REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CORAM: A.K NDUNG'U J

CIVIL APPEAL NO 621 OF 2018

JAMES KAMAU KIMANI.....APPELLANT

VERSUS

CORPORATE INSURANCE CO. LIMITED.....RESPONDENT

(Being an appeal from the judgment of CMCC NO. 4716 of 2009, James Kamau Kimani versus Corporate Insurance Company Limited delivered on 2nd December 2015 by the Hon. Mr.Lorot Senior Principal Magistrate)

JUDGEMENT

1. James Kamau Kimani, the appellant herein, sued Corporate Insurance Co. Limited in the lower court. The claim was in respect of a comprehensive insurance policy No. C01/089/1/900760/2008 taken out by the appellant in respect of motor vehicle registration number KAX 649S. The insurance policy by the appellant with the respondent was for a period of 1 year running from 5th September 2008 to 4th September 2009. The appellant alleged that the vehicle was involved in an accident on 11th October 2008 and the vehicle extensively damaged. He alleged that he sought compensation from the respondent, but the respondent repudiated the said policy.

2. The respondent denied the occurrence of the accident and that the vehicle was in the control of an authorized driver at the time of the accident. The respondent averred that upon investigations, the appellant was found to have breached the terms of the policy wherefore the respondent proceeded to exercise its rights under the policy and repudiated the plaintiff's claim. The respondent claimed that in any case the appellant had lodged a claim for theft of the vehicle and in his claim the appellant explained that the theft had been committed by his driver. The respondent contends that theft by servant was not among the risks covered in the said insurance policy. They further denied that the pre-accident value of the motor vehicle was Kshs 630,000/-.

3. During the hearing, the parties adduced evidence in support of their respective claims. The appellant testified as Pw1 while Tiberius Nyang'au testified as Dw1. Judgment was entered in favour of the Respondent at the conclusion of the trial.

4. Aggrieved by the decision, the Appellant appealed to this court. The Memorandum of Appeal contains seven grounds of the appeal as follows:

1. *The trial magistrate erred in law and in fact in the way she interpreted the evidence produced in court.*
2. *The learned magistrate erred in law and in fact by finding that the plaintiff failed to prove his case.*
3. *The learned magistrate erred in law and fact by finding that the appellant's suit was unsustainable in law.*
4. *The learned magistrate erred in law and fact by finding that the appellant's suit was brought in bad faith.*

DETERMINATION

5. Before I deal with the issues raised in the appeal, I must point out that I am guided by the principle that as this is a first appeal, it is my duty to reconsider the evidence, evaluate it and reach my conclusion bearing in mind that it is the trial court that saw and heard the witnesses testify and was able to assess their demeanour (see ***Selle v Associated Motor Boat Co. [1968] EA 123***).

6. Having considered the parties' submission and the evidence presented before the lower court the issue for determination revolve around whether the respondent was entitled to settle the appellant's claim.

7. The dispute before me revolves around an insured and an insurance company and the contract is guided by the principle of *uberrimae fidei*. The Court of Appeal on its part in **Co-Operative Insurance Company Ltd vs. David Wachira Wambugu [2010] 1 KLR 254** held that:

> *"The learned Judge was right in saying that a contract of insurance is one of uberrimae fidei. The insurer is entitled to be put in possession of all material information possessed by the insured. In policies of insurance, whether marine insurance or life insurance, there is an understanding that the contract is uberrimae fidei, if you know any circumstances at all that may influence the underwriter's opinion as to the risk he is incurring, and consequently as to whether he will take it, you will state what you know. There is an obligation there to disclose what you know, and the concealment of a material circumstance known to you, whether you thought it material or not, avoids the policy…Contracts of insurance are contracts of utmost good faith and this gives rise to a legal obligation upon the insured, prior to the contract being made, to disclose to the insurer all material facts and circumstances known to the insured which affect the risk being run. Insurance is a contract of speculation and the special facts upon which the contingent chance is to be computed lie most commonly in the knowledge of the assured only; the underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge to mislead the underwriter into a belief that the circumstance does not exist. The keeping back such circumstance is a fraud, and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention, yet still the underwriter is deceived and the policy is void; because the risqué run is really different from the risqué understood and intended to be run at the time of the agreement. The policy would be equally void against the underwriter if he concealed. The governing principle is applicable to all contracts and dealings. Good faith forbids either party, by concealing what he privately knows, to draw the other into a bargain from his ignorance of the fact and his believing the contrary."*

8. Under the *uberrimae fidei* principle one has to essentially abstain from bad faith and act in good faith in an insurance contract. This would be achieved through disclosure and candor. Misrepresentation or non-disclosure once established leads to an inference of breach of the *uberrimae fidei principle.* Any keeping back is fraud and the policy may be avoided.

9. The duty applies and runs both before and after the execution of the contract as the object of disclosure is to inform the parties of matters immediately under consideration. (See **Black King Shipping Corporation –vs- Massie "The Litsion Pride" [1985] 1 Lloyds R 137 and also Manifest Shipping Co. Ltd –vs- Union Polaris Insurance Co. Ltd "The Star Sea" [1995] 1 Lloyds R 651**) where the Courts held the view that commercial good sense dictated that the duty extend beyond execution of the insurance contract and run until after a claim is actually filed in court. Where there is breach then the aggrieved party is entitled to avoid the policy.

10. PW 1 testified his driver informed him that the vehicle had been stolen and also reported the theft to the police station in Muthaiga. The abstract from the police records pertaining to OB. 4/12/10/2008 reveal that that the report of theft of motor vehicle KAX 649S Toyota Corolla 110 Saloon valued at Kshs 495,000/- was reported by the appellant. A claim was made by the appellant in the respondent's '*Motor Theft Claim Form*'. At the time the appellant made the claim, he informed the respondent that the loss occurred near De'Larue along Thika Road. The appellant described the circumstances under which the loss occurred as follows;

> *"The driver alleged that he had been robbed the vehicle but after police investigations he was charged with stealing of the vehicle and giving false information."*

On 13th October 2008, the appellant's driver, Daniel Muigai Muraya was arraigned in court to answer to the charges. Up to this point the only information known to the appellant was that the motor vehicle had been stolen hence his claim under '*Motor Theft Claim Form*'.

11. In his own words in his witness statement the plaintiff states at paragraph 3;

> *"3. On 11th October 2008 one Daniel Muraya who was driving my vehicle with my authority called me and informed me that the vehicle had been stolen. Mr. Daniel Muraya and I then proceed to Muthaiga Police Station the next day and reported the theft of the vehicle and recorded our statements. The police then carried out their investigations and found out that Mr. Muraya had lied to the police about the theft of the vehicle. He was arrested and charged with stealing the vehicle and the offence of making a false statement to the police at Makadara CR No. 4028 of 2008 but was subsequently acquitted."*

12. The claim by the appellant as particularized under paragraph 4 of the plaint states;

> *"4. On or about the 11th October 2008 during the currency of the said policy, the insured motor vehicle registration KAX 649S while in custody of the insured's authorized driver was involved in collision with motor vehicle registration number KAJ 419N along Moi Avenue at the junction of Mama Ngima Street in Nairobi as a result of which the insured motor vehicle was extensively damaged."*

13. Notably this claim is lodged in court on the 24/7/2009 vide a plaint dated 20/7/2009. By the time the suit is lodged, the criminal case facing the appellant's driver for a charge of stealing the motor vehicle and giving false information was still pending as the said driver was acquitted on 18/12/2009. The question whether the driver was an unauthorized one or had stolen the motor vehicle had not been conclusively answered by the time the claim was lodged in court.

14. In cross examination, the appellant stated inter alia that "**The truth was that it was not a theft, it was an accident**."

15. On the part of the respondent, Tiberius Nyang'au (DW 1) testified that on 23/10/2008, the appellant reported that the motor vehicle had been stolen. They caused investigations to be conducted by Ms Rapid Investigation Services. A report dated 28/11/2008 was prepared. The report indicated that the motor vehicle was not stolen. The claim was repudiated on ground that the circumstances of loss as reported were not covered.

16. On cross examination, DW 1 stated that theft was covered under the policy. That *'theft'* included theft when the vehicle was **under the hand of** an authorized driver, **not by** the authorized driver. Cross examined further, he stated;

> *"We declined the claim on the circumstances of loss presented to us, including what the police said and the findings of our investigator."*

17. At paragraph 6 of the defence, the respondent avers;

> *"6. The defendant further denies that the said insured motor vehicle KAX 649S was in the control of an authorized driver at the time of the alleged accident as averred in paragraph 4 of the plaint and puts the plaintiff to strict proof thereof."*

18. I have re-evaluated the evidence on record, considered the submissions by counsel and had due regard to the judgement of the trial court.

19. The appellant bore the burden to prove that the respondent had no valid ground upon which to repudiate the claim. **Section 107** of the **Evidence Act** lays this bare;

> *"S 107* ***(****1) 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.*
>
> *(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."*

20. The record herein shows the appellant's claim is based on an accident involving his authorized driver when in control of his (the appellant's) motor vehicle. There is on record a claim to the respondent on the basis that the motor vehicle was stolen earlier on lodged by the appellant. While that earlier claim may as well be on the basis of false information initially given by the authorized driver (and which may not be blamed on the appellant), in a strange twist, the same authorized driver was subjected to investigations by the police who made a finding that there was evidence to sustain a charge of stealing of the said motor vehicle against the driver and indeed charged him vide Makadara Criminal Case No. 4028 of 2008 where the appellant was the complainant.

21. The certainty of the claim lodged before the respondent by the appellant becomes cagey. Two issues readily spring to the fore;

1. Is the claim one arising from a road traffic accident involving an authorized driver of the appellant or

2. Is the claim one arising from theft of the motor vehicle by the authorized driver.

22. In answer to the claim, DW 1 in his evidence as per his witness statement raises valid grounds that made the appellants claim unsustainable. At paragraph 8 of his statement he states;

> ***"Para 8:*** *In his plaint the plaintiff claims that the subject motor vehicle was involved in an accident with motor vehicle registration number KAJ 419N along Moi Avenue in Nairobi on 11.10.2008, the date he claims his motor vehicle was stolen. He claims that the motor vehicle was in custody of his authorized driver when the accident happened. He has not explained how the motor vehicle was involved in an accident while with his driver while at the same time it had also been stolen on the same date and was only recovered on 11.11.2008.*
>
> *The plaintiff has also not provided to the defendant any statement by his authorized driver to verify his claims of theft and/or accident to the subject motor vehicle on the alleged date.*
>
> *The plaintiff has all along failed and/or refused to furnish the defendant with the details of the alleged accident which details would enable the defendant to sufficiently investigate and address the accident and attendant loss if any."*

23. The police found for a fact that there was evidence to sustain a charge of stealing of motor vehicle against the driver of the appellant. The driver was acquitted of this charge. It is noteworthy that the acquittal was as a result of witnesses including the appellant failing to testify in the matter and after long delay, the driver was acquitted. That acquittal did not help clear the opaqueness in the appellant's claim.

24. Counsel for the appellant has correctly summed up the issue for determination herein being whether the loss was occasioned through a risk covered by the policy and whether the respondent was lawfully entitled to repudiate the policy or avoid compensating the plaintiff.

25. The submission by the appellant that it is clear from the evidence adduced by both the appellant and the respondent that the loss was occasioned by an accident which was a risk covered by the policy is not borne out of the record. The only person who could positively affirm this fact was the driver of the subject motor vehicle at the material time and who would be in a position to give better and detailed particulars of the accident to enable the insurer fully investigate the claim and deal with it either way. As it were, as the claim was lodged, the said driver was defending himself in a court of law against a charge of stealing the said motor vehicle at the time of the accident!

26. The trial court is faulted by the appellant for stating that the plaintiff did not state how the accident occurred. It is urged that this is not a burden the plaintiff would have been in a position to discharge bearing in mind that all the parties concerned learnt of the accident after investigations were done by the insurance investigators.

27. At all material time, the appellant was in control of his motor vehicle even when the motor vehicle was in hands of his authorized

driver. Indeed the authorized driver herein was his employee/servant. There is no explanation why the appellant did not call the said driver as a witness or at least present the driver's statement to the respondent to enable the respondent appreciate the circumstances of the alleged accident.

28. The way I understand it, the duty of an insurer to compensate an insured against a covered risk is not in doubt. The duty however goes hand in hand with the insured's duty to disclose truthfully, exhaustively and conclusively, all material details of the circumstances leading to the loss to enable the insurer appreciate whether the risk in issue is covered or whether any grounds exist for repudiation of the claim.

29. That duty was not any less on the part of the insured in this case. The insured herein has taken a nonchalant posture as though it was enough to state *"I have suffered loss, compensate me"* without offering sufficient details of the circumstances surrounding the loss. I have scoured through the record and the same is lacking of any details from the insured on how the accident (if at all) happened never mind that the initial report of theft of the motor vehicle was never conclusively resolved.

30. An insured needs proof that his claim is a genuine claim and the insurer will need to be certain the claim satisfied the terms and conditions of the insurance contract.

31. The contention in the submissions by the appellant that the evidence was clear that all parties were deceived by the runaway driver as there was no theft cannot possibly be true in light of the evidence gathered by the police and which evidence led to the charging of the said driver.

32. I agree with counsel for the respondent on the submissions that the lower court did observe that the appellant had completed a theft of motor vehicle claim. The police investigated the claim. The appellant did not specify exactly what point the police concluded the driver was lying. The court observed that it was apparent that between 13th October 2008 and 19/11/2008, the appellant was not aware of the whereabouts of the vehicle. The two police abstracts produced were unclear on the date of loss, whether it was on 21/10/2010 or 11/10/2010. It is also not explained how the police knew the driver was lying before the motor vehicle was found.

33. It was for the appellant to call the police officer who investigated the case to shed light on all these grey areas. This was not done leaving a gaping hole in the appellant's case.

34. In their defence, the respondent averred that theft by servant was not a covered risk under the contract of insurance between the appellant and the respondent. No evidence is adduced to rebut this fact.

35. As stated earlier in this judgement, the duty of full disclosure under the *uberrimae fidei* principle applies and runs both before and after the execution of the contract. It runs until after the claim is made.

36. In our instant suit the elements of material non-disclosures and lack of clarity in the claim are glaring. Through his evidence, the appellant has not resolved whether the claim is one under an accident involving an authorized driver in the course of his work and movement or whether it is one of theft by a servant. If it was the later, the appellant has not offered evidence to show that the risk of theft by servant was covered under the policy.

37. I will now consider whether the appellant is entitled to the value of the motor vehicle at Kshs 630,000/-. In **Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5**the court held as follows:

> ***"An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low …."***

38. The appellant claims Kshs 630,000/- being the value of the vehicle plus the cost of repairs. The appellant produced an assessment report dated 3rd March 2009 where the pre-accident value is estimated at Kshs 500,000/- and the salvage value at Kshs 120,000/-. In ***Madison Insurance Limited v Solomon Kinara t/a Kisii Physiotherapy Clinic KSM CA Civil Appeal No. 263 of 2033 [2004]eKLR***, the Court of Appeal observed as follows;

> *In their book "The Law of Insurance", 2nd Edition, under the heading "The Contract of Insurance" and sub-heading "Indemnity" at page 4, Preston and Colinvaux state as follows:*
>
> *Indemnity, it has been said, is the controlling principle in insurance law, and by reference to that principle a great many difficulties arising on insurance contracts can be settled. Except in insurance on life and against accident the insurer contracts to indemnify the assured for what he may actually lose by the happening of the events upon which the insurer's liability is to arise, and in no circumstances, is the assured in theory entitled to make a profit of his loss. That rule might be inferred as being the intention of the parties, having regard to the aim of a contract of insurance, but there are further powerful reasons for its application. Were it not so, the two parties to the contract would not have a common interest in the preservation of the thing insured and the contract would create a desire for the happening of the event insured against. Where in fact the assured has a prospect of profit, there and there only can arise the temptation to crime, fraud or such carelessness as may bring about the destruction of the thing insured.*
>
> *That is very powerful language, but the passage nevertheless brings out the basic concept underlying a contract of insurance, namely that the party whose property is being insured pays premium not with the intention of making any profit out of the transaction but rather with the intention that were the items assured to be destroyed, stolen or damaged, the other party offering the policy would replace the stolen or destroyed item or pay the reasonable charges for its repair.*

39. In this instant case DW 1 confirmed through his testimony that the policy for indemnity was for Kshs 500,000/- based on the value of the vehicle.

40. I would have awarded compensation for damage to the vehicle in the amount of Sh 380,000 being the pre-accident value of Kshs 500,000 less salvage value of Ksh. 120,000.

41. With the result that I find the trial court properly addressed itself to the evidence before it and reached the correct conclusions.

42. Without difficulty, I find that the insurer was justified in taking the position that the appellant was in breach of his duty to act in utmost good faith at the time of reporting the incident and in his subsequent conduct in the process of making the claim and for the reasons above stated I am satisfied that the respondent was entitled to repudiate the claim.

43. The appeal is without merit and is dismissed with costs to the respondent.

Dated, Signed and **Delivered** at **Nairobi** this **27th** day of **February, 2020.**

A. K. NDUNG'U

JUDGE