REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 46 OF 2015

BRITISH AMERICAN INSURANCE CO.(K) LTd.....1ST APPELLANT

JULIUS M. MUTUNGA.....2ND APPELLANT

VERSUS

DANIEL GIKUNDA ANAMPIU.....RESPONDENT

(Being an Appeal from the Judgement of Mr Kutwa (P.M.)

delivered on 22ND September 2015 in Meru CMCC No. 300 of 2010

David Gikunda Anampiu vrs British American Tobacco & Another)

JUDGMENT

Background

1. The Respondent herein was the Plaintiff in the trial Court and the 1st and 2ndAppellant was the 1st and 2nd Defendants respectively.

2. The Respondent herein filed suit against the Appellants claiming Kshs 712,279.28 plus interest at commercial rate of 18% per annum, general damages for breach of contract, costs and interest.

3. The Respondent claimed that at all material times to the suit he had been a customer for the Appellants having taken out various insurance policies with the Appellants as follows;

a. Policy No. 01852166 commencing on policy date 1/9/1995 for a schedule of 15 years with bonus on 1st September 2000 and 1st September 2005 and with a maturity date of 1/9/2010.

b. Policy No. 01902936 commencing on policy date of 1/11/2000 with 1st Bonus on 1/11/2004 and with a maturity date of 1/11/2010.

c. Policy No. 01902935 with a date of issue on 1/11/2000 being a personal accident cover and being an income replacer policy.

d. Policy No. 160 -166 super saver with lien policy of 15 years term with a commencement date of 30/08/2005 and with a date of maturity as 30/08/2020.

4. It was the Respondent averment that he faithfully paid his premiums to the 2nd Defendant, an agent of the 1st Defendant, whenever it became due until February 2008 when the 1stAppellant declined to pay the already matured bonuses. That he complained to the 1stappellant and it offered to conduct an investigation and give feedback to the Respondent. That the appellant did not forward any response to the Respondent hence this claim.

5. The appellant filed its defence on 17th September 2010 and an amended Defence on 28th September 2010. It denied the averments made by the Respondent and put the respondent to strict proof. In particular it stated;

a. Policy No. 01852166- "money back" bonus payable if premiums were paid in accordance with the specified schedule. The Respondent was in arrears of premium payments hence not entitled to the bonus.

b. Policy No. 01902936 – "E plus" the plaintiff fell in arrears of premium remittances thus no bonus payable.

c. Policy No. 01902935- "Personal Accident" the policy is a term cover and remains valid as long as premiums are paid in terms thereof. Benefits in the policy accrue only on the occurrence of the risks therein covered and no claim has been made in respect of the policy.

d. Policy No. 160-166 – "super saver" The policy matures in August 2020 when the bonus ought to be paid. The plaintiff has fallen in premium arrears.

6. The Respondent filed a reply to defence on 25th January 2011 denying the averments made by the appellant. The matter was then set down for hearing on 21st July 2015. The Respondent testified and produced the **Original policies (Pexh 1) letter of complaint as to the keeping of the records (Pexh2), Reply to the letter (Pexh3), receipts for payments and bank statement (Pexh 6,7,8).** In cross-examination he told the court that he fully paid for the policies. That he was to receive bonuses for the E- Plus Policy and the super saver policy but he never received the same. That the Appellants had admitted that he had fully paid for his policies until September 2005. That there was no evidence that he was at any time in arrears.

Oral testimonies

7. The Appellant testified through **Simon Mugera** the branch Manager Meru Branch. He stated that the appellant was in arrears in all the policies. In the first policy he was to pay a monthly payment of Kshs. 895 for 60 months totalling Kshs. 53,780/= that at the time he had only paid Kshs. 35,780/=. That the policy had the options of surrendering of the policy and/or converting the policy into a paid up policy. The options were available if the premiums were paid up for three years. At the time the premiums had not been paid for three years.

8. That the same position applied to E-plus policy. The Appellant stated that the Respondent was in arrears since he ought to have paid Kshs. 128,400/= by 1/11/04 but he had paid Kshs. 119,752.24/=. As for the super saver policy it was his testimony that the policy was to be paid at the end of the maturity period. The Respondent was however equally in arrears. In cross-examination he testified that the Respondent was entitled to the surrender value in money back and E- plus policies but the Respondent did not exercise this option.

Decision by trial court

9. The trial Magistrate considered the testimony of both parties. It was his determination that the failure of the 1st Appellant to call the 2ndAppellant to testify in this case led to the logical conclusion that his evidence would be prejudicial. That the options of forfeiture could not arise in this case since Respondent had fully paid for its premiums for three years and the option could only be exercised once the Respondent knew the status of his account by the 1stAppellants. He therefore held that the appellants were in breach of the policy No. 01902935 and Policy No. 160-166.

The appeal

10. The Appellants were aggrieved by the aforesaid determination hence lodged this appeal enumerating four grounds of appeal namely;

a. That the Learned Magistrate erred in fact and in law in finding that the Respondent had demonstrated on a balance of probability that he paid his policy up to September 2005.

b. That the Learned Magistrate erred in fact and in law in holding that the 1st Appellant was liable to pay the bonuses and maturity payment in the event the policies matured.

c. That the learned magistrate erred in fact and in law in determining that the 1st Appellant must repay the policy premiums while the said policies had attached and the risk passed.

d. That the learned Magistrate erred in fact and in law in ordering the 1st Appellant to repay the plaintiff a sum of Kshs. 717,279.28 plus interests and cost of the suit.

Submissions

11. On 27th September 2018 parties agreed to canvass the appeal by way of written submissions. Both parties have since filed their written submissions.

12. The appellant submitted that the payment of premiums was a condition precedent to any benefit under the policies and this cannot be proved on a balance of probabilities. There has to be actual prove of the payments. That once the premium is earned upon the assumption of risk, it is not refundable. They relied on the cited case of **Insurance Company of East Africa v Marwa Distributors Limited [2015] eKLR & citation in MacGillivray on Insurance Law 11th Edition pg. 217**

13. The Respondent submitted that he was able to provide prove of payment upto September 2005. That the appellant never kept books of accounts or if they did they failed to produce them upon request. That the 1st Appellant also failed to call upon the 2nd Appellant. The

Appellant failed to challenge the Respondent's evidence on the payment of premium. On the repayment of the premiums they submitted that the provisions of payment of bonuses and non- forfeiture options are available in all the premiums hence the trial magistrate was correct having found that the Appellant to be in breach of all the policies for lack of statement of account and having found the appellant failed on the test of utmost good faith then he was properly guided in law to order for the repayments of the premiums as proved by the Respondent. He relied on the cited cases of **Imara Steel Mills Ltd v Heritage Insurance Co. Kenya Ltd & 38 Others [2016] eKLR, Virani t/a Kisumu Beach Resort v Phoenix East Africa Assurance Company Ltd**

Analysis and Determination

14. This is the first appellate Court. My duty therefore is to re-evaluate all the evidence on record and to draw independent conclusions. There is a caveat, however; I neither saw nor heard the witnesses. See **Selle v Associated Motor Boat Company Ltd [1968] EA 123, Williamson Diamonds Ltd v Brown [1970] EA 1.** I shall so proceed.

15. The grounds of appeal herein may be collapsed into one ground, namely.

> **a. That the Learned Magistrate erred in fact and in law in finding that the Respondent had proved on a balance of probability that he paid his policy up to September 2005.**

16. From the record, the Respondent wrote letters to the Appellants seeking for proper accounts of his policies prior to the institution of this suit. He also filed a request of particulars under Order 2 Rule 6 of the Civil Procedure Rules. The request was responded to by the Appellant herein but did not elicit any concrete information on payment of premiums by the Respondent on the policies in question.

17. The Appellant has alleged that the Respondent was in Breach of contract due to non-payment of the premiums as per the policies contracts. That notwithstanding, they concede that the non-forfeiture options are still available to the Respondent.

18. The burden of proving the allegation that the Respondent made periodic payments of the premiums cannot shift to the Appellant. Nevertheless, the Appellant alleged that the Respondent had not fully paid up his premiums. The Respondent requested for accounts on his premiums before filing suit and even made a request for particulars thereto. In light of the nature of the policies in issue and the relationship created between the insured and the insurer, accounts became inherent embodiment such that the Respondent is entitled to request for accounts and the Appellant is obligated to render such accounts when requested for. The Appellant did not render any accounts which were integral part of these proceedings. Rules of disclosure and right to information necessary to institute proceedings backs this view.

19. In addition, the Respondent stated he had paid up his premiums through the 1st and 2nd Appellant. The 2nd Appellant was an agent of the 1st Appellant; his actions done with real or ostensible authority bind the principal. The Respondent produced evidence to show he had paid premiums for the policies in issue, He however conceded that he had paid Kshs. 119,752.24/= by 1/11/04 but this was within the effective date of the concerned policy.

20. The question therefore is whether there was non-payment of premiums which resulted into a breach of the perms of the Insurance contract. Under the sub- heading **Premium loan** it is provided;

> **"At any time when this policy is in effect premium payments may be resumed….."**

21. The appellants claimed breach of contract; they provided nothing to support this allegation by the Appellants. I stated that the admission by the Respondent for payment of Kshs. 119,752.24 as at 1/11/2004 was within the effective period of the policy concerned and the above cited clause allows resumption of premium payment. Only accounts would have unravelled these matters but which the Appellants refused to render.

22. On the other hand, the Respondent presented the receipts of payments he had made. He proved that the 2nd Appellant also received payments on behalf of the principal, the 1st Appellant. The 1st Appellant conceded that the 2nd Appellant was their agent/ and/or representative hence capable of receiving the aforesaid payments. Insuring the public has public element in it and that is why states enact legislation to protect the insuring public. This issue is one of great public significance as it is to the particular insured. An agent for insurance company is a critical player in all undertakings done on behalf of the principal insurer. You will see the value of these observations later in the judgment.

23. The trial magistrate took into account failure to call the 2nd Appellant who was the agent of the 1st Appellant as a witness. The Respondent adduced sufficient evidence and raised evidential burden on the Appellants. It was critical in light of the issues before the trial court that the Appellant discharged its onus of evidential burden through such witness or evidence. Therefore, taking the foregoing into account as well as the circumstances of this case, and the evidence adduced, I find nothing on which to fault the determination made by the trial Magistrate on the failure by the 1st Appellant to call the 2ndAppellant to testify; the logical conclusion is that his evidence would be prejudicial. The situation was compounded by failure by the Appellant to render true and accurate accounts on the status of the policies; was a major omission in such contract. No proper reasons were given as to why they did not pay out the bonuses. They were therefore in breach of the terms of the contract. Needless to state that disclosure was an integral part of the contract. The correspondences made by the Appellant did not remedy or satisfy the query made and accounts requested by the Respondent.

24. The Appellants did not therefore discharge their evidential burden. The Respondent herein proved deliberate refusal by the Appellants to render accounts was stealth and concealment. Insurance relationship is based on good faith. The Appellants acted contrary to that reality. The Respondent also proved payment of premiums. The actions by the Appellant denied the Respondent his bonuses when they became due.

25. The above recapitulation of facts of the case and the foregoing conclusions brings me to this: that the trial Magistrate did not err in

finding and holding the Respondent herein had fully paid up his premiums. I find that the Respondent herein had proved his case on a balance of probabilities. As such, the Respondent was entitled to full benefits that became due and payable under the relevant insurance policies.

26. I am aware that the Appellants argued that the Learned Magistrate erred in fact and in law in holding that the 1st Appellant was liable to pay the bonuses and maturity payment in the event the policies matured and that the 1st Appellant must repay the policy premiums while the said policies had attached and the risk passed.

27. I have looked at the policy contracts. In all the policy documents they had the option that the policy may be reinstated within two (2) years of the due date of the first premium, subject to satisfactory evidence of insurability and payment of all unpaid premiums with interest.

28. The policies also carried non-forfeiture options after premium payments. (a) Cash Surrender value- policy may be surrendered to the company for its cash value. (b) Paid up Policy- policy may be changed to a fully paid up policy for a reduced amount of insurance. Premium loan policy maintained for a further period.

29. The trial Court considered that Policy No. 01902935 was a personal accident cover and benefits only accrue upon occurrence of the insured risk. I also find that this policy is not payable unless the insured risk attaches. The Respondent is not claiming the risk attached. As for Policy No. 160-166; the trial magistrate correctly found that it ought to mature in August 2020. He therefore proceeded to award Policy No. 01852166 and Policy No. 01902936.

30. The finding of the Trial Magistrate was also to the extent that the Respondent was to be paid bonuses on policies No. 01852166 and 01902936. He also found that the Appellant was equally in breach of the terms of the agreement hence granting the Respondent the award sought in Policy No. 160-166 and Policy No. 01902935.

31. His determination was two-fold first on the policies that accrued and on the breach of contract. This distinction was made clear and as I have held above the trial magistrate did not err in holding that the premiums were actually paid. It then follows that the bonuses that were to be paid became payable. The actions of the Appellant were breach of contract hence the said breach ought to be compensated. I should think that the amount of the premiums paid serves as the yardstick for quantum of damages and compensation thereof.

32. I therefore find and hold that this appeal lacks merit and is dismissed with costs to the Respondent.

Dated, signed and delivered in open court this 29th day of July, 2019

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F. GIKONYO

JUDGE

IN PRESENCE OF

Riungu for respondent

M/S Nyagah for Githae for appellant

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F. GIKONYO

JUDGE