



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 650 OF 2016

BRITISH AMERICAN COMPANY (K) LTD.....APPELLANT

V E R S U S

JUDITH ABRAHAMS GUSERWA.....RESPONDENT

(Being an appeal from the judgment of SPM G.A. Mmasi (Mrs)

delivered on 22nd September 2016 in Milimani CMCC No. 7747 of 2012))

JUDGEMENT

1) Judith Abrahams Guserwa, the respondent herein, filed an action against British American Insurance Ltd, the appellant herein before the Chief Magistrates Court vide the plaint dated 12th September 2012. In the aforesaid plaint the respondent sought to recover a sum of kshs.909,396/55 from the appellant being the premiums the respondent had paid to the appellant for a life insurance policy.

2) The appellant filed a defence to deny the respondent's claim arguing inter alia that the policy lapsed and the respondent therefore had no benefits under the policy.

3) Hon. G. A. Mmasi, learned Senior Principal Magistrate heard the case and in the end she entered judgment in favour of the respondent as prayed in the plaint with costs of the suit.

4) The appellant being aggrieved preferred this appeal and put forward the following grounds:

i. That the learned magistrate erred in fact and in law in failing to distinguish between the lapse of benefits under the policy and the extinction of the policy.

ii. That the learned magistrate erred in fact and in law in failing to hold that premium and risk under the policy passed concurrently.

iii. That the learned magistrate erred in fact and in law in failing to properly analyse the defence evidence.

iv. That the learned magistrate erred in fact and in law in not holding that a refund of the premium earned could only be done as per the policy document terms.

v. That the learned magistrate erred in fact and in law in not holding that the policy was alive though the benefits thereunder were in a lapsed state and could only be reinstated by the remittance of the outstanding balance and penalties applicable.

vi. That the learned magistrate erred in fact and in law in holding that it was the obligation of the defendant to collect the premium contrary to what was expressly provided for in the policy, to wit, that the plaintiff had the obligation to ensure that premiums were remitted when they fell due.

vii. That the learned magistrate erred in fact and in law in holding that the plaintiff was never informed that the policy was in a lapsed state as at 2007.

viii. That the learned magistrate erred in fact and in law in not holding that the plaintiff had been in arrears of the premium due as at December, 2007.

ix. That the learned magistrate erred in fact and in law in not holding that the plaintiff was in breach of the terms of the policy.

5) When the appeal came up for hearing, this court issued orders directing the parties to file and exchange written submissions. I have re-evaluated the case that was before the trial court. I have further considered the rival submissions. Though the appellant put forward a total of 9 grounds, those grounds may be summarised to the following broad grounds.

6) The first main ground is a combination of grounds 1, 5, 6 and 7 of which relate to the question as to whether the policy benefits had lapsed and if so whether those benefits could be reinstated by remittances of the outstanding balances and the applicable penalties. The aforementioned are determined together.

7) It is the submission of the appellant that for the policy to be alive, the monthly premium had to be paid. The appellant pointed out that there was evidence to show that the respondent was informed in the year 2008 that she was in premium arrears but the respondent feigned ignorance claiming she was not told about the arrears of premium since she had signed a standing order with her bank.

8) The appellant further argued that the respondent had failed to meet her obligations under the policy when she did not fully pay up the premiums. It is the submission of the appellant that the policy being in arrears for over 30 days causes it to lapse. The appellant also argued that the policy could only have been said to be extinguished should the whole cash surrender value have been used up in maintaining the policy in a lapsed state.

9) The appellant also argued that the policy was in a lapse state pending the respondent paying up the arrears to enable the respondent reap the benefits of the policy and that the respondent had the responsibility of ensuring that she had fully paid up all her premiums.

10) The respondent on the other was of the submission that the trial magistrate applied the correct principles, the facts and law to arrive at her decision. The respondent is of the submission that the trial court rightly found that the benefits were still available to the respondent as the policy never lapsed and that it wasn't possible to continue collecting premiums for a lapse policy.

11) With respect, having re-evaluated the case that was before the trial court, I am satisfied that the policy was alive, therefore it means that the benefits were similarly alive and available for the respond to be paid.

12) The second main ground is in respect of grounds 2, 3, 4 and 9.

The appellant is of the submission that the premiums paid to it were incapable of being refunded as the same was earned upon acceptance of the risk. The appellant also argued that the risk of the respondent's early death had passed to the appellant and consequently, the right to the premium had passed to the appellant and therefore the respondent is not entitled to a refund.

13) The respondent's submission over this ground is to the effect that the trial court analysed the policy document and addressed the circumstances when a refund of premiums could be made.

14) I have carefully considered the rival submissions and having re-evaluated the case before the trial court, it is clear to this court that the trial court found the appellant liable for breach of the policy of insurance. It was pointed out that the appellant had failed to inform the respondent timeously of the premium arrears, to collect the premiums through the standing order and to collect premiums for a policy which had allegedly lapsed. For the above reasons the court ruled that the respondent was entitled to a refund of her premiums.

15) The final issue which was substantively argued is the question as to why the respondent was not informed in time of the arrears of premiums which were building up. Had the appellant informed the respondent of the arrears the respondent would have settled. There was also no explanation as to why the appellant did not collect the premiums from the respondent's bank through the standing order. I am convinced that the learned Senior Principal Magistrate properly dismissed the suit.

16) In the end, this appeal is found to be without merit. It is dismissed with costs to the respondent.

Dated, Signed and Delivered in open court this 31st day of May, 2019.

J. K. SERGON

JUDGE

In the presence of:

.....for the Appellant

.....for the Respondent