Trident Insurance Company Limited v Obonyo & another (Civil Appeal 43 of 2019) [2022] KEHC 10399 (KLR) (28 July 2022) (Judgment)

Neutral citation: [2022] KEHC 10399 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL 43 OF 2019

JN KAMAU, J

JULY 28, 2022

BETWEEN

TRIDENT INSURANCE COMPANY LIMITED ..... APPELLANT

AND

SIMON ODHIAMBO OBONYO ..... 1ST RESPONDENT

JOHNCELE INSURANCE BROKERS LIMITED ..... 2ND RESPONDENT

(Being an appeal from the Judgment of Hon Rose M. Ndombi (SRM) delivered at Kisumu in Chief Magistrate's Court Case No 317 of 2017 on 5th March 2019)

JUDGMENT

Introduction

1. In her decision of 5th March 2019, the Learned Trial Magistrate, Hon Rose M. Ndombi (SRM) dismissed the 1st Respondent's claim against the 2nd Respondent herein but entered Judgment in favour of the 1st Respondent against the Appellant herein as follows:-

    a. Special damages car hire Kshs 156,000/=

    b. The defendant is hereby ordered to repair the plaintiff's car and pay storage costs

    c. Costs of the suit.

    d. Interest (a) and (c) above at court rate (sic)

2. Being aggrieved by the said decision, on 1st April 2019, the Appellant filed a Memorandum of Appeal of even date. It relied on seven (7) grounds of appeal.

3. The Appellant's Written Submissions were dated and filed on 10th November 2021. Those of the 1st Respondent were dated 24th November 2021 and filed on 7th July 2022 while those of the 2nd Respondent's Written Submissions were dated and filed on 28th March 2022.

4. The Judgment herein is based on the said Written Submissions which the parties relied upon in their entirety.

Legal Analysis

5. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.

6. This was aptly stated in the case of *Selle & Another vs. Associated Motor Boat Co Ltd & Others* [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses and thus make due allowance in that respect.

7. Having looked at the Grounds of Appeal and the respective parties' Written Submissions, it appeared to this court that the issues that had been placed before it to consider were as follows :-

    a. Whether or not the Learned Trial Magistrate erred in having found that Appellant ought not to have cancelled the insurance policy and thus ought to have paid the 1st Respondent's claim.

    b. Whether or not the Learned Trial Magistrate erred in having awarded the 1st Respondent special damages in respect of car hire charges.

8. This court therefore dealt with the said issues under the following distinct and separate heads.

I. Cancellation of the policy

9. Grounds of Appeal Nos (1). (2), (4), (5) and (7) were dealt with under this head as they were all related.

10. It invoked Section 156(1) of the *Insurance Act* and also relied on the case of *Liki River Farm Limited vs Tausi Assurance Co Ltd* [2018] eKLR where the court held that an insurer would only assume risk under an insurance if full premium was paid to it, a guarantee for payment was made in a prescribed manner, a deposit of a prescribed amount was made in advance and insurance could be issued on credit but only where an insured was financed and it received an acceptable undertaking from the financier.

11. It contended that the 1st and 2nd Respondents did not avail evidence to demonstrate that the insurance policy was issued by guarantee for payment in a prescribed manner and that there was no evidence that the parties agreed to facilitate the Policy by way of instalments. It added that there was also no evidence of an acceptable financial undertaking from a financier to demonstrate that the insurance was issued on credit.

12. It was its case that the Policy warranted full payment of premium in accordance with Section 156(1) of the *Insurance Act* and due to non-payment of the full premium amount, it was entitled to cancel the policy as was evidenced by its letter dated 4th September 2015 to the 1st Respondent in which it had stated that insurance was on "cash and carry" basis.

13. It argued that the notices for payment were addressed to both the 1st and 2nd Respondents and that the same were duly received by the 2nd Respondent and subsequently, Trial Court erred in holding that the notice of cancellation of the Policy was sent to the 1st Respondent only.

14. It added that despite it issuing notices to the 1st and 2nd Respondents to make payments with haste as was the required under the Policy, the same was not done. It added that the Policy operated on "cash and take" basis hence the requirement that it would only assume risk or be liable under the Policy on condition that the full premium was paid.

15. It placed reliance on the case of *Kenya National Assurance Co. Limited vs Kimani & Another* [1987]KLR 236 where it was held that premium was the consideration that moves from the promise to the promisor to make the agreement enforceable and in its absence, the agreement would be unenforceable nudumpactum both in law and equity.

16. It pointed out that it received the 1st Respondent's claim for indemnity on 15th January 2016 when his Policy cover had already expired. It further contended that by its letter dated 20th January 2016, it undertook to access the damage of the vehicle on condition that the Policy excess of Kshs 27,500/= was paid. It argued that the same was not paid and hence it was not obliged to intervene in the matter.

17. In this regard, it placed reliance on the case of Kenya National Assurance Co. Limited vs Kimani & Another (1987) KLR 236 where it was held that excess was the insured's agreed contribution to the loss and its non-payment did not avoid or impair the legal nature of the contract of insurance but the only result was that the insured's obligation to the insured was diminished to the extent of the excess.

18. It also cited several cases among them the case of *Concord Insurance Company Limited vs David Otieno Alinyo & Others* Court of Appeal Civil Appeal No 30 of 2005 (eKLR citation not given) where the court held that it was trite law that the insured could not recover losses which were avoidable and for which he had a duty in law to mitigate.

19. On its part, the 1st Respondent also relied on Section 156(1) of the *Insurance Act* and argued that the Appellant admitted that it had a running account with the 2nd Respondent and therefore, they had their own arrangements on how they sorted out their premium payments. He pointed out the Appellant accepted premium payments from the 2nd Respondent on his behalf but that in its evidence, it claimed that it held the money since the 2nd Respondent had its debts. He stated that by having his insurance sticker during the policy period with him, he was fully covered as per the terms of the Policy. He was emphatic that he could not therefore be subjected to the relationship and/or arrangement between the Appellant and the 2nd Respondent.

20. He added that the Appellant had only refused to settle the storage costs and repair charges for his motor vehicle but chose to file this appeal out of time. He averred that he did not receive any cancellation Notice until three (3) months after the accident occurred.

21. He explained that since he was offered insurance services by the Appellant through the 2nd Respondent, liability was purely on the Appellant since the 2nd Respondent only offered brokerage services and earned commission from the Appellant and not from him. He pointed out that the Appellant had admitted the claim as it had already settled the claim vide cheque No 003282 dated 24th August 2019 amounting to Kshs 245,120/= being special damages, costs and interest and the Appeal overtaken by events.

22. He referred to Section 2(1) which defines a broker as an intermediary and Section 156(2) of the *Insurance Act* and argued that according to Section 10(2)(iii) of the *Insurance Act*, the Appellant was

required to notify the Registrar of Motor Vehicles and Commissioner of Police that it had cancelled the policy and he had refused to surrender the policy in writing. He added that the Appellant's witness conceded that no such notification was issued.

23. He submitted that in agency contracts, the agent dropped out of the picture where the principal was disclosed. He averred that the 2nd Respondent did not drop out in this case and the Appellant failed to address the court about the arrangement it had with the 2nd Respondent.

    a. He averred that he met the conditions of the policy and was emphatic that the arrangements between him and the Appellant ought not to affect his right to compensation. He urged this court to condemn the Appellant to pay costs for having made him go through the Appeal despite it having complied in part with the Trial Court's Judgment.

24. On its part, the 2nd Respondent submitted that the Appellant admitted having received premiums and continued to receive the same after allegedly cancelling the policy and did not refund the subsequent amount paid to it by the 2nd Respondent on behalf of the 1st Respondent on the ground that the 2nd Respondent owed it monies for other clients.

25. It argued that through its actions, the Appellant ought to be estopped from claiming that the policy was cancelled as espoused under Section 120 of the *Evidence Act*. In this regard, it placed reliance on the cases of *Pickard vs Sears* 112 E.R 179, *Serah Njeri Mwobi vs John Kimani Njoroge*[2013]eKLR and *First Assurance Company Limited vs Seascapes Limited* [2008]eKLR where the common thread was that the doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person.

26. It further argued that the Appellant's failure to notify the 1st Respondent of the cancellation of the policy cover issued amounted to a serious act of negligence which should not be condoned by this court. It pointed out that the Appellant's letter dated 29th September 2015 to the 1st Respondent and copied to it stated that if payments would not have been effected within fourteen (14) days, the policy would be deemed cancelled. It pointed out that, however, in the Appellant's letter dated 23rd April 2016, it claimed that the policy was cancelled on 6th October 2015 and while in its letter dated 4th September 2015, it was indicated that the policy was cancelled with effect from 1st August 2015. It submitted that the Appellant therefore had alot to hide and never clarified to court on the said discrepancies in the dates of alleged cancellation.

27. It asserted that the 1st Respondent produced receipts for car hire and the Learned Trial Magistrate was correct to award the special damages. It added that the Trial Court was also correct to find that the issue of balance of premium if any, was an issue which was to be excluded and was to be sorted out between the Appellant and the 1st Respondent, if at all there was any balance.

28. It pointed out that in its letter dated 20th January 2016, the Appellant admitted to having registered a loss with regard to the 1st Respondent's Motor Vehicle but nonetheless engaged assessors and ordered that the subject Motor Vehicle be taken for repairs at its appointed garage. It stated that the issue of the alleged balance was never raised. It submitted that the issue of liability was to be settled by the Appellant as the Policy was between the Appellant and the 1st Respondent.

29. Notably, PW 1, the 1st Respondent herein testified that sometimes in December 2014, he secured a comprehensive insurance cover for his Motor Vehicle Registration Number KCB 818 D Toyota Wish (hereinafter referred to as "the subject Motor Vehicle") with the Appellant through the 2nd Respondent, who was the Appellant's agent. He further stated that he was issued with the Appellant's sticker which was to cover the subject Motor Vehicle for the period 14th December 2014 to 15th

December 2015. He was emphatic that he had never been charged with driving a vehicle without an insurance cover.

30. He told the Trial Court that on 13th December 2015, he was involved in an accident and he reported the same to the Police Station where he was issued with a Police Abstract Report which he adduced as evidence. He added that he lodged a claim with the Appellant and was given a Claim Form which he also produced as an exhibit. He stated that in January 2016, the 2nd Respondent informed him that the Appellant had indicated that by the time the accident occurred, he was not under cover. He added that the 2nd Respondent later indicated to him that there was an account problem and that it was working to rectify the same.

31. William Opiyo Marenya (herein referred to as "DW 1") testified on behalf of the 2nd Respondent herein. His testimony corroborated that of the 1st Respondent. He stated that he approached the Appellant to provide a comprehensive insurance cover for the 1st Respondent's Motor Vehicle which the Appellant accepted to issue at a cost of Kshs 44,000/= per annum with the arrears being payable within the period. He added that 1st Respondent paid the amount in two (2) instalments and that he complied with all the conditions.

32. Robert Garama (hereinafter referred to as "DW 2") testified on behalf of the Appellant herein. He stated that they had a working account with the 2nd Respondent as insurance brokers and added that the 2nd Respondent worked for a commission. He added that the 1st Respondent had to remit the full amount to it before it could remit the commission to the 2nd Respondent.

33. Notably, it was not in dispute that the 1st Respondent took a policy cover with the Appellant to insure his subject Motor Vehicle against risk and that he paid his premiums through the 2nd Respondent. DW 1 confirmed that the 1st Respondent paid his premiums as was required to the Appellant through it with the balance being remitted to the Appellant on 31st November 2016. It added that the Appellant accepted the said amount and demanded a balance of Kshs 4,000/=.

34. To the mind of this court, the Appellant's argument that the policy had been cancelled at the time the 1st Respondent's Motor Vehicle was involved in an accident was not tenable. The 1st Respondent was clear that the sticker he was given by the Appellant covered the period between 14th December 2014 and 15th December 2015. Be that as it may, DW 2 testified that they did not notify the 1st Respondent of the cancellation of the Policy. He also informed the Trial Court that the 2nd Respondent had their debt and that is why they withheld refunding the 1st Respondent as the money was always remitted by the 2nd Respondent.

35. In view of the foregoing undisputed facts, it would follow that the Appellant was under an obligation to indemnify the 1st Respondent for the loss and damage suffered on account of the accident, unless of course, the Appellant could establish by necessary facts and evidence that the 1st Respondent acted in breach of the terms and conditions of the existing insurance policy thereby giving it the right to repudiate the policy.

36. It was the 1st Respondent's evidence that he acted in good faith during the existence of the policy and the presentation of his claim for compensation. He implied that he did all that was required of him in the fulfillment of the terms and conditions of the policy.

37. Even though the Appellant indicated otherwise and contended that the 1st Respondent acted in bad faith by failing to remit the balance of the premiums, no credible evidence was led to support the contentions. Even most intriguing is the fact that the policy document was never tendered in evidence by the Appellant even if it proved lack of utmost good faith by the 1st Respondent. In essence, the 1st

and 2nd Respondent's evidence was neither discredited nor disproved by the Appellant as it did not adduce sufficient proof to show that it served the 1st Respondent its letter repudiating liability before the accident occurred. Notably, the 1st Respondent admitted having received this cancellation Notice after the accident occurred.

38. The Appellant argued that from the conduct of the parties, the 1st Respondent relied on the 2nd Respondent as an agent to facilitate the insurance Policy on his behalf and therefore it was an error of the Trial Court to have relieved the 2nd Respondent of its liability to the 1st Respondent. It was emphatic that the 2nd Respondent having acted as an agent of the 1st Respondent, any liability due ought to have been settled by the 2nd Respondent.

39. A reading of the record showed that the 2nd Respondent was an agent of the Appellant, a fact that the Appellant did not deny. This court noted that although the Appellant did not come out clearly on its relationship with the 2nd Respondent, its witness at the Trial Court indicated that it had a running account with the 2nd Respondent. Indeed, DW 2 confirmed that it paid 2nd Respondent commissions after it received premiums from the 2nd Respondent. DW 1 also confirmed that the 1st Respondent paid the premiums.

40. This court was therefore not persuaded that the Trial Court erred in dismissing the 1st Respondent's claim against the 2nd Respondent as the 2nd Respondent was only an agent of the Appellant and received monies on behalf of the Appellant and could not be held liable for any loss or damage when its principal was disclosed.

41. It was therefore proper for the Trial Court to arrive at the conclusion that the Appellant was liable to indemnify the 1st Respondent for any loss and damage arising from the material accident by repairing his car and paying full storage costs as the insurance cover was valid at the time the accident occurred on 13th December 2015.

42. In the premises, the Appellant's Grounds of Appeal Nos (1), (2), (4), (5) and (7) were not merited and the same be and are hereby dismissed.

II. Special damages on car hire charges

43. Grounds of Appeal Nos (3) and (6) were dealt with under this head as they were related.

44. The Appellant submitted that being a man of reasonable means, the 1st Respondent would have commenced repair which would have lasted less than a month to restore the vehicle to its useful purpose under the Policy but instead he abandoned the car at the garage as a result of which car hire services and storage costs which ought to have been minimised were incurred.

45. It argued that the 1st Respondent did not take reasonable steps to mitigate the losses as a result of the accident. In this regard, it placed reliance on the case of *S.M Thiga vs Phoenix E. Assurance Co Ltd* [2016] eKLR where the court declined to award the plaintiff therein special damages arising from the failure to mitigate his losses by hiring car services instead of making arrangements to repair the damaged vehicle.

46. It was emphatic that the Learned Trial Magistrate erred in failing to consider that the 1st Respondent did not mitigate the alleged damages. It urged the court to allow its appeal.

47. On his part, the 1st Respondent submitted that he had nothing much to do with mitigating the damages as his claim was admitted and he was advised to take his car to the garage. He added that assessors were appointed to carry out assessment to ascertain the extent of damage and after three (3) months, he

was informed that the Appellant had declined the claim. He argued that at that time, he had already incurred losses and the costs of repair were high.

48. Notably, the 1st Respondent notified the Appellant of the claim through the 2nd Respondent on 14th January 2016. The Appellant accepted the claim, registered it, issued him with a Claim Form and appointed assessors to ascertain the extent of the damage only to disown the claim after three (3) months.

49. The Respondent could not have mitigated the car hire charges because at the time the Appellant accepted the claim, he had a good reason to believe that he had a valid insurance cover and that the Appellant would pay his claim. He was forced to hire a motor vehicle due to the nature of his work and incurred transport costs of Kshs 156,000/=.

50. It is trite law that special damages must be strictly pleaded and proved. The 1st Respondent produced receipts amounting to Kshs 156,000/= to prove the above. The Appellant did not rebut his claim. This court was satisfied that the 1st Respondent was able to prove his claim for Special Damages.

51. In the premises foregoing, Grounds of Appeal Nos (3) and (6) were not merited and the same be and are hereby dismissed.

Disposition

52. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal lodged on 1st April 2019 was not merited and the same be and is hereby dismissed.

53. The Appellants to bear the Respondents' costs of this Appeal.

54. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 28TH DAY OF JULY 2022

J. KAMAU

JUDGE