REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 87 OF 2018

MADISON

INSURANCE CO. LTD ……...…… APPELLANT

VERSUS

STANLEY KINOTI MBURUGU ……..……...… RESPONDENT

[Being an appeal against the decision and judgment of HON. CAROLINE KEMEI-SRM in Githongo SRMCC No. 21 of 2017 made and delivered on the 7th day of August, 2018]

J U D G M E N T

1. On 9th June, 2017, the Respondent filed a suit in the trial court praying for a declaration that the appellant was under obligation to repair and/or replace the damaged motor vehicle registration No. KBY 139M, ISUZU Lorry ("the subject vehicle").

2. In the said suit, the respondent alleged that he had insured the subject vehicle with the appellant and that the vehicle had been completely damaged in a fire accident on 20th February, 2017 at his home. That although the appellant was under an obligation to repair the subject vehicle, it had declined to do so when presented with the claim.

3. The claim was vigorously defended by the appellant who contended that the respondent had wilfully and voluntarily caused the fire by use of an accelerant so as to make it appear as if it were a fire accident. The appellant further contended that the respondent presented a false compensation claim against it with intent to defraud and gain unfair self-enrichment.

4. After the trial, the trial court found that; there was no evidence of the direct cause of the fire and that there was nothing to link the respondent to the alleged act of arson. Accordingly, the trial court found for the respondent and made a declaration that the appellant was obliged to replace the respondent's subject vehicle and awarded costs to the respondent.

5. Aggrieved by the decision, the appellant preferred this appeal setting out nine (9) grounds of appeal that may be summarised as hereunder:-

> ***a) That the trial court erred in arriving at a decision that was against the weight of the evidence, and in particular, the evidence of the private investigator and the registered fire safety officer;***
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> ***b) That the trial court erred in dismissing the clear evidence tendered that the subject vehicle had been sold by the bank after the respondent had failed to service a loan for which the subject vehicle had been used as security;***
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> ***c) That the trial court erred in ordering the appellant to replace a vehicle that was no longer in the possession and/or ownership of the respondent contrary to the principle of indemnity; and***
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> ***d) That the trial court erred in ordering the appellant to replace a motor vehicle without any assessment and/or valuation or whatever form of ascernment of the extent of damage, if any, to be indemnified.***

6. This being a first appeal, the court is enjoined to re-evaluate and analyse the evidence on record and make its own findings and arrive at its own independent conclusions. See **Selle v Associated Motor Boat Company Ltd [1968] EA 123 and Williamson Diamonds Ltd v Brown [1970] EA 1.**

The case before the trial court was as follows.

7. **PW1** established that he was the owner of the subject vehicle and that he had insured it against fire with the appellant. That on 20th February, 2017, the subject vehicle caught fire and was extensively burnt. A claim he lodged with the appellant was declined.

8. **PW2** was the driver of the subject vehicle. He told the court how he had used the subject vehicle on the material day to transport sand. That he packed the same in the compound of **PW3** at 8pm. The following morning, he received information that the same had caught fire and burnt extensively.

9. **PW3,** the father of the respondent, told the court how he was awaken by the barking of dogs on the material night. When he went outside, he found the subject vehicle on fire. With the help of neighbours, they were able to put off the fire before the vehicle was completely destroyed.

10. **DW1,** the appellant's claims manager, admitted that the subject vehicle was covered by the appellant for about Kshs.5.2 million. That the appellant received a claim on the policy from the respondent on 21st February, 2017. The appellant engaged the services of Parity Loss Assessment to investigate the incident. That the investigations revealed that the fire was as a result of arson where by, the appellant declined to settle the claim.

11. **DW2** received instructions from the appellant to investigate the incident. He engaged the services of a fire expert, **DW3** whose analysis of the evidence at the scene and the subject vehicle concluded that the fire was started by an accelerant. They advised the appellant accordingly.

12. I have carefully considered the entire record and the submissions of the learned counsel.

13. The subject matter of the suit before the trial court was a policy of insurance. A contract of insurance is all about indemnity. In the case of **Madison Insurance Company Ltd v. Solomon Kinara t/a Kisii Physiotheraphy Clinic [2004] eKLR,** the Court of Appeal observed: -

> ***"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:***
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> > ***'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'.***
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> ***That is very powerful language, but the passage nevertheless brings out the basic concept underlying the 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".***

14. On fire policy, Salmon J delivered himself in the case of **Slattery v Mance [1962] 1 All ER 525, at pg 526** as follows:-

> ***"…the risk of fire insured against is quite obviously not confined to an accidental fire. If the ship has been set alight by some mischievous person without the plaintiff's connivance, there could be no doubt that the plaintiff would be entitled to recover. Of course the plaintiff cannot recover if he was the person who fired the ship or was a party to the ship being fired. This result, however, does not depend on the construction of the word "fire" in the policy but on well-known principle of insurance law that no man can recover for a loss which he himself has deliberately and fraudulently caused. It is no more than an extension of the general principle of insurance law that no man can take advantage of his own wrong. In my judgement once it is shown that the loss has been caused by fire, the plaintiff has made out a prima facie case, and the onus is on the defendant to show that on a balance of probabilities that the fire was caused or connived by the plaintiff. Accordingly, if at the end of the day the jury come to the conclusion that the loss is equally consistent with arson as it is with an accidental fire, the onus being on the defendant, the plaintiff would win on that issue."***

15. With the foregoing principles, I propose to examine the grounds of appeal raised by the appellant vis a vis the evidence before the trial court and the consequent judgment.

16. The first ground was that the trial court's decision was against the evidence on record. That the evidence of **DW2 and DW3** was not properly evaluated. The evidence of **DW2,** the insurance investigator at Parity Loss Assessment and **DW3,** a registered fire safety officer pointed to negligence on the part of the respondent and an element of fraud.

17. They both contended that the subject vehicle did not have an extinguisher at the time of the fire and that there was an intentional use of an accelerant to cause fire on the motor vehicle. They raised suspicion that this may have been caused by the respondent's failure to maintain the motor vehicle in good condition. They further contended that, since the respondent had been unable to service the loan he had secured with the subject vehicle, he destroyed the same so that he would be compensated to be able to clear the facility.

18. What the two sought to do was to rebut the respondent's position that the fire was accidental. I am satisfied that **DW2 and DW3** established that the fire could not have been caused by an electrical fault nor could it have been caused by any explosion from the engine compartment. The testimony of **DW3** also diminished the likelihood of the fire being accidental as the vehicle had been a stationary position for about six hours.

19. However, the trial court, as well as this court, was hampered in establishing liability for reason of unavailability of the basis of the contract between the parties. The terms of the contract between the parties was not before the trial court or this court. Neither the policy document nor the terms thereof was produced nor pleaded.

20. The foregoing being the case, all the court would infer was that, the subject policy must have been a fire policy to indemnify the respondent in the event of the destruction of the subject vehicle by fire. There is nothing to show that arson, except that which the respondent is guilty of either directly or through connivance, was excepted.

21. In this regard, it is not enough for the insurer to prove that the loss was as a result of arson. The insurer must establish that the arson was as a result of a deliberate and/or calculated act on the part of the insured or was perpetrated with his connivance. **See Hesbon Onyuro & another (suing as the Administrators of Alice Akoth Okong'o (Deceased) v First Assurance Company Limited [2017] eKLR.**

22. In the present case, all that the appellant proved was that the fire was not accidental. However, there was no evidence that the respondent was involved in the arson. The appellant did not call the police to produce the results of the investigations. There was no report by the appellant to the police that it suspected foul play by the respondent. The fact of the respondent being in financial stress was not *per se* enough to charge the respondent with the unfortunate incident.

23. Accordingly, evidence lacking, by way of a report from the government analyst, that the substance found in the vehicle cabin was an accelerant and that the same must have been placed by the respondent or his direction or with his connivance, I am unable to agree with the appellant.

24. The trial court was correct in the manner it analysed the evidence of **DW2 and DW3.** The conclusion arrived at was correct based on the evidence before the court. The respondent had discharged his evidentiary burden which the appellant was unable to rebut and discharge. Ground 1therefore fails.

25. The second ground was that the trial court ignored the evidence of the sale of the vehicle for loan default. The appellant's contention was that the fact of the respondent's inability to service the loan he had taken on the security of the subject vehicle, was evidence that the respondent had deliberately set the vehicle on fire.

26. To this court's mind, the nexus between the loan default by the respondent, the fire incident and the subsequent sale of the vehicle is far-fetched. There was nothing to show that it is the respondent's financial difficulties, if at all, which led to the fire incident the subject of the claim. I reject ground 2.

27. Grounds 3 and 4 of the Memorandum of appeal are interrelated and I therefore propose to deal with them jointly. These were to the effect that the trial court erred in ordering the appellant to replace the subject vehicle against the principle of indemnity.

28. The evidence on record is that, there was a fire policy in force in respect of the subject vehicle. The vehicle was involved in a fire incident on 20th February, 2017. The cabin of the said vehicle was substantially damaged as a result of the said fire. A claim was lodged with the appellant but was declined. At pages 49 and 50 of the record is a quotation dated 27th February, 2019 in respect of the subject vehicle by Tims Garage, Nkubu for Kshs. 2,514,880/-. It is not clear to whom it is addressed.

29. In the Plaint dated 9th June, 2017, the respondent's claim was for a ***"declaration that the defendant is under obligation to repair and or replace the plaintiff damaged vehicle registration No. KBY 139M Isuzu Lorry".*** That is the declaration which the court granted the respondent.

30. In the case of **Madison Insurance Company Ltd v. Solomon Kinara t/a Kisii Physiotheraphy Clinic (supra),** the Court of Appeal was emphatic that a policy of insurance enjoins the insurer to replace *"the stolen or destroyed item or pay the reasonable charges for its repair"*.

31. In the present case, on 9th February, 2018, Counsel for the respondent informed the trial court that the vehicle was sold and was no longer available. The question therefore that arises is, as at the time the court rendered its judgment, was the vehicle available to be repaired and/or replaced? I do not think so.

32. The vehicle having left the possession and ownership of the respondent by his own act or otherwise, it could not be repaired. As for replacement, it is not clear whether it is its full value that was to be replaced or the insured value. Of course it could not be the full value because, firstly, its value was not known and secondly, the policy being a contract of insurance, the value replaceable is only that which would indemnify the respondent for the loss suffered.

33. On indemnity, the salvage value was also not known. While the appellant is expected to have valued the shell that was in the garage when **DW2 and DW3** were carrying on investigations, under ***sections 107 through 109 of the Evidence Act Cap 80, Laws of Kenya,*** it is he who alleges that must prove. It is the respondent who claimed to have suffered loss. It was upon him to prove and quantify that loss.

34. In **Hesbon Onyuro & Another (suing as the Administrators of Alice Akoth Okong'o (Deceased) v First Assurance Company Limited [2017] eKLR,** Majanja J held: -

> ***"The plaintiff did not set out the nature and extent of the loss it suffered as a result of the fire. Under the principles of indemnity, the plaintiff could not claim the full sum assured. Its claim could only be limited to such loss as for example, the cost of repair of the premises to put them to the condition they were prior to the fire. Such loss and damage, being in the nature of special damages, ought to have been pleaded, particularised and proved to the required standard (See Maritim & Another v. Anjere [1990-1994] EA 312, 316).***

35. I reiterate the foregoing here in toto. The respondent did not specify the nature and extent of loss and damage he had suffered. Any loss he suffered was special damage and should have been pleaded with particularity and proved. This he failed to.

36. Accordingly, the 3rd and 4th grounds of appeal succeed. The end result is that the appeal has merit and the judgment and decree of the trial court cannot stand. The appeal is allowed. The suit in the trial court is dismissed with no orders as to costs.

37. Since the appellant succeeded only on a technicality, the failure by the respondent to properly plead his claim, I will make no order as to costs.

It is so decreed.

DATED and DELIVERED at Meru this 30th day of May, 2019.

A. MABEYA

JUDGE