REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 653 OF 2019

BRITAM GENERAL INSURANCE

COMPANY (KENYA) LIMITED.............................APPELLANT

-VERSUS-

SYRUS OTIENO ONYANGO............................RESPONDENT

(Being an appeal from the judgment and decree of Honourable Mmasi (Mrs.) (Senior Principal Magistrate) delivered on 22nd October, 2019 in Milimani CMCC NO. 3565 OF 2018)

JUDGEMENT

1. The respondent who was the plaintiff in Civil Suit No. 3565 of 2018 before the Chief Magistrate's Court at Milimani Commercial Courts instituted a suit by way of the plaint dated 20th March, 2018 and sought the sum of Kshs.584,000/= against the appellant arising out of an insurance policy.

2. The respondent pleaded in his plaint that he was at all material times the registered owner of motor vehicle registration number KCB 526D Toyota Allion ("the subject vehicle") and that he had taken out a comprehensive motor vehicle insurance policy with the appellant on or about the 9th day of February, 2019 vide Policy Number 552/804/1/003724/2016 which issued Certificate Number A7880866 for the period between 9th February, 2017 and 5th October, 2017, wherein the appellant had undertaken to indemnify the respondent for all costs and expenses, which the latter would become legally liable to pay in respect to any loss arising out of the subject vehicle.

3. The respondent pleaded that on or about 7th September, 2017 the subject motor vehicle was involved in a road traffic accident along Thika-Garissa Road, resulting in extensive damage to the subject vehicle. Upon reporting the accident to the appellant, it instructed the respondent to avail the subject vehicle to M/S Rucini Garage for repairs and which repairs were initially to be catered for by the appellant but due to its inaction, the respondent undertook the repairs himself, incurring expenses in the sum of Kshs.584,000/=. The respondent claimed the said sum as compensation from the appellant.

4. Upon service of summons, the appellant entered appearance and filed its statement of defence on 15th May, 2018 denying the respondent's claim.

5. At the trial, the respondent testified and called one (1) witness, whereas the appellant relied on the testimony of two (2) witnesses.

6. Upon filing of submissions, the trial court delivered judgment in favour of the respondent and against the appellant as prayed in the plaint.

7. The aforesaid decision has precipitated the appeal presently before this court. The memorandum of appeal dated 6th November, 2019 constitutes a total of five (5) grounds essentially challenging the trial court's judgment.

8. The appeal was disposed of by way of written submissions. On its part, the appellant argues that the trial court did not consider the subject on insurance premium financing, wherein the insurance policy was to subsist on the condition that the respondent paid the agreed premiums in full and hence upon the default of the respondent, the appellant canceled the insurance policy even before the occurrence of the accident. The appellant made reference to the case of **Liki River Farm Limited v Tausi Assurance Co. Ltd [2018] eKLR** where the court held that the validity of a policy agreement was dependent upon the full payment of the requisite premiums. It is the argument of the appellant that owing to the default on the part of the respondent, it canceled the insurance policy and hence there was no valid contract between itself and the respondent at the time of the accident so as to warrant liability on its part. Consequently, the appellant urges this court to interfere with the decision of the trial court by setting it aside and dismissing the respondent's claim with costs.

9. In reply, the respondent on his part submits that at the time of the accident, all requisite payments in respect to the insurance policy had

been fully made and that no cancelation notices of the insurance policy were ever served upon him by the appellant. The respondent therefore pleads with this court to dismiss the appeal with costs and to uphold the decision of the trial court.

10. I have considered the rival submissions on record alongside the relevant authorities cited. As required of me being the court sitting on a first appeal, I have re-evaluated the evidence placed before the trial court. I will consider the five (5) grounds of appeal under the two (2) limbs hereunder.

11. The first limb of the appeal has to do with whether the learned trial magistrate considered the totality of the evidence which was placed before her. On the subject of the insurance premium financing agreement, it was the evidence of Micah Ruga Kamathi who was DW1 that he was at all material times the Branch Manager-Cooperative Bank (University Way Branch) ("the bank") and that the bank financed the premiums paid to the appellant. His evidence was confirmed by that of DW2 (Kelvin Mwangi) a Legal Assistant with the appellant, who stated in his evidence that the bank acted as the agent of the appellant and that the premiums paid would go through the bank. The witness further stated that the contract in question existed between the appellant, the respondent and the bank. In her judgment, the learned trial magistrate acknowledged the existence of an insurance agreement between the parties herein.

12. Upon my re-examination of the evidence, it is not in dispute that the appellant and the respondent had at all material times entered into an insurance agreement vide the policy mentioned hereinabove. However, I observed that none of the parties availed a copy of the insurance agreement before the trial court for reference and in order to ascertain the nature of the agreement. Suffice it to say that going by the testimonies of the respective witnesses, it is apparent that the insurance arrangement in question involved the appellant, the respondent and the bank; the latter of which is said to have been an agent of the appellant. There is nothing to indicate that the learned trial magistrate overlooked this evidence.

13. Concerning the subject of the loan repayment details produced by the bank, the respondent who was PW1 stated that he made monthly payments of Kshs.4,869.82 towards the premiums and which payments were financed by the bank. The respondent produced a loan statement for his loan account as well as a bank statement for his personal account, both issued by the bank to show the track record for repayment of the loan. According to the respondent, the two (2) accounts held with the bank are linked.

14. In his evidence, DW1 testified that between May and June, 2017 the premiums had not been serviced on time and hence the respondent's loan account was in default. The witness further testified that where premiums were not paid in time, an insurance company ought to be informed. He also clarified that in the present instance, the bank is the one that financed the premiums to a sum of Kshs.41,377.19, and that it is the bank that paid the appellant the premium sum in order for it to issue the respondent with the insurance cover, and subsequently the respondent would repay the bank. It was also the evidence of DW1 that notwithstanding some delays, the loan was repaid in full and that the bank statement produced does not reflect a default on the part of the respondent. DW2 on his part confirmed that the insurance premiums were paid through the bank and that the respondent was therefore indebted to the bank at all material times, but had no outstanding premiums owing to the appellant.

15. The learned trial magistrate observed that it is the bank that remitted the funds to the appellant as seen in the bank statements produced at the trial and that the delays in making any premium payments could not have mandated the appellant to declare that at the time of the accident the respondent was uninsured.

16. From re-evaluation of the pleadings, material and evidence, I note, as the learned trial magistrate did, that the premium payments were made to the appellant directly by the bank and it is clear that the arrangement was such that the bank would make such payments on behalf of the respondent and thereafter the respondent would repay the outstanding loan. It is also clear that on various occasions there were delays on the part of the respondent in repaying the loan sum; however, DW1 stated that the said sum was eventually cleared and the evidence that was adduced does not indicate any particular defaults on the part of the respondent. I therefore concur with the overall finding of the learned trial magistrate that no credible evidence has been tendered to show that the respondent necessarily defaulted on his premium payments.

17. In respect to the evidence touching on the cancelation notice, the respondent stated in his evidence that he did not receive any notification of cancelation of the insurance policy and only came to learn of the cancelation from the bank, upon taking the subject vehicle for repairs. DW1 gave evidence that the policy was cancelled in July, 2017 at the behest of the bank but was later reinstated in September, 2017 during which time the respondent had continued to repay the loan in respect to the premiums. It was the testimony of DW2 that the policy was canceled for non-payment of premiums effective 27th June, 2017 and that the premiums were to be paid in monthly instalments through the bank. However, the witness indicated that he had no evidence to show the cancelation of the policy and that upon occurrence of the accident, the appellant's agents advised the respondent to take the subject vehicle for repairs at their garage. The witness also indicated that it was a term of the policy agreement that if the subject vehicle was involved in an accident, the appellant would undertake the repairs.

18. In the end, the learned trial magistrate was satisfied that the respondent had proved his case on a balance of probabilities.

19. Upon re-examination of the evidence, I find nothing credible to indicate that if at all the policy was cancelled, notice of the same was given to the respondent. It is also apparent that any cancelation of the insurance policy was done irregularly and it even appears that upon cancelation, the policy was reinstated. In my view, the above conduct by the appellant as well as the act of instructing the respondent to transport the subject vehicle for repairs at its garage demonstrates the existence of an insurance relationship between the parties at all material times, whether expressly or impliedly. I am therefore satisfied that the learned trial magistrate arrived at a correct finding and to point out that the cancelation of the insurance policy was irregular and the appellant was liable to indemnify the respondent for any costs incurred in repairing the subject vehicle, pursuant to the insurance policy agreement.

20. The second limb of the appeal concerns itself with whether the learned trial magistrate considered the submissions by the appellant. Upon perusal of the record, I note that the appellant filed its written submissions before the trial court on 15th August, 2019. Upon perusal of the impugned judgment, I have not come across anything to indicate that the learned trial magistrate overlooked the appellant's submissions. In the same manner, the appellant has not placed any credible evidence or material to support such assertion.

21. In the circumstances, I have no reason to interfere with the reasoning and finding arrived at by the learned trial magistrate.

22. Consequently, the judgment of the trial court is hereby upheld and the appeal dismissed with costs to the respondent.

DATED AND SIGNED AT NAIROBI THIS 27TH DAY OF JULY, 2021.

A. MBOGHOLI MSAGHA

JUDGE

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 29TH DAY OF JULY 2021.

J. K. SERGON

JUDGE

In the presence of:

Mr. Kiplagat for the Appellant

Mr. Muturi for Respondent