REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO. 29 OF 2015

MADISON INSURANCE COMPANY KENYA LTD.....APPELLANT

-VERSUS-

DANIEL ACHAKAI OKASIBA.....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. M. Njagi, Principal Magistrate,

delivered on 23 February 2015 in Eldoret CMCC No. 612 of 2010)

JUDGMENT

[1] This appeal arises from the decision of the Principal Magistrate **(Hon. M. Njagi)** in **Eldoret Chief Magistrate's Civil Case No. 612 of 2010: Daniel Achakai Okasiba vs. Madison Insurance Company Kenya Limited**. The Respondent was the Plaintiff before the lower court. He had sued the Appellant claiming **Kshs. 120,000/=,** interest thereon and costs being sums due to him on account of two ten-year insurance policies that he took out with the Appellant. It was the contention of the Respondent before the lower court that the Appellant only paid him interest but failed to refund his contribution totaling **Kshs. 120,000/=** for both policies.

[2] The Respondent's cause of action, as pleaded in paragraphs 3 and 4 of his Plaint dated **1 March 2010**, was that on or about **1 August 1999,** he entered into a ten-year contract of insurance with the Appellant under **Policy No. LR3248532** and **Policy No. LK3248533** whereby the Appellant was to pay him **Kshs. 120,000/=** on maturity in consideration of his monthly premiums of **Kshs 500/=** for each policy. The Respondent asserted that he duly paid all the premiums as and when they fell due; and that upon maturity, he placed his claim with the Appellant for refund. He added that the Appellant not only failed to refund his contribution of **Kshs. 120,000/=** but received excess premiums of **Kshs. 2,000/=** after the maturity date; hence his suit before the lower court.

[3] In its Statement of Defence before the lower court, the Appellant denied that **Kshs. 2,000/=** was erroneously paid to them by the Respondent or that the Respondent was entitled to the sum claimed by him. It denied the contents of paragraphs 3 and 4 of the Plaint as it did the other averments Respondent, save for the jurisdiction of the court. Thus, after hearing the parties and considering the written submissions filed by Counsel on behalf of the parties, the learned trial magistrate found in favour of the Plaintiff and entered judgment in his favour for **Kshs. 122,000/=** together with interest and costs, as prayed.

[4] Being aggrieved by the decision of the lower court, the Appellant filed this appeal on **17 March 2015** on the following grounds:

> **[a]** The trial magistrate erred in law and in fact in entering judgment for the Respondent against the Appellant.
>
> **[b]**The trial magistrate erred in law and in fact in failing to consider the terms of the insurance policy and therefore made an erroneous judgment.
>
> **[c]** The trial magistrate erred in law and in fact in failing to consider the fact that the Respondent had been paid his dues at various stages of partial maturity of the policy.
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> **[d]** The trial magistrate erred in law and in fact in failing to properly interpret the terms of the policy and the nature of the policy of insurance.
>
> **[e]** The trial magistrate erred in law and in fact in ordering the Appellant to refund premiums of **Kshs. 122,000/=.**
>
> **[f]** The trial magistrate erred in law and in fact in failing to consider the evidence adduced and on record.

[g] The trial magistrate erred in law and in fact in failing to apply the rules of interpreting written contracts.

[h] The trial magistrate erred in law and in fact in failing to consider the fact that the Respondent had been paid all his dues and he was not owed any monies by the Appellant.

[5] Thus, the Appellant prayed that the appeal be allowed with costs; that the trial magistrate's Judgment be set aside; and that the Respondent's case before the lower court be dismissed with costs. The appeal was urged before **Hon. Ogembo, J**. by way of written submissions which were thereafter highlighted on **19 July 2017**. In his written submissions, Counsel for the Appellant, **Mr. Kitiwa**, took the posturing that the trial court misdirected itself in failing to adhere to the terms of the two policies and therefore arrived at an erroneous decision. He relied on **Prudential Assurance Co. Ltd vs. Sukhwinder Singh Jutley & Another** [2007] eKLR to buttress his argument that, by dint of the parole evidence rule, no oral evidence ought to have been allowed or used by the lower court in interpreting the terms of the two policies.

[6] Mr. Chepkwony for the Respondent took the view that the appeal has been brought in bad faith for the purpose only of delaying or denying the Respondent the fruits of his Judgment. He submitted that litigation ought to come to an end and that no useful purpose would be served by granting the orders sought by the Appellant, as that the only objective of the appeal was to prevent the Respondent from enjoying his success and legitimate expectation. He accordingly urged the Court to dismiss the appeal with costs.

[7] 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. 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..."**

[8] I have accordingly perused the lower court record and note that each side called one witness. The Respondent testified on his own behalf on **19 August 2013.** His evidence was that he was approached in **1999** by the Appellant's agents and convinced to take out two policies for his sons**, Jeronim Okasiba** and **Philip Sulmet.** They thus entered into a written agreement for the two policies, **No. LK 3248532** and **No. LK 324833**, which were to commence on **1 August 1999,** with a maturity date of **1 July 2009**. It was further the evidence of the Respondent that he duly paid the agreed monthly premiums of **Kshs. 500/=** per policy through a check-off system from his salary until the maturity date; but that when he submitted his claim for refund, the Appellant declined to pay him. He produced documents in support of his case, which included the correspondence exchanged between the parties and pay slips in proof of the deductions made after the maturity date of the policy.

[9] On behalf of the Appellant, its Agency Manager, **Kennedy Obara Obamo (DW1)** testified on **4 August 2014** and confirmed that indeed the Respondent took out two policies of insurance with them which were to mature on **1 August 2009**. While conceding that the monthly premiums were **Kshs. 500/=** for each policy, **DW1** clarified that the basic sum assured was **Kshs. 25,000/=** only for each policy; and that bonuses were paid on a yearly basis over the 10-year period; such that on maturity, the sum due to the Respondent was **Kshs. 53,384/=** only for the two policies. He therefore denied that the Respondent was entitled to **Kshs. 122,000/=** as claimed by him. He however conceded in cross-examination that the Appellant continued to receive the monthly premiums from the Respondent's employer and that by the time the pay order was stopped, a sum of **Kshs. 3,000/=** had been remitted to the Appellant which the Appellant was not entitled to and which it was ready to pay back. **DW1** produced the Defendant's Bundle of Documents as exhibits before the lower court and two of the documents are the subject policy documents.

[10] From the foregoing, there is no dispute that the parties did enter into an insurance contract on **1 August 1999,** whereby the Appellant agreed to furnish the Respondent with two School Fees Policy covers at a consideration of **Kshs. 500/=** per policy. It is common ground that the policies were to commence on **1 August 1999** and would run for a period of ten years. The parties are further in agreement that the Respondent not only paid all the premiums due but had overpaid by **Kshs. 2,000/=;** and that, two months before the maturity date, the Appellant had forwarded to the Respondent Directions for Payment Form to facilitate payment. The Appellant's letter dated **30 June 2009,** which was produced by the Respondent or before the lower court as the **Plaintiff's Exhibit 2**, is explicit on this.

[11] There is credible proof that the Respondent complied with the Appellant's instructions; and that he duly filled the forms and returned them to the Appellant vide his letter dated **19 June 2009** (**the Plaintiff's Exhibit 3).** Copies of the said forms were also exhibited before the lower court and marked the **Plaintiff's Exhibit 5(a) and (b).** According to the Respondent, the Appellant only paid interest, leaving unpaid his contribution of **Kshs. 120,000/=** for the two policies, in respect of which he was entitled to a refund. In this regard, the Respondent produced, as **the Plaintiff's Exhibit 8** before the lower court, a demand letter dated **28 October 2009,** written on his behalf to the Appellant by his Advocates, **M/s Chepkwony & Company Advocates**.

[12] Thus, the learned trial magistrate came to the conclusion, on the basis of the indubitable facts aforestated that:

> **"The evidence of the Plaintiff … that after he submitted the directions for payment form exhibit 5(a) and (b) he had not paid is not rebutted by any other material evidence on record. No evidence in proof of payment was tendered to counter the plaintiffs claim. Even his demand notice P exhibit 8 went unanswered. In the circumstances I find the evidence tendered by DW1 in defence is a mere denial which did not rebut the plaintiffs claim, which I therefore find proved to the tune of Kshs. 122,000.00. Accordingly, I enter judgment for the plaintiff against the defendant for:**
>
> **a. Kshs. 122,000.000**

b. Costs and interest

c. Right of Appeal for 30 days."

[13] Consequently, at the root of this appeal lies the question whether, in coming to the decision aforementioned, the lower court erred in principle by failing to consider and fully appreciate the terms of the policies. It is a cardinal principle that it is the formal contract that records the bargain and reveals the true intentions of the parties thereto. Hence, in **Prudential Assurance Company of Kenya Limited V Sukhwender Singh Jutney and Another** (supra), the following excerpt from **Odgers' Construction of Deeds and Statutes** (5th edn.) at p.106, was cited with approval by the Court in connection with construction of contract:

> **"It is a familiar rule of law that no parol evidence is admissible to contradict, vary or alter the terms of the deed or any written instrument. The rule applies as well to deeds as to contracts in writing. Although the rule is expressed to relate to parol evidence, it does in fact apply to all forms of extrinsic evidence. As it stands this is not a rule of interpretation but of law, and means that the interpretation of the document must be found in the document itself with the addition if necessary of such evidence as we have previously seen is admissible for explaining or translating words and expressions used therein."**

[14] With the foregoing in mind, I have carefully perused the policy documents exhibited at pages 23 to 27 of the Record of Appeal. Their purport is plain; namely, that the sum assured was **Kshs. 25,600/=** but with participation in bonuses. At the bottom of page 24, an option was provided for whereby the Respondent could earn cash benefits at 10% for the years 2002 to 2005 and 20% for the years 2006 to 2008; in which event the basic sum assured plus total bonuses would be reduced accordingly on maturity of the policy. No evidence was presented before the lower court to show that the Respondent signed up for the cash-back option or that he was paid in terms of the percentages set out in the policy document at page 24 of the Record of Appeal. It would therefore be reasonable to conclude that the entire sum assured of **Kshs. 25,600/=** per policy, was due and payable upon maturity of the two policies.

[15] I note that, in the Directions for Payment Form filled by the Respondent, he indicated that the amount due for **Policy No. LR 3248532** was **Kshs. 6,000/=** together with bonus of **Kshs. 25,600/=,** yet in the net sum payable he asked for **Kshs. 85,600/=.** In respect of **Policy No. LK 3248533**, he reflected the figures as **Kshs. 60,000/=, Kshs. 25,600/=** and **Kshs. 85,000/=,** respectively. No explanation was proffered for the variations. More importantly, the Respondent did not explain to the lower court the basis upon which he arrived at those figures. The burden of proof was on the Respondent to justify the sums claimed by him; and it was therefore a misdirection on the part of the trial magistrate to give judgment for the sum claimed without such justification. This is because **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.**

[16] Moreover, in **Serraco Limited vs. Attorney General** [2016] eKLR, the Court of Appeal held that:

> **The burden that was on the appellant was to prove the averments in the plaint on a balance of probabilities. (See Kirugi & Another v. Kabiya & 3 Others [1987] KLR 347. It is common ground that beyond cross-examining the appellant's witness, the respondent did not call any evidence either to rebut that of the appellant or to support its own averments in the defence. In CMC Aviation Ltd v. Crusair Ltd (No1) [1987] KLR 103 this Court pointed out that until averments are proved or disproved or the parties admit them, they are not evidence and no decision can be founded on them. Proof is by evidence because averments are merely matters, the truth of which is submitted for investigation."**

[17] I would accordingly agree with Counsel for the Appellant that the Appellant was under no obligation to make payments on the basis of the questionable figures posted by the Respondent in the Directions for Payment Forms in the absence of a clear justification and a meeting of minds on those figures. In the premises, the lower court ought to have strictly relied on the Policy documents in ascertaining the rights and obligations of the parties; and the documents, as pointed out herein above, lead to the conclusion that, the assured sum which was payable at the maturity of the Policies was only **Kshs. 26,500/=** per policy together with any unpaid bonuses.

[18] Having so found, the next issue for consideration in this appeal is whether the Respondent was paid the sum assured and any bonuses due to him upon maturity of the two policies. In this regard, the contention of **DW1** was that the sum assured was paid on maturity in the sum of **Kshs. 53,384**; and explained that, for each policy the sum assured was **Kshs. 25,600/=** to which an amount of **Kshs. 1684/=,** in the form of bonus payment, was added. They also refunded one of the overpaid premiums in the sum of **Kshs. 500/=.** The Appellant relied on the evidence of **DW1** and letter dated **24 September 2009** to support its assertion that payment was duly made to the Respondent vide Cheque No. 205680. I note that in his witness statement in the Supplementary Record of Appeal filed on **16 March 2017**, the Respondent explicitly admitted that he received payment in the sum of **Kshs. 51,200/=.**

[19] In the premises, what remains unpaid is the premium overpayment of **Kshs. 2,000/=** which was conceded by the Appellant together with the lumpsum bonus of **Kshs. 1684/=** for the two policies. I therefore find merit in the appeal and would allow the same with costs, which I hereby do. The lower court's judgment dated **23 February 2015** is hereby set aside and substituted with Judgment in the Respondents favour for **Kshs. 3,684/=** only together with interest at court rates from the date of the lower court Judgment and costs.

It is so ordered.

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

OLGA SEWE

JUDGE