsel submitted that the appellant's submissions do not address the issues raised in the memorandum of the appeal.

23. Counsel further submitted that as much as there was no formal application for directions on the third party proceedings filed in the lower court trial on August 24, 2021, the trial court pronounced itself on how the court would proceed in the presence of appellant's counsel in court which satisfied the requirements of order 1 rule 22 of the *Civil Procedure Rules*.

24. In addition, Counsel submitted that it is not disputed that the 2nd respondent financed the purchase of the motor vehicle KCS 105C and registered in the joint names of the 2ndrespondent and 3rd respondent, the motor vehicle insured by the appellant and the 1st respondent's interest captured in the policy. Therefore the trial magistrate did not error on the real triable issues between the appellant and the 2nd respondent.

25. Further that the trial court did not err in finding instructions were given for the repairs of the motor vehicle and should be liable to pay the charges.

26. Counsel further submitted that the contractual right of the 2nd respondent was hinged on the fact that their interests were noted on the policy of insurance. Therefore the decisions of the trial court in finding the fact that the 3rd party failed to consult the plaintiff and the 1st respondent.. were sound and factual.

27. The appellant having noted the interest of the 2nd respondent in the policy document was under an obligation to inform them of anything that would affect that policy.

28. Counsel submitted the trial court did not introduce a new aspect into the case by stating '' ...the 3rd party colluded with the 2nd respondent to deny the plaintiff repair charges..''.The magistrate laid the basis for her observation which she considered reasonable.

29. Counsel further submitted that the appellant was not justified in their refusal to fail to issue a release letter to the 1st respondent as they have received premiums from the amount agreed with the 3rd respondent.

30. Counsel further submitted that the payment was in a cash *in lieu* and not ex-gratia as was evidenced by the testimony of the appellant witness. Counsel urged the court to ignore the appellant's submission on the ex-gratia as the same does not apply to the instant case and submitted that storage charges were pleaded in the plaint filed in the trial court at Kshs 108,250/= which was a standard figure and urged the court to uphold the trial court's findings and dismiss the appeal filed herein.

2nd Respondent's Submissions

31. Counsel for the respondent filed submissions on June 15, 2022 and addressed the issue of issuance of directions as per order 1 rule 22 of the *Civil Procedure Rules*. Counsel submitted that the appellant has failed to highlight the prejudice suffered by the omission; the same was not addressed during the trial process and the appellant has filed her defence and fully participated in the proceedings with full knowledge.

32. On the issue of insurable interest, it was submitted the appellant has failed to satisfactorily define the principle for obvious reason and a broad definition will not aid the court.

33. Further, that the 2nd respondent demonstrated its interest before the trial court on the basis of joint registration of the suit motor vehicle and the interest was duly noted in the insurance policy. The risk of the 2nd respondent is ascertained as it advanced specific monies to the 3rd respondent and gave evidence by way of a loan statement; that the 2nd respondent will be prejudiced by the loss or damages thereto.

34. Counsel further submitted that during the trial, the appellant submitted having instructed the 3rd respondent to take the motor vehicle for repairs at the 1st respondent's workshop and the appellant is bound by their pleadings and admissions; and cited the case of *Choitram vs Nazari* (1984) KLR 327 where the court held as follows;-

> ''...for the purpose order xii rule 6(now order 13 rule 2), admissions can be express or implied either on their pleadings or otherwise, e.g in correspondence... it matters not if the situation is arguable, even if there is a substantial argument, it is an ingredient of jurisprudence, provided that a plain and obvious case is established upon admissions by analysis"

35. Counsel for the 2nd respondent associated with the 1st respondent's submissions and urged the court to uphold the trial court judgement and dismiss the appeal with costs to the 2nd respondent.

Analysis and Determination

36. This being the first appeal, I am obligated to re-evaluate the evidence of the trial court and come up with my own conclusion. I am however minded of the fact that unlike the trial court, I did not have the chance to hear witnesses and observe their demeanor, for this I give due allowance. This position was held in the case of *Selle & Another Vs Associated Motor Board Company Ltd*. [1968] EA 123, where the court held 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 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..."

37. In view of the above, I have perused record of appeal, considered grounds of appeal and submissions filed. I wish to consider whether the trial court erred in condemning the appellants to pay repair and storage charges

38. In the policy of the insurance contract, the insurer is under a duty to indemnify the insured by reinstating the insured to a position the insured was before the occurrence of the accident. The appellant contends the trial court erred in condemning to pay the storage charges and the repair costs.

39. The appellant instructed the 1st respondent to carry out repair costs of the motor vehicle and went ahead to instruct its assessors to value the motor vehicle and issue cost advice on the approximate costs of the repair. After the same was issued the appellant directed the 1st respondent to conduct the repairs which he did, after the completion, the appellant instructed its assessors to inspect the same and ensure the same was well repaired, this was done but the vehicle was not collected and it has remained in the 1st respondent's yard.

40. From the evidence adduced during trial court, it is not in dispute the appellant caused the delay in collecting the motor vehicle from the garage by failing to issue a release order thus occasioning storage charges incurred by the 1st respondent.

41. The appellant has not denied giving instructions on the repairs of the motor vehicle and contention that it gave the monies to the 3rd respondent as ex-gratia cannot stand. In my view therefore, the 1st respondent was correct in seeking an order from the court to dispose off the motor vehicle.

42. From the foregoing I see no merit in the appeal herein and dismiss with costs to the respondents.

43. Final orders:-

    1) Appeal is hereby dismissed.

    2. Costs to the respondents.

JUDGMENT DELIVERED, DATED AND SIGNED VIRTUALLY AT KIAMBU THIS 28TH DAY OF JULY, 2022.

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RACHEL NGETICH

JUDGE

In the Presence of :

Kinyua – Court Clerk

Mr. Muma for Appellant

Mr. Kegode for respondents