



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURT

CIVIL APPEAL NO.163 OF 2017

THE MONARCH INSURANCE COMPANY LTD.....APPELLANT

VERSUS

WARUCIA MWANGI.....RESPONDENT

JUDGMENT

1. The respondent filed a claim before the subordinate court claiming that on 11th March 2010 his motor vehicle registration number KAL 125 was involved in an accident and extensively damaged. Upon assessment by the appellant's assessors it was declared uneconomical to repair and therefore written off. He averred that at the time of the accident the pre-accident value was Kshs.350, 000/= which the applicant was obligated to pay. After the respondent reported the accident to the appellant he towed the vehicle to a garage in Donholm on instructions of the appellant. Despite having written statements and depositing the original log book with the appellant, they declined to compensate the respondent resulting into the respondent filing his suit with the trial court.

2. The appellant filed his defence on 10th February 2012 denying the claim. The appellant denied the occurrence of the alleged accident, alleged pre-accident value and breach of contract.

3. After hearing both parties, the trial court found that the respondent had proved his case on a balance of probabilities and entered judgment in favour of the respondent.

4. Aggrieved by the decision of the trial court the appellant filed this instant appeal. The appeal lies on the following grounds;

1. The Learned Magistrate erred in law and in fact on finding and awarding the sum insured of the motor vehicle to be Kshs.350,000/=.

2. The learned Magistrate erred in law and fact failing to consider that the pre-accident value of the suit motor vehicle was Kshs.250,000/= before pronouncing his judgment.

3. The Learned Magistrate erred in law and fact in failing to consider the salvage value of the suit motor vehicle of Kshs.100,000/= when awarding Kshs.350,000/= as compensation to the plaintiff.

4. The Learned Magistrate erred in law and in fact in failing to find that the totality of the evidence the Respondent's claim had not been proven.

5. There was no good or proper basis for the said assessment of compensation payable to the Respondent.

5. As a first appellate Court, this court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that the court did not have the opportunity of seeing and hearing the witnesses first hand. (*See Selle & Another –vs- Associated Motor Boat Co. Ltd. & Others (1968) EA 123.*)

6. At the trial court Warucia Mwangi testified as PW1. He testified that he owned motor vehicle number KAL 125 X. He adopted his statement dated 13th December 2011. According to his statement he gave his motor vehicle to David Mwangi Thuo who left Nairobi at 10:45a.m. and proceeded to Limuru. At about 12.00 noon he was informed that the vehicle had been involved in an accident. He recorded a statement with the police and later he accompanied Thuo to the insured where he reported the matter. The insurers told him to tow the

vehicle from parklands police station to Oserian garage at Donholm. On cross examination PW1 testified that he had not caused the valuation of the motor vehicle be done before the cover was issued. He further testified that the accident occurred 2 weeks after the cover was issued. Police constable George Ogot No.76532 (PW2) testified that a report was made on 11th October 2010 that an accident occurred involving KAL 125X Toyota.

7. The appellant called Obed Kariuki Ireri (DW1) as its witness. DW1 testified that they instructed Morrison and Associates to investigate the accident. He pointed out that there were contradictions from the statement of the insured, driver and the passengers. He testified that the main contradiction was on the time the accident occurred. They decided not to rely on the report by Morrison and Associates and appointed Factline investigator in the hope of getting a credible report. He testified the insured declined to co-operate with the second investigator.

8. It was the appellant's submission that the accident occurred before an insurance contract existed between the appellant and the respondent. The appellant contends that there was conflicting information as regards with the occurrence of the accident. They pointed out that the respondent failed to cooperate with their second investigator. They urged that in any case the pre-accident value of the car was Kshs.250, 000/= and that the trial court erred in awarding Kshs.350, 000/= to the appellant. They submitted that the respondent insured the vehicle at the value of Kshs.320, 000/=. The trial court further failed to consider that the salvage value was Kshs.100,000/= when entering its judgment.

9. The respondent argued that the trial court was correct in awarding Kshs.350,000/= as compensation for the value of the motor vehicle which was written off. They challenged the appellants contention that the vehicle was insured for Kshs.320, 000/=. They argued that the appellant had all documentary evidence but did not produce any of it to support his claim, and the Appellant's evidence through its witness Obed Oreri that the vehicle was insured for Kshs.320,000/= is not plausible. They further submitted that the pre-accident value of Kshs.250,000/= has similarly been plucked from the air as there was no evidence led on the pre-accident value. They also argued that the issue of the value of salvage did not arise before the trial court. They finally submitted that the appellant was determined to avoid payment of the claim by relying on a simple technicality due to a typographical error in paragraph 4 of the plaint which stated the date of the accident as 11th March 2010 instead of October 2010.

DETERMINATION

10. The appellant took issue with the contradicting dates in which the accident is said to have taken place. The appellant has pointed out that as per the plaint, the respondent indicated that the accident occurred on 11th March 2010 and this was before he got insurance cover from the appellant.

11. In the case of Joseph Mbuta Nziu v Kenya orient Insurance Company Ltd [2015] e KLR the court referred to a decision of Nigerian Supreme Court and stated – “ In ADETOUN OLADEJ (NIG) LTD vs NIEGRIA BREWERIES PLC S.C. 91/2002, Judge Pius Aderemi J.S.C. expressed himself as follow;

“.....it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.”

12. The Nigerian Supreme Court went ahead and held that;

“In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”

13. Going by the allegations in the plaint the accident occurred before the respondent took out an insurance policy with the appellant and the appellant would thus not be bound as it had no contractual obligations towards the respondent as at 11th March 2010. PW1 adopted his witness statement dated 13th December 2011 as his evidence in chief. As per his written statement the accident occurred on 11th March 2010. On cross examination he confirmed that the accident happened on 11th March 2010. PW2 testified that an accident occurred on 11th October 2010 involving KAL 125X around 9:30a.m. PW2 admitted that he did not visit the scene of the accident.

14. The duty of the plaintiff is to prove his claim against the defendant on a balance of probabilities. What amounts to proof on a balance of probabilities was discussed by Kimaru, J in *Willian Kabogo Gitau vs. George Thuo & 2 Others [2010] 1 KLR 526* where the Court stated that:

“In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that is probable than not that the allegations that he made occurred.”

15. The respondent who testified as PW1 was categorical both in his witness statements filed in court on 13/12/2011 and in his first answer in cross examination that the accident occurred on 11/3/2010. In the statement at paragraph 2 he states;

“I remember on 11/3/2010 I gave out my said vehicle to my friend Mr. Mwangi who was to pick his nephew from school at Kabete. At around midday, one Mr. Duncan Maina, a friend of mine called me and informed me that Mr. Mwangi was involved in an accident at Spring Valley on his way to Kabete and the vehicle has been towed to Parklands police station.....”

16. In the 1st answer in cross examination he stated “ Accident happened on 11/3/2010.

17. This, in my view is a material contradiction which was not resolved even in re-examination of PW1 and should not have been overlooked by the trial court.

18. The pleading itself (plaint) at paragraph 4 of the plaint reads;

“4 on or about the 11th day of March 2010, the Plaintiff’s Motor Vehicle was involved in a road accident at Spring Valley Nairobi and was extensively damaged and upon assessment by the Defendant’s assessors, was declared uneconomical to repair and therefore written off.”

19. The respondent thus pleaded that the accident occurred on the 11/3/2010 and proceeded to adduce evidence in support of that fact.

20. It is submitted for the respondent that the appellants want to avoid payment by relying on a simple technicality due to typographical error in paragraph 4 of the plaint which stated the date of the accident as 11/3/2010 and not 11/10/2010.

I hold a contrary view. This is not a simple technicality. The respondent makes the statement in his pleading (plaint). He re-confirms it in his witness statement. He further confirms the date when under cross examination.

21. A party is allowed to amend its pleading at any stage. Despite the existence of the error, no attempt was made to amend the pleading. The matter is compounded by the fact that the error is not only in the pleading but is also on the witness statement and on the respondent’s evidence on oath. There is no proof or certainty on whether the accident was on 11/3/2010 or 11/10/2010 arising from the contradictory evidence on record.

22. The contradicting testimony by the respondent’s witnesses weakened the respondent’s case and I find that he did not meet the threshold requires for proving civil cases, that is, proof on a balance of probabilities.

23. I am satisfied that on the evidence before court, the respondent’s case is not proved to the required degree. I find the appeal meritable and I allow it.

24. Having determined this central issue, I do not deem it necessary to address the other peripheral issues raised by the appellant.

25. With the result that the appeal is allowed. I set aside the judgment of the trial court and substitute thereof an order dismissing the respondent’s suit. The appellant shall have the costs of suit both at the trial court and on appeal.

Dated and delivered at Nairobi this 27th day of February, 2020.

A.K. NDUNG’U

JUDGE