REPUBLIC OF KENYA

IN THE HIGH COURT AT SIAYA

CIVIL APPEAL NO. 48 OF 2019

ICEA LION GENERAL INSURANCE COMPANY LIMITED.....APPELLANT

VERSUS

CHRIS NDOLO MUTUKU

T/A CRYSTAL CHARLOTTE BEACH RESORT.....RESPONDENT

(Appeal from the judgment and decree in Bondo PM's Court Civil suit No. 80 of 2018 delivered on 9/10/2019 by Hon. E. Wasike, SRM)

JUDGMENT

Introduction

1. This is an appeal from the judgment of Bondo Senior Resident Magistrate E.N. Wasike in Bondo PMCC 80 of 2018 in which the respondent instituted suit against the appellant for damages amounting to Kshs. 1,421,000 being special damages suffered by the respondent as a result of a break in into the respondent's business premises, which business was insured by the Appellant herein. The trial court after considering the totality of facts and evidence on record found in favour of the respondent and allowed the respondent's claim as prayed.

2. Aggrieved by the trial court's judgement and decree, the appellant filed a memorandum of appeal dated 4th November 2019 setting out eight grounds as follows:

a) *That the Learned Trial Magistrate grossly misdirected himself in treating the evidence and submissions on liability before him superficially and consequently coming to a wrong conclusion on the same.*

b) *That the Learned Trial Magistrate grossly misdirected himself in treating the evidence and submissions on quantum before him superficially and consequently coming to a wrong conclusion on the same.*

c) *That the Learned Trial Magistrate misdirected himself in ignoring the principles applicable and the relevant authorities cited in the written submissions presented and filed by the Applicant.*

d) *That the Learned Trial Magistrate erred is not sufficiently taking into account all the evidence presented before him in totality and in particular the evidence presented in behalf of the Appellant.*

e) *That the Learned Trial Magistrate erred in failing to hold that the Respondent had failed to prove liability on the part of the Appellant under the policy of insurance while the onus of proof lay with the Respondent.*

f) *That the Learned Trial Magistrate erred in law and in fact in failing to find that the Respondent's claim(s) fell under consequential loss which was not covered by the policy of insurance between the Appellant and the Respondent.*

g) *That the Learned Trial Magistrate erred in awarding damages against the weight of the evidence presented by the Appellant and the well laid out principles set out in the submissions and authorities filed by the Appellant.*

h) *That the Learned Trial Magistrate failed to apply judicially and to adequately evaluate the evidence and exhibits tendered and thereby arrived at a decision unsustainable in law.*

3. The parties canvassed the appeal by way of written submissions.

Appellant's Submissions

4. It was submitted by the appellant that the trial magistrate failed to evaluate the evidence placed before him and consequently arrived at a wrong conclusion specifically that in light of the disclosure by PW1 that his employee had broken into his premises and stolen, the provisions of the exclusion clause contained in the policy document came into effect thus barring the appellant from any liability.

5. It was further submitted that the learned magistrate erred in finding the appellant was liable to indemnify the respondent yet the evidence on record demanded that the appellant be absolved of any liability especially after the exception clause came into fore.

6. It was submitted that the BizBora Policy entered into between the parties herein was a standard policy of indemnity which did not cover consequential loss but only actual loss and further that consequential loss was an irrecoverable loss under a Standard Contract of Indemnity. Reliance on this proposition was placed on the cases of **Hesbon Onyuro & Another v First Assuarance Company Limited [2017] eKLR, Madison Insurance Company Ltd v Solomon Kinara t/a Physiotherapy Clinic [2004] eKLR, Mohamed Athman Mjahid v Gateway Insurance Company Limited [2005] eKLR** and **Concord Insurance Company Limited v David Otieno Alinyo [2005] eKLR** all of which held inter alia that consequential loss was not recoverable in a standard form policy of insurance unless provided for.

Respondent's Submissions

7. It was submitted that the exclusion clause pleaded by the appellant in both the lower court and in this appeal was not part of the contract entered into between the two parties herein but was an attempt by the appellant to introduce new terms to the contract entered by them. Further to the above it was submitted that no evidence was adduced before the court to show that the aforesaid document was part of the contract of insurance.

8. The respondent further submitted that the witness who testified on behalf of the appellant in the trial court failed to show that he had been authorised by the appellant's Board of Directors to represent the appellant in the trial court.

9. The respondent further submitted that the "Final Quantum Report" produced by the appellant before the trial court was improperly on record as it went against the provisions of section 35 (1) of the Evidence Act that provides that a document which establishes a fact is only admissible in evidence if the maker has personal knowledge of the matters dealt with by the statement and if the said maker is called as a witness.

10. It was submitted that the fact that the respondent's employee was arrested in relation to the break in at the respondent's premises and subsequently later had the case against him withdrawn did not absolve the appellant's from their contractual obligations and further if the appellant was convicted in its belief of the employee's guilt it was open for them to go for subrogation against the employee.

11. The respondent further submitted that he was entitled to compensation for loss of user/lost earnings as the appellant had not pointed out any clause in the policy document avoiding the same. He submitted that courts have routinely awarded loss of user and loss of earnings provided that the same are specifically pleaded and proved. Reliance was placed on the cases of **Samuel Kariuki Nyangoti v Johaan Distelberger [2017] eKLR, Gebosch Dredger v SS Edison [1933] AC 449, Moore & Another v Der [1971] 3 All ER 517, Jebrock Sugarcane Growers Co. Limited v Jackson Chege Busi, Civil Appeal No. 10 of 1991 (Kisumu), Madhupaper International Ltd & Another v Kenya Commercial Bank Ltd & 2 Others (2003) eKLR** and **Stephen Karanja Kibuku v Safaricom Limited [2018] eKLR.**

Analysis & Determination

12. This being a first appeal, this court's role as stipulated in section 78 of the Civil Procedure Act is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See the case of **Selle & Anor. v. Associated Motor Boat Co. Ltd (1968) EA 123**). This court nevertheless appreciates 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 the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in **Mwanasokoni v Kenya Bus Service Ltd. (1982-88) 1 KAR 278** and **Kiruga v Kiruga & Another (1988) KLR 348).**

13. I have carefully perused the proceedings, the judgement, the record of appeal as a whole including the parties' submissions.

14. The evidence before the trial court which is undisputed is that the parties herein had a contractual relationship in terms of a contract of insurance which covered the respondent's properties against all risks including fire, burglary, terrorism, political violence and acts of man. The insurance cover for the said properties ran from 4/10/2016 to 3/10/2017 and renewed by mutual consent on the 3/10/2017 to 3/10/2018 as per the endorsement Ref R18975017 dated 27th September, 2017. The same was produced in evidence as an exhibit and confirmed DW1 Samwel Ogol. In the intervening period, the respondent's business premises were broken into and several items stolen whose value was kshs 279,000 inclusive of transport for replacement amounting to Kshs 7,000 totalling Kshs 286,000 claimed by the respondent/plaintiff. The respondent also claimed that as a result of the said theft, he lost the profits/earnings from the business discotheque and 16 accommodation rooms. He also claimed for the cost of labour for the reparses. Further, the respondent testified that he was not bound by exclusion clause in the Bizbora Insurance Policy Document as the document never formed part of the Insurance contract.

15. The defendant/appellant in its evidence adduced by DW1 Samwel Ogol admitted insuring the respondent's properties but denied liability on account that there were exclusion clauses in the insurance policy in that as the respondent's employee was suspected to have stolen the items, was charged before Bondo Principal Magistrate's Court and 'admitted' the theft and promised to compensate the respondent hence the respondent was not liable for the loss. In addition, the defendant/appellant contended that the Insurance Policy excluded the appellant from compensating the respondent for any consequential loss.

16. From the above evidence and the submissions, the issues that flow for determination are as follows:

a) ***Whether the appellant was excluded from liability of the contract as a result of the alleged actions of the respondent's***

employee who was implicated in the theft;

b) ***Whether the exclusion clause produced by the appellant in the BizBora Insurance Policy document formed part of the contract and if so whether it excluded the appellant from liability; and***

c) ***Whether the trial court erred in awarding the respondent damages for consequential loss.***

d) ***There are other ancilliary questions that the court will endeavor to resolve.***

17. The appellant submitted that by virtue of provisions of exception contained in the BizBora Insurance Policy document, produced as an exhibit DExhibit 1, specifically exception 1 of section B and exception 1c of section c, the appellant was excluded from liability as the theft at the respondent's premises involved the respondent's employee one Jared Onyango Radier who was charged in Bondo PMCR 102/18 with the offence of bar breaking and stealing contrary to section 306 (a)of the Penal Code and the alternative charge of failing to prevent a felony contrary to section 392.

18. However, I do note that on the 11/6/2018 when the criminal matter came up the prosecution withdrew the charges against Mr. Radier under section 87(a) of the Criminal Procedure Code. Consequently, Radier's guilt was never confirmed. In Kenya, the overriding principle of Criminal justice is that an accused person under Article 50 (2) (a) of the Constitution has the presumption of innocence in his favour guaranteed in the bill of rights unless the contrary is proved by the state beyond reasonable doubt. That being the case, the charging of the Respondent's employee per se cannot be a basis upon which the appellant could seek or seeks to avoid complying with the provisions of the contract of insurance between itself and the respondent. In addition, if the appellant wished to rely on the aspect of charging or suspicion by an insured's employee, the insurance contract would have specifically stated that the insurance company would be entitled to avoid the policy upon suspicion or charging of the insured's employee with the theft of the property insured.

19. Furthermore, the appellant relied on a Bizbora Insurance Policy document which was neither signed nor dated and therefore whether that document constitutes an insurance contract is subject of an issue to be determined herein below. Nonetheless, I find that there was no evidence that the respondent's employee admitted stealing or conniving to steal or attempted to steal the respondent's insured property to warrant application of the exclusion clause in the disputed Bizbora Insurance Policy document which is neither signed nor dated.

20. As to whether the BizBora Insurance Policy document produced by the appellant formed part of the contract of insurance between the parties herein, which document provides at Section C Exceptions 1 (c) where the theft is due to theft or attempted theft or wilful act by an employee of the insured or the insured in connivance with another person or employee, I note that the appellant submitted that this was part of the documents produced by consent before the trial court and as such, the respondent ought to have inspected and interrogated the same. The respondent maintained that this was not part of the insurance policy contract which he entered into with the appellant.

21. From the trial court record, DW1 testified that the BizBora Policy produced as D. Exhibit 1 was not part of the contract of insurance duly executed by the Respondent. An indepth examination of the said Bizbora Insurance Policy document shows that neither was it signed by the Appellant's representative nor by the respondent and neither is it dated for purposes of it being relevant to these proceedings and the contract of insurance between the appellant and the respondent. That being the case, albeit the appellant produced the said document as an exhibit in the lower court, the said document cannot be construed by the court to be a binding contract between the parties hereto as it was never a part of the insurance contract in issue. Production of a document by consent does not in itself confer of assure the probative value of that document. An exclusion clause must at all times be part of the signed contract and not a separate document veiled behind a contract and especially a contract of this nature where the value of the insured property is over 30million. Accordingly, I find and hold that the Biz Bora Policy was not binding on the respondent. A contract of insurance between two parties is only valid if both parties or at least the Respondent or insured signs it and dates it. That was not the case with DExhibit 1.

22. The respondent denied knowledge of the BizBora Insurance policy claimed by the appellant. It was therefore incumbent upon the appellant, in light of the respondent's denial and in the absence of the respondent's signature and even any date on the said policy, to substantiate that the policy was indeed part of the contract entered into between the parties, this court is unable to hold that the BizbBora Insurance Policy document formed part of the contract in issue. Section 107 of the Evidence Act Cap 80 Laws of Kenya provides that; ***"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."***

23. Furthermore, if the policy was a general policy which did not require execution by the client insurer, the question is, why did the said policy document have a place at the bottom for ***Client Signature***? Accordingly, I conclude that the aforementioned Insurance Policy document did not constitute a contract between the parties herein and that the appellant's reliance on the same has no legal or factual basis.

24. Finally, on whether the trial court erred by awarding the respondent ***damages for consequential loss,*** which was loss of income from the discotheque and the 16 accommodation rooms at the Resort, it was argued by the appellant that consequential loss was not recoverable in a standard form policy of insurance unless provided for whereas the respondent submitted that he was entitled to compensation for loss of user/lost earnings as the appellant had not pointed out any clause in the policy document avoiding the same.

25. It was the respondent's case that his premises were broken into and his items stolen and that there were some damages which he repaired. I do note however that the appellant did not controvert the respondent's claim on loss of earnings/user either on cross-examination or in their defence.

26. The appellant cited the Court of Appeal in **Concord Insurance Company Limited** (supra) where it was held, inter alia that consequential loss was not recoverable in a standard form policy of insurance unless provided for. On his part, the respondent cited cases where the court considered loss of user/ earnings. The record of appeal at page 17 has Memo 12 (c) which is part of the insurance policy produced by the respondent as an exhibit and which provides that the insurance cover shall not cover consequential loss.

27. In the case of **Samuel Kariuki Nyangoti** (supra) relied on by the respondent, the Court of Appeal allowed the award of loss of user(profits) where a party had lost his matatu as a result of an accident. The Court of Appeal was of the opinion that where a party completely losses his chattel as a result of an accident ***in which the defendant was liable to compensate***, he was liable to claim for loss of user/profit.

28. This case of ***Samuel Kariuki Nyagoti*** [supra] is however distinguishable from the instant case as the contract between the parties herein at Memo 12 is explicit that ***compensation for any consequential loss*** shall not be entertained. Courts rarely interfere with parties' power to enter into contracts and set the terms therein for themselves. In this case, there is an express exclusion clause for consequential loss in the insurance contract between the parties which document is dated 12/07/2016 and relied on by the respondent as his evidence. Accordingly, it is my humble view that the trial court erred in granting the respondent damages for loss of user/earnings as prayed as the same was strictly restricted by the insurance contract.

29. The upshot of the above is that the instant appeal partially succeeds to the extent that the award in favour of the Respondent by the lower court for the claim for loss of earnings or consequential loss is hereby set aside and substituted with an order dismissing the claim for loss of earnings. The plaintiff only succeeds in his claim for the stolen items being special damages as pleaded and proved in paragraph 9 of the plaint amounting to **Kshs 286,000** together with costs of the suit and interest on the awarded sum, to accrue from date of filing suit until payment in full.

30. I must mention that albeit the respondent claimed that the witness for the appellant, Mr Samwel Ogol a manager of the appellant company had no authority to testify for the appellant. The respondent cited **Order 9 Rule 2 (c) of the Civil Procedure Rules** which provides:

> ***"the recognized agents of parties by whom such appearance, applications and acts may be done are:***
>
> ***(c) in respect of a corporation, an officer of the corporation duly authorised under the corporate seal.***

31. A similar issue arose in **Wines & Spirits Kenya Limited & another v George Mwachiru Mwango [2018] eKLR** where the Court of Appeal observed as follows:

> ***"Closely related to this, the respondent has taken issue with the oral testimony of the appellants' sole witness, Mr. John Waiganjo; whom the respondent claims lacked authority to testify. This being a preliminary point, it is perhaps pertinent to dispose of it immediately, before delving into the merits of the case.***
>
> ***[15] Looking at the record, no objection appears to have been raised regarding Mr. Waiganjo's competence to testify. The issue was however mentioned, albeit peripherally, in the course of his cross examination. Asked whether he had been authorized by his co-director to testify on the 2nd appellant's behalf, he stated that though he was duly authorized, he had not brought the resolution with him to court. The respondent now asserts that on account of Mr. Waiganjo's failure to produce a written resolution detailing his authority to testify, his testimony ought to have been disregarded. However, save for the decision the Bugurere Coffee Growers case, no law has been cited to support the contention that a witness, who is a director of a company must evince a written authority from the company in order to testify on behalf of the company. In addition, the decision in the Bugerere case is vastly distinguishable from the circumstances herein because in that case, the question for determination was whether an unauthorized firm of advocates could institute legal proceedings on behalf of a company. In this case however, the question is whether a witness needs similar authority in order for him to testify on the company's behalf.***
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> ***[16] Under the law of evidence, the court is allowed to make certain presumptions of fact. One such presumption is with regard to persons acting in a certain capacity or under documents. According to Phipson on Evidence; 17th Edn at p.1264-65; where a public official purports to act in a certain capacity, the court may readily presume the veracity of his capacity to so act. However, a higher premium is placed upon a private individual. The authors had this to say on the subject:***
>
> > ***"Generally however, private relationships cannot, except as against the parties acting or acquiescing, be so established……***
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> ***As against the parties themselves, however, acting in a capacity is, in civil cases, generally, and even in criminal cases sometimes, sufficient proof; though, where the appointment is by written contract, and not mere resolution, and its terms are material, parol evidence will be inadmissible if the document itself can be produced." (Emphasis added)***
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> ***In our view therefore, the production of written authorization is only mandatory where contractual issues have been raised not in cases of authorization by mere resolution. In this instance, the authorization was by way of a resolution dated 15th September, 2014 which resolution is on record and has not been challenged by the respondent. Consequently, the testimony of Mr. Waiganjo was properly on record."***

32. In this case, the appellant in its list of witnesses dated 05/10/2018 listed Mr Samwel Ogol, its Branch Manager Kisumu Office and Job Omondi, Loss adjuster General Adjusters Kenya Limited. However, only the Branch Manager testified and during the hearing, the respondent never raised any issue with the competence of the witness to testify on behalf of the appellant. He did not even cross examine the witness on whether he was authorised to testify for the appellant. That issue was only in the submissions by the respondent but the trial court did not make any reference or make any issue out of it.

33. Furthermore, none of the documents produced by the said witness has in any way prejudiced the respondent as the main exhibit is the

insurance policy which the respondent produced in evidence and which clearly sets out an exclusion clause on compensation for consequential loss which this court has disallowed and allowed the other claim for the loss of property in his business premises.

34. Accordingly, I find no merit in the objection to the competence of the witness Mr Samwel Ogol and dismiss the objection.

35. In the end, I allow the appeal herein only to the extent that the award for loss of earnings and cost of labour is set aside and substituted with an order dismissing the claim for Kshs 1,135,000. All other grounds of appeal are found to be devoid of merit and are hereby dismissed. The award for loss of the respondents' property valued at kshs 279,000 together with transport for replacement of the lost items, kshs 7,000 all totalling to kshs 286,000 is hereby upheld together with costs and interest at court rates from date of filing suit until payment in full.

36. I order that each party shall bear their own costs of this appeal.

37. Orders accordingly.

Dated, Signed and Delivered at Siaya this 20th Day of January 2021 *via Microsoft teams in the presence of Mr Dancan Njoga counsel for the appellant and absence of Mr C.N. Mutuku Advocate for the respondent.*

R.E. ABURILI

JUDGE

Court Assistants: Modestar and Mboya