Ndoria v Xplico Insurance Co. Ltd (Civil Appeal 35 of 2019) [2022] KEHC 11281 (KLR) (Civ) (4 August 2022) (Judgment)

Neutral citation: [2022] KEHC 11281 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 35 OF 2019

CW MEOLI, J

AUGUST 4, 2022

BETWEEN

WILSON WANJOHI NDORIA .... APPELLANT

AND

XPLICO INSURANCE CO. LTD .... RESPONDENT

(Being an appeal from the judgment of E. A Nyaloti (Mrs.) (CM) delivered on 15th January 2019 in Nairobi Milimani CMCC No. 576 of 2015)

JUDGMENT

1. This appeal emanates from the judgment delivered on January 15, 2019in Nairobi Milimani CMCC No. 576 of 2015. The suit was commenced by way of a plaint filed on February 10, 2015by Wilson Wanjohi Ndoria the plaintiff in the lower court (hereafter the appellant) against Xplico Insurance Company Ltd, the defendant in the lower court (hereafter the Respondent). The claim was for compensation in respect of the insured motor vehicle registration number KBX 904M which the Appellant alleged to have purchased at Kshs. 1,700,000/- on December 24, 2013, and immediately comprehensively insured it for the said value, with the respondent under policy no. 070/09/006/13/12/010/Comp having paid the requisite premium.

2. The appellant further averred that the December 25, 2013he was carjacked while waiting at his gate at Tasia Estate at about 3.30am and that the robbers beat him up and abandoned him by the Nairobi National Park, and that was admitted at Nairobi Hospital for about seven days. That he reported the incident to the police and was issued with a police abstract and also reported to therespondent, forwarding to them all the requisite documents including a claim form. He averred that the Respondent made several but unfulfilled promises to settle the claim.

3. The respondent filed a statement of defence denying the key averments in the plaint and pleaded breach of contract on the part of the appellant. The suit thereafter proceeded to a full hearing during which the appellant adduced evidence. The trial court found that the appellant had not proved his case against the Respondent and proceeded to dismiss the suit with costs.

4. Aggrieved with the outcome, the appellant preferred this appeal specifically challenging the trial court's finding, based on the following grounds:-

> " 1. That the learned magistrate erred in law and fact in holding that the plaintiff did not produce an extract of the occurrence book from the police yet the same had been produced as an exhibit by consent in court.
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> 2. That the learned magistrate erred in law and fact in failing to appreciate that the defence did not provide evidence to controvert the evidence of the plaintiff on liability and hence arrived at a wrong decision.
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> 3. That the honorable magistrate erred in law and fact in failing to appreciate that a certificate of insurance is a confirmation of insurance cover having been effected as on awaits for the policy document to be issued later to him by the insurance company.
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> 4. The learned magistrate erred in law and fact by considering irrelevancies such as a tracking device of the motor vehicle and basing her decision on that instead of the fact that the plaintiff had entered into a contract of insurance with the defendant and had even issued with a certificate of insurance hence she arrived at a wrong decision.
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> 5. The Hon. Magistrate erred in devising her own theories as to what ought to have been done by the two contracting parties and the terms of their contract which would amount to the court re-writing the terms of the parties insurance contract.
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> 6. The Hon. Magistrate erred in law and fact in ignoring the fact that sale agreement clearly indicates the purchase price value of the motor vehicle and it was the primary document used by the defendant to demand for premium before effecting cover or accepting payment thereof hence the value of the motor vehicle was not in dispute. How could the plaintiff do a valuation on the motor vehicle when it was stolen and it has never been recovered by the police?
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> 7. The learned magistrate did not assess the quantum of damage she would have awarded and that was wrong." (Sic)

5. The appeal was canvassed by way of written submissions. Concerning whether the appellant had proved the alleged loss of the vehicle in a robbery, counsel for the Appellant submitted that a police abstract being summary of the occurrence book was produced as an exhibit, without objection by the respondent, corroborating evidence of loss of the appellant's motor vehicle in the robbery incident. He therefore faulted the trial court for holding that a police officer ought to have been called as a witness to produce the occurrence book extract and pointing out that the Respondent did not call any evidence to controvert the appellant's evidence on the occurrence of the robbery. Counsel contended that the appellant had proved that his vehicle was insured by therespondent through the production of the log book, certificate of insurance and receipt for the payment of an insurance cover issued by the respondent.

6. Counsel asserted that the question of fitting the appellant's motor vehicle with a tracking device was not an issue canvassed before the court by the respective parties and that the trial court erred in basing its decision thereon. Counsel asserted that production of a valuation report by a motor valuer was not the only means of proving the value of the appellants motor vehicle, and that the appellant had tendered uncontroverted evidence in the form of a sale agreement which confirmed that he purchased the vehicle at Kshs. 1,700,000/. That therespondent used the said value to determine the premiums payable by theappellant. The court was urged to allow the appeal with costs.

7. The respondent naturally defended the trial court's findings. Counsel began by anchoring his submissions on the dicta in *Selle & another v Associated Motor Boat Co. Ltd & another* (1968) E.A 123 concerning the principles to be observed by an appellate court on a first appeal. While placing reliance on the decisions in High Court Civil Case No. 656 of 2002 *Francis Njoroge Njonjo v Irene Muroki Kariuki & 7 others*, *Fredrick Odongo Otieno v Al-Husnain Motors Limited* [2020] eKLR and *Peter Kanithi Kimunya v Aden Guyo Haro* [2014] eKLR counsel argued that the trial did not err in discounting the police abstract as proof of the robbery in the absence of accompanying evidence concerning the police findings in investigations on the robbery. Counsel stated that the police abstract merely confirms that indeed a report was made by the appellant that he had been robbed of his motor vehicle.

8. Counsel submitted that in an insurance claim, indemnity is about insured value, and the failure by the appellant to produce a copy of the proposal form to ascertain the pre- theft value or the value of the insurable interest, if any, was fatal on his part and that it was not enough to assert that the motor vehicle had been insured at a cost of Kshs 1,700,000/-. It was argued that the burden of proof on a balance of probabilities under section 107, 109 and 112 of the *Evidence Act* lay with the appellant in this instance. Citing *Lion of Kenya Insurance Company Limited v Edwin Kibuba Kihonge* [2018] eKLR and *UAP Insurance Company Limited v Canadian Baptist International* [2019] eKLR counsel submitted that the appellant was not the registered owner of the subject motor vehicle at the time of alleged theft; that no connection had been shown between the appellant, the registered owner and the vendor thereof and hence the appellant had not demonstrated that he had an insurable interest in the motor vehicle.

9. Counsel submitted that the Appellant's omission to produce the proposal form for the vehicle's insurance cover meant that his alleged insurable interest was not proved; and moreover that , the insurance cover that was obtained from Respondent through material non-disclosure of vital information in breach of the principle of utmost goof faith. Lastly, counsel relied on the decisions in *Habib Zurich Finance (K) Limited v Muthoga & another* [2002] 1 EA 81 and *Total (K) Limited formally Caltex Oil (K) Limited v Janevams Limited* [2015] eKLR to argue that the appellant's suit comprised a liquidated claim that ought to be specifically proved. The court was urged to dismiss the appeal.

10. This is a first appeal. The Court of Appeal for East Africa set out the duty of the first appellate court in Selle –vs- 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 particular circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.
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> 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."

See also *Peters v Sunday Post Limited* (1958) EA 424 and *Williams Diamonds Limited v Brown* (1970) EA 1.

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 vs Duncan Mwangi Wambugu* [1982 – 1988] IKAR 278).

12. 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. In the court's view, the appeal turns on the single question whether the Appellant had proved his case to the required standard. Pertinent to the determination of issue are the pleadings, which form the basis of the parties' respective cases before the trial court. A review thereof is useful before delving into evidentiary matters.

13. In the now famous case of *Wareham t/a A.F. Wareham & 2 others 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. Theappellant by his plaint averred at paragraphs 3,4,5,6 and 7 that:

> "3. The plaintiff avers that he bought motor vehicle registration number KBX 904M on the 24.12.2013 and he immediately insured it comprehensively at a value of Kshs. 1,700,000/= with the defendant herein under policy no. 070/09/006/13/12/010/Comp and paid the requisite premium as agreed and was issued with a certificate of cover by the defendant.
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> 4. That on the 25.12.2014 I was carjacked by robbers while waiting for my house gate to be opened for me at about 3.30am in Tasia Estate. The robbers beat me up with gun butts and finally left me for dead next to the Nairobi National Park. As a consequence I was admitted at Nairobi Hospital for about 7 days.
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> 5. I reported the matter to the police and was issued with a police abstract as by law provided.

6. I reported the matter to my insurers, the defendants herein and forwarded to them all the requisite documents as requested by them including a claim form.

7. Despite several promises by the defendant to pay, they reneged on their promise hence resort to court." (Sic)

15. The respondent filed a statement of defence denying the averments and particulars pleaded in the plaint and in addition pleaded that the appellant was in breach of contract by stating at paragraphs 8, 9 and 10 that:

" 8. In the alternative and without prejudice to the foregoing the defendant avers that if the said motor vehicle was carjacked as alleged, then the value of the said motor vehicle registration number KBX 904M was extremely minor and that the present claim is grossly exaggerated and unfounded.

9. The Defendant avers that the plaintiff was in breach of the terms of contract entered between them and the Plaintiff put to strict proof.

Particulars of Breach of Contract

a. Failure to disclose material facts

b. Misrepresentation

c. Failure to abide by the policy requirements

d. Failure to take responsible steps to avert the incidence

e. Parking at a risky place

f. Colluding with the carjackers

10. In the further alternative and without prejudice to the foregoing the Defendant avers that if the said motor vehicle was carjacked, which is hereby denied, then it was an oversight on the part of the Plaintiff and there was nothing that the Defendant could do to avert the same." (sic)

16. The appellant contended that by virtue of the comprehensive cover issued by the respondent pursuant to the Policy No. 070/09/006/13/12/010/Comp he was entitled to compensation for the loss of his vehicle as a result of the carjacking incident on December 25, 2013. The respondent on its part refuted the averment and asserted that the appellant did not have an insurable interest and or was in breach of the policy, if any. During the hearing of the suit the appellant testifying as PW 1 adopted his witness statement as his evidence in chief and produced several documentary exhibits. He asserted that the value of his lost motor vehicle was Kshs. 1,700,000/- which sum he claimed as compensation.

17. The respondent did not call any witness in support of its case and or averments in its statement of defence. In its judgment the trial court stated inter alia that :

....."7. I have considered the evidence on record and I am satisfied that the Plaintiff has not proved his case against the Defendant on a balance of probability. I note that the Defendant did not adduce any evidence to contradict the Plaintiff's case. The law is very clear under section 107 of the *Evidence Act* that he who alleges must prove his case.

8. The plaintiff only produced a police abstract but failed to call the police officer as a witness. The OB extract was not produced as evidence. The plaintiff did

not produce the Insurance Policy contract. The only documents produced by theplaintiff are the motor vehicle logbook, sale agreement, certificate of insurance, and an insurance receipt.

9. The plaintiff has not adduced any evidence that he had fitted his motor vehicle with a tracking device.

10. There is no evidence from a motor vehicle valuer to prove that the motor vehicle was valued at Kshs. 1,700,000.

11. I am satisfied that the Plaintiff has not proved his case against the defendant and the Plaintiff's case against the defendant is dismissed with costs. (sic).

18. The applicable law as to the burden of proof is found insection 107, 108 and 109 of the *Evidence Act*. The duty of proving averments contained in the plaint lay squarely on the Appellant. 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....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)

19. The appellant's grievance was based on a contract of insurance being Policy No. 070/09/006/13/12/010/Comp, and that the respondent had failed to fulfill its end of the bargain in that regard. The appellant's contention was that the respondent was obligated to indemnify him for loss of his motor vehicle KBX 904M lost in the carjacking incident. The Court of Appeal in *Kenindia Assurance Co. Ltd v Monica Moraa* [2016] eKLR describing the nature of a policy of insurance cited with approval the decision of the Supreme Court of India in *United India Insurance Company vs. Kantika Colour Lab and others* Civil Appeal No. 6337 of 2001 where that court stated as follows:-

> "Contracts of Insurance are generally in the nature of contracts of indemnity. Except in the case of contracts of Life Insurance, personal accident and sickness or contracts of contingency insurance, all other contracts of insurance entitle the assured for the reimbursement of actual loss that is proved to have been suffered by him. The happening of the event against which insurance cover has been taken does not by itself entitle the assured to claim the amount stipulated in the policy. It is only upon proof of the actual loss, that the assured can claim reimbursement of the loss to the extent it is established, not exceeding the amount stipulated in the contract of Insurance which signifies the outer limit of the insurance company's liability. The amount mentioned in the policy does not signify that the insurance company guarantees payment of the said amount regardless of the actual loss suffered by the insured. The law on the subject in this country is no different from that prevalent in England; which has been summed up in Halsbury's Laws of England - 4th Edition" [Emphasis Added]

20. This court agrees with the finding of the trial court that the appellant's evidence was neither challenged nor controverted at the trial. However, for the Appellant's cause to succeed on a balance of probabilities the Appellant ought to have demonstrated the existence of a contract of insurance, accruing rights thereunder and in reference to accruing rights, proof of actual loss of motor vehicle KBX 904M. Thus, the policy of insurance, is the document creating the legal relationship between the respective parties

and upon which the claim of breach of contract or indemnity is founded. The policy document sets out rights and obligations of the respective parties.

21. The appellant did not produce the policy document at the trial. Section 2 of the *Insurance Act* describes 'Policy' as:-

> " (a) in relation to ordinary life assurance business or industrial life assurance business, includes an instrument evidencing a contract to pay an annuity upon human life; (b) in relation to bond investment business, includes a bond, certificate, receipt or other instrument evidencing the contract with insurer; and (c) in relation to other classes of business, includes an instrument under which there is for the time being an existing liability already accrued or under which any liability may accrue;" [Emphasis Added]

22. Section 7 of the *Insurance (Motor Vehicles Third Party Risks) Act* describes a 'Certificate of Insurance' as:

> " A certificate of insurance shall be issued by the insurer to the person by whom a policy of insurance is effected"

23. The certificate of insurance derives its existence and force from the policy of insurance and in the absence of the latter, no binding legal relationship can be asserted. All that the Appellant produced at the trial was a receipt from Xplico Insurance Co. Ltd (P.Exh. 2) and Certificate of Insurance (P. Exh. 3) as proof of the contract of insurance between the respective parties. However, none of these documents contains the contract terms, the respective rights, and obligations of the parties, and more importantly, the Respondent's obligations towards the Appellant as sought to be enforced by the suit. Thus, it was impossible to tell what accruing rights the appellant was entitled to under the alleged policy of insurance concerning the alleged loss of his motor vehicle. On a balance of probabilities, there was no proof that the respondent was under an obligation to compensate the Appellant for the loss of his vehicle and that there was breach of the contract terms by the respondent. The appellant's failure to produce the policy of insurance was fatal to his case, and it is not available to him to blame the respondent for this lapse as he could have but did not serve a notice to produce upon the respondent, in that regard.

24. Secondly, the appellant failed to demonstrate that he had, and the value of any insurable interest in the alleged lost vehicle at the time he took out the alleged insurance policy. The logbook in respect of the vehicle shows that the vehicle was registered in the appellant's name on 17.01.2014, nearly a month since the policy of insurance was paid for. The appellant did produce an agreement of sale between the appellant and a company known as Alpha Automobile Ltd dated 24.12.2013 purporting the sale of the vehicle to the Appellant for the sum of Shs.1,700,000/-. However, neither a witness from the said company nor the alleged owner of the vehicle (one Dabaso Bonaya Adano) were called to testify on the transaction. Neither did the Appellant tender evidence of the payment of the consideration in the agreement for the purchase of the vehicle. These matters were averred in the plaint and disputed in the respondent's defence statement, and it was upon the Appellant to prove his averments, notwithstanding the respondent's decision not to call any evidence at the trial.

25. In addition, the appellant's claims that he lost the vehicle to robbers on the night of the date when he took out the insurance policy were disputed and required firm proof. The mere tendering of a police abstract, (and not a copy of the Occurrence Book entry), and his own oral evidence did not suffice. The court agrees with the trial court that the evidence of the officer who investigated the case or other appropriate police witness or other witness after the fact of the alleged robbery, such as the person

who allegedly rescued the Appellant at his alleged place of abandonment by the robbers would have corroborated the appellant's account. The fact that the appellant was treated at the Nairobi Hospital in the period after the alleged robbery does not by itself prove the occurrence of such robbery and loss of the vehicle.

26. Thus, in the court's view, the trial court cannot be faulted for finding as it did, that the appellant had failed to prove his case on all fronts. The appellant did not discharge the burden of proof and his suit was properly dismissed. Consequently, the appeal is without merit and is equally dismissed with costs to the respondent.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 4TH DAY OF AUGUST 2022.

C.MEOLI

JUDGE

In the presence of:

For the Appellant: Mr. Muinde

For the Respondent: Ms. Winrose h/b for Mr. Kinyanjui

C/A: Carol