REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 196 OF 2009

JUBILEE INSURANCE COMPANY LTD.....APPELLANT

-VERSUS-

JOHN WAITHAKA CHEGE.....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. G.A. MMASI, Senior Resident Magistrate, delivered on 1st December 2009 in Eldoret CMCC No. 1329 of 2004)

JUDGMENT

[1] This is an appeal from the Judgment and Decree passed by the lower court in **Eldoret Chief Magistrates Civil Case No. 1329 of 2004: John Waithaka Chege vs. Jubilee Insurance Company Limited**, wherein the Respondent, **John Waithaka Chege**, sued the Appellant, **Jubilee Insurance Co. Ltd**, for indemnity pursuant to an insurance policy. The contention of the Respondent was that, by a policy of insurance No. 35289 dated **28 September 1998**, issued by the Appellant in consideration of an annual premium of **Kshs. 19,500/=,** his house on the piece of land known as **Block 11/Mwanzo Area/02**, including the perimeter wall and the domestic property in it, was covered by the Appellant against various perils. In particular, he stated that the perimeter wall was insured for the sum of **Kshs. 500,000/=;** and that the perils contemplated included storm and tempest.

[2] The Respondent further contended in his Plaint before the lower court that, during the currency of the policy, heavy rains that afflicted the country in 1998 caused damage to his perimeter wall; and that when he presented his claim to the Appellant, the Appellant wrongfully repudiated the policy; and so, he had to bear the cost of repairing the wall in the sum of **Kshs. 369,634/=.** He added that, thereafter in **October 1999**, again during the life of the policy, which he had renewed and paid for, the perimeter wall was again destroyed when a tree fell on it due to strong winds. That when he presented his claim for **Kshs. 64,126.25** to the Appellant, the claim was again rejected. It was thereupon that the Respondent filed the lower court suit, seeking a declaration that the Appellant's repudiation of the insurance contract, in both instances, was wrongful; and claiming **Kshs. 433,760.25** by way of indemnity plus interest and costs.

[3] The suit was resisted by the Appellant. In its Statement of Defence dated **4 February 2003**, the Appellant contended, in the main, that loss occasioned by storm and tempest was not an insured risk. The Appellant also denied that the damage in question was caused by heavy rains, but happened on account of inadequate foundation at the time of construction, and that it had developed over a considerable period of time. Thus, the Appellant had prayed for the dismissal of the suit with costs.

[4] Upon hearing the parties, the lower court rendered its Judgment on **15 December 2009**, finding in favour of the Respondent. It was satisfied that the damage had indeed occurred, and that the damage was due to an insured peril and was therefore covered in the subject policy. Hence, judgment was entered for the Respondent in the sum of **Kshs. 433,760.25** plus costs and interest as prayed in the Plaint. Being dissatisfied with that decision, the Appellant preferred this appeal from the Judgment and Decree of the lower court, raising the following grounds of appeal:

> **[a]** That the learned trial magistrate grossly misdirected herself in handling the entire case as an ordinary run of the mill case without considering or sufficiently considering the various, substantial ramifications latent and patent in the evidence.
>
> **[b]** That the learned trial magistrate did not or did not sufficiently consider the Appellant's case with the gravity it deserved, more so when it was backed by disinterested professional evidence.
>
> **[c]** That the learned trial magistrate did not consider that, as in all insurance contracts, the Respondent did not adhere to the principle of *uberrimei fidei*, and that, consequently, the Respondent's claim ought to have been dismissed.
>
> **[d]** That the learned trial magistrate did not consider that the Respondent reconstructed the wall to a much superior structure than it

was at the time the wall was insured, and attempted to illegally gain from the misfortune of the wall collapsing.

[e] That the learned trial magistrate should have considered whether the wall could have collapsed due to gradual deterioration and subsidence rather than heavy rains.

[f] That the learned trial magistrate did not direct her mind at all to the strong possibility that the concrete columns on the side of the wall had become detached and was not supportive of the wall, with the result of collapse by natural attrition.

[5] Thus, it was the Appellant's prayer that its appeal be allowed with costs, and that the judgment of the learned trial magistrate be set aside. The appeal was duly admitted and directions issued that the same be disposed of by way of written submissions. Thus, in the Appellant's written submissions dated **9 October 2018**, Counsel for the Appellant proposed the following issues for determination:

[a] Whether there was a policy of insurance in existence during the two unfortunate occasions of loss to the Respondent;

[b] Whether there was adequate proof that the Respondent suffered damage, and whether the same were insured under the policy;

[c] Whether the amount claimed as repair charges were proved.

[6] According to **Mr. Maganga** for the Appellant, the Respondent had failed to put a finger on the exact duration when the heavy rains of **1998** started or which specific month of the year that the rains undermined his perimeter wall. On whether the subject peril was insured, Counsel referred the Court to the policy document, marked the **Plaintiff's Exhibit No. 1** before the lower court. He urged the Court to find that loss and damage arising from **"atmospheric conditions"** were excluded under the exceptions to Section C of the Policy; and therefore that the Appellant was under no obligation to indemnify the Respondent for his damaged wall. Counsel further urged the Court to note that whereas in the Respondent's Exhibit 2, it was concluded that the damage was a consequence of the *El Nino* rains, this fact was never pleaded in the Plaint. Hence, it was submitted that the lower court erred in allowing the Respondent's claim on the basis of that document.

[7] It was further the submission of **Mr. Maganga** that the lower court failed to take into consideration the unrebutted expert evidence adduced on behalf of the Appellant by the two defence witnesses. He relied on **Halima Abdinoor Hassan & 3 Others vs. Corporate Insurance Company Ltd** [2015] eKLR to support the proposition that an insurance company is not liable for loss specifically placed under an exception clause. Counsel also pointed to what he called errors and contradictions in the Judgment of the lower court; and for all these reasons, Counsel for the Appellant urged the Court to allow the appeal and set aside the lower court's judgment and substitute it with an order dismissing the Respondent's case with costs.

[8] Mr. Kariuki, learned counsel for the Respondent, reiterated his position that the Appellant was under obligation to compensate his client for his loss; and that the evidence presented before the lower court by the Respondent proved his case on a balance of probabilities; namely, that the Respondent suffered loss and that the loss was covered under the parties' domestic insurance cover. He further submitted that there is therefore no reason why the Appellant should not pay the sums decreed by the lower court to the Respondent. Counsel urged the Court to disregard the evidence given by the two defence witnesses and confirm the lower court decision, that the Respondent entered into a contract of insurance with the Appellant and paid his premiums dutifully; and therefore, that it would be unjust if the Appellant was to be allowed to repudiate the contract entered into and fail to settle the two claims. Regarding the alleged errors in the Judgment, **Mr. Kariuki** urged the Court to disregard them as typographical errors which had no effect whatsoever on the outcome of the suit and the Judgment of the lower court. In his view, the trial magistrate did not err in any way. He accordingly prayed that the lower court Judgment be upheld; and that the appeal be dismissed with costs.

[9] As this is a first appeal, it is the duty of this Court to re-evaluate the evidence adduced before the lower court and come up with its independent conclusions on the basis of that evidence, while bearing in mind that it did not have the benefit of seeing or hearing the witnesses. In **Selle & Another vs. Associated Motor Boat Co. Ltd & Others** [1968] EA 123 it was held that:

> **"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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..."**

[10] The evidence of the Respondent, who testified before the lower court as **PW1**, was that in the years **1998** and **1999**, he took out an insurance cover with the Appellant in respect of his house in Mwanzo area of Eldoret Town. The agreed annual premium for the policy, being Policy No. 35289, was **Kshs. 19,500/=**. It was the evidence of the Respondent that he duly paid the premiums for the two years aforementioned. He produced the policy document as **the Plaintiff's Exhibit No. 1** before the lower court. The Appellant further testified that in **February 1999**, he noted that the perimeter wall, which was covered for **Kshs. 500,000/=** had been damaged. He consequently informed the Appellant and submitted his claim form to that effect. He thereafter had the wall repaired by **Spacematic Systems.** He had to pay **Kshs. 349,605/=** for the repairs. He produced the receipts as the **Plaintiff's Exhibit 2** before the lower court.

[11] The Respondent also confirmed to the lower court that he was interviewed by **Cunningham** at the instance of the Appellant; and a report was duly prepared. As he was awaiting payment, a tree fell on the rear part of the perimeter wall in **October 1999** and that, he again filled the claim form and forwarded it to the Appellant for settlement, after **Muchiri & Associates** assessed the damage and quantified the loss. It was the evidence of the Respondent that he again had to carry out the repairs on his own at a cost of **Kshs. 64,165/=.** He produced the invoice and receipt for the second repair works as the **Plaintiff's Exhibit 7 and 8** in support of his claim before the lower court. The Respondent also produced before the lower court a report prepared by the Meteorological Department in connection with the unusual *El Nino* rains experienced in the early part of **1999**. It was marked the Plaintiff's Exhibit No. 9 before the lower court.

[12] The Appellant called two witnesses before the lower court, namely **Sospeter Nyabok Anyango (DW1)** and **John Kipkemoi Kiptui**

(DW2). DW1 told the lower court that, as the Branch Manager of **Cunningham & Lindsey**, Eldoret, he came to know that their company was instructed by **Jubilee Insurance Co. Ltd,** Kisumu Branch, to investigate and report on the Respondent's claim. He produced the report that was prepared by his predecessor, whose recommendation to the Appellant was that the claim for **Kshs. 369,000/=** was not payable. He added that he was not aware of the second incident for **Kshs. 64,000/=. DW2** was the Officer in charge of the Eldoret Meteorological Station. He produced a report prepared by his predecessor, **Joseph S. Mugalla**, explaining the *El Nino* phenomenon which, according to him ceased in **February 1998**. The report was marked **Defence Exhibit No. 1** before the lower court.

[13] Hence, from a careful consideration and evaluation of the evidence presented before the lower court, there is no dispute that the parties hereto entered into a contract of insurance vide Policy No. 35289 for what was referred to as Domestic Package, which included the residential building on **Block 11/Mwanzo Area/02,** its perimeter wall as well as furniture and fittings therein for a total value of **Kshs. 6,490,600/=.** The Respondent was to pay premiums in respect of the cover at **Kshs. 19,500/=** per annum, and the policy was initially for the period **7 August 1998** to **6 August 1999**. The Respondent availed not only the policy document, (**the Plaintiff's Exhibit No. 1)** but the renewal thereof, which was marked the **Plaintiff's Exhibit 10.** The latter document confirms that **Policy No. 35289** was renewed from **7 August 1999** to **7 August 2000**. **[14]** There is no doubt therefore that there was a valid policy of insurance in respect of the subject property, and in particular, the perimeter wall, during the entire period between **7 August 1998** and **7 August 2000**. The cover limit for the perimeter wall was **Kshs. 500,000/=** only. In the premises, the only issues for my reconsideration, as can be gleaned from the Grounds of Appeal and the written submissions in respect thereof, are:

[a] Whether there was adequate proof that the Respondent suffered damage, and whether the peril was insured under the policy;

[b] Whether the amount claimed as repair charges were duly proved.

[a] <u>On Whether the Respondent suffered damage and whether the peril was insured under the subject policy</u>:

[15] The Respondent gave evidence that when he noticed the damage on his perimeter wall in **February 1999,** he brought the matter to the attention of the Appellant and duly filled a Claim Form in that regard. The Respondent also exhibited a report by **Spacematic Systems**, a firm of architects, to buttress his testimony. The report confirms that there were several visible vertical cracks running from the foundation all the way to the top of the external elevation of the fence wall covering two sides of the perimeter wall. The report further shows that the damage was attributable to the *El Nino* rains and that the cracks posed a danger to the entire perimeter wall. It was thereby proposed that the damaged sections be pulled down and reconstructed to restore the structural soundness of the perimeter fence.

[16] The Appellant's loss adjusters, **Cunningham GM (Kenya) Ltd,** visited the site and compiled a report which was produced by **DW1** and marked **the Defence's Exhibit 3**. The report, dated **24 June 1999**, is at pages 32 to 34 of the Record of Appeal. It confirms that the property was inspected by agents of the Appellant; and that it was indeed surrounded by a 2.5 metres high perimeter wall, built of concrete blocks. As regards the nature and extent of the damage, the report reveals as hereunder:

> **"The wall has sustained various cracks, some of which extend from the foundation to the top of the perimeter wall. Most of the concrete columns on the two sides of the wall have become detached and are no longer supporting the wall. The result of this is that the wall is bulging outwards and is on the verge of collapse. The affected area is 200 sq. metres. The current repair work has been estimated at over Kshs. 369,000/=."**

[17] It is manifest therefore that indeed, the Respondent's evidence as to his damaged perimeter wall was confirmed by the evidence of **DW1** and the aforementioned report compiled by **Cunningham GM (Kenya) Ltd**. As to the cause of the damage, the Respondent blamed the *El Nino* rains experienced in Kenya, as elsewhere in the region, in the year 1998/1999. Both the Respondent and the Appellant placed before the lower court rain fall data obtained from the Meteorological Stations at Kapsoya and Eldoret International Airport; and, the letter dated **15 November 1999** produced by the Defence before the lower court, does acknowledge that a significant amount of rainfall was experienced in Eldoret Town and its environs, especially during the month of **July 1998**.

[18] Whereas the Appellant refuted the Respondent's assertions that the wall was undermined by heavy rainfall, the Cunningham Report concedes that the property is located within a slightly sloping ground, and that the lower side of the perimeter walls abuts a swampy area; so that whenever it rains, water tends to accumulate in the swampy area and extends to the Respondent's wall. In those circumstances, the lower court cannot be faulted for coming to the conclusion that the first damage to the perimeter wall was occasioned by heavy rainfall.

[19] As to whether this was an insured peril, I have looked at the Policy itself. There is no doubt that storm and tempest were covered under Clause 8 of the Policy and any attempt by the Appellant to avoid the claim would be pointless and amounts really to a splitting of hairs; for, according to the **Concise Oxford English Dictionary**, 12th Edition, **"storm"** is defined thus:

> **"a violent disturbance of the atmosphere with strong winds and usually rain, thunder, lightning or snow."**

[20] I note that, in the Cunningham report, it was postulated that the wall could have been damaged by hydrostatic pressure/inadequate foundations; and that this may have developed over time. It appears this is what informed their conclusion that the damage was not attributable to storm or tempest; and therefore that the peril was not covered under Clause 8 of the Policy. This scenario, if true, would entail the question as to whether the Respondent was in breach of the *uberrimae fidei* principle, as was contended in Ground 3 of the Appellant's Grounds of Appeal.

[21] In **<u>Carter vs. Boehm [1766] 3 BURR. 1905, at page 1164</u>** the principle of **uberrimae fidei** was explicated thus:

> **"Insurance is a contract upon speculation. The special facts upon which the contingent chance is to be computed lie most commonly in the knowledge of the insured 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, and to induce him to estimate the risque, as if it did 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 risque run is really different from the risque understood and intended to be run at the time of the agreement...Good faith forbids either party, by concealing what he privately knows, to draw the other party into a bargain from his ignorance of the fact, and his believing the contrary."

[22] It was therefore upon the appellant to demonstrate that there were certain facts that were within the Respondent's knowledge, and which came to light thereafter, which the Respondent did not disclose at the time the contract of insurance was entered into; or thereafter in his claim form. From my perusal of the record of the lower court, there is no such indication, save for the suppositions that were set out in the report by **Cunningham GM (Kenya) Ltd.** It is therefore far from convincing that in Ground 6 of the Appellant's Grounds of Appeal, it was contended that:"

"That the learned trial magistrate did not direct her mind at all to the strong possibility that the concrete columns on the side of the wall had become detached and was not supportive of the wall, with the result of collapse by natural attrition."

[23] It was not open to the trial court to act on possibilities or surmises, for **Section 107(1)** of the **Evidence Act, Chapter 80** of the **Laws of Kenya,** is *explicit* 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.

[24] Moreover, **Sections 109** of the **Evidence *Act*** *also recognizes that:*

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

[25] *The burden of proof was on the appellant to satisfy the trial magistrate that the respondent withheld information from it; which it did not discharge.* It is also noteworthy that Clause 8 includes damage caused by floods as well as damage caused by subsidence (gradual caving in or sinking) or landslip. Therefore, the contention by the Appellant that the damage falls under **"atmospheric conditions"** provided for in the Exception Clause on page 15 is clearly untenable; since that Exception Clause is limited to Section C of the cover and is therefore not applicable to Section A under which Clause 8 aforementioned falls. It is worth mentioning too that the Policy Schedule mentions the specific items covered pursuant to Section C, and the perimeter wall is not one of them. Thus, there can be no doubt that the first incident was a peril duly insured by dint of Clause 8 of the Policy marked **the Plaintiff's Exhibit 1**, and is therefore not the subject of the Exception Clause under Section C; and I so find.

[26] As for the 2nd incident, whereby a tree fell on the rear part of the perimeter wall in **October 1999** and caused damage to it, the evidence of the Respondent was entirely uncontroverted. The Respondent produced a report by **Muchiri Wachira & Associates** dated **19 October 1999** confirming the damage. **DW1** conceded that he was never informed of the second incident and was therefore unaware of it. There was therefore sufficient basis for the lower court's findings in connection with the second incident.

[b] <u>Whether the amount claimed as repair charges were proved.</u>

[27] The Respondent adduced credible evidence before the lower court to demonstrate that he twice carried out repair works on the damaged fence through **Spacematic Systems**. He produced documents to support the damage assessment as well as invoices and receipts to prove payment. The documents were marked **the Plaintiff's Exhibits 2, Exhibit 3, Exhibit 4, Exhibit 7** and **Exhibit 8** before the lower court. That evidence was not controverted by the Appellant. Indeed, in the Cunningham report, it was conceded that the repair work for the first incident of damage was worth over **Kshs. 369,000/=.** It is therefore of no consequence that the Respondent had earlier put in a claim for **Kshs. 290,000/=** granted that that was just an estimate at the time. Thus, it is my finding that the Respondent was indeed entitled to the sum awarded to him by the lower court, namely: **Kshs. 433,760.25** together with interest at court rates and costs of the suit.

[28] In the result, I find no merit in the appeal and it is hereby dismissed it with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 30TH DAY OF APRIL 2020

OLGA SEWE

<u>JUDGE</u>