REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 618 OF 2008

PETER N. KINYARI.....APPELLANT

VERSUS

WILLIAM O. MATENDECHERE.....1ST RESPONDENT

GATEWAY INSURANCE CO. LTD.....2ND RESPONDENT

JUDGMENT

The Appellant herein was the Plaintiff in CMCC Number 10378/2003 in which he has sued the Respondents claiming a sum of Kshs. 205,000/- plus interest thereon from 30/08/1999 and a declaration that the 2nd Respondent is liable to satisfy the decree issued in the aforesaid suit plus costs and interest in favour of the 1st Respondent. He also sought for the costs of the suit to be borne by the 2nd Respondent.

The cause of action arose from an accident that occurred on 9th March, 1993 when the Appellant was driving his motor vehicle registration number KTA 201 along Kikuyu-Gitaru road when he knocked down a minor pedestrian who sustained fatal injuries due to the said accident. Following that accident, the 2nd Respondent who is the father to the minor(deceased) instituted Civil Suit number 4322 of 1996, claiming damages arising from the death of the minor in which, judgment was entered in his favour against the Appellant for Kshs. 125,220/- plus costs and interest.

The Appellant averred that, at the time of the occurrence of the said accident, his aforesaid motor vehicle was insured by the 2nd Respondent vide policy number 14/07220 against third party risks pursuant to which he was issued with certificate Insurance number CF 388582 commencing on 21st June, 1992 and expiring on 20th June, 1993. He avers that the said policy covered liabilities that required to be covered by the Insurance (Motor Vehicles Third Party Risks) Act, Cap 405 Laws of Kenya.

The Appellant stated that he had notified the 2nd Respondent of the accident and he duly paid the policy excess of Kshs. 5,000/- on the 13th April, 1993 which the 2nd Respondent had duly acknowledged receipt of.

That the 1st Respondent had through his advocates notified the 2nd Respondent of the accident and duly gave the requisite notice of intention to file the suit under the provisions of the insurance (Motor Vehicles Third Party Risks) Act. He contended that the 1st Respondent also notified the 2nd Respondent of the existence of the suit aforementioned but the 2nd Respondent neglected to defend the suit without any reasonable cause.

That on 7th June, 1999, the 1st Respondent authorized a court broker to proclaim the Appellant's goods which included the aforesaid motor vehicle insured by the 2nd Respondent, following which, the Appellant through his advocates notified the 2nd Respondent of the execution so that they could satisfy the decree in accordance with the terms of the policy and the provisions of the Insurance (Motor Vehicle Third Party Risks) Act but the 2nd respondent failed to satisfy the decree as a consequence of which he suffered damages which he claimed in the plaint.

In his statement of defence filed on 29th October, 2003, the first Respondent averred that he is a stranger to the averments set out in the plaint but admitted that he was pursuing execution of the decree in CMCC number 4322 of 1996 against the Appellant.

The 2nd Respondent filed its statement of defence on the 13th day of November, 2003 in which it stated that the suit is incompetent in that it was filed in contravention of the mandatory provisions of the subsisting policy of insurance which stipulates that all disputes arising out of the said policy be referred to arbitration in the manner prescribed.

In the alternative and without prejudice to the aforegoing, the appellant averred that the appellant failed to report to the 2nd Respondent the occurrence of the alleged accident nor did he pay any excess and as such the 2nd Respondent was not aware of the accident. The 2nd

Respondent further stated that the Appellant in breach of the mandatory policy conditions failed to forward summons to enter appearance in civil suit number 4322 of 1996 arising from the alleged accident. It denied having been notified of the accident as required under Cap 405 Laws of Kenya and averred that it was entitled to avoid the policy and/or reject the appellants claim.

It further averred that it was only notified of the execution when it was too late in the day having only become aware of the existence of the suit against the appellant at that later stage and thus the appellant was clearly in breach of the policy stipulations and the 2nd Respondent is not liable under the policy. The 2nd Respondent further stated that the subsisting contract of insurance between them was in law a contract of indemnity which enjoined the appellant to first meet the claim(s) and thereafter seek indemnity from the 2nd Respondent and by him failing to pay the claim, he failed to mitigate his losses as required under the law.

The 2nd Respondent further contended that by failing to take action to stop the sale of his motor vehicle, the Appellant knowingly acquiesced to the sale and in view thereof, he was the author of his own misfortune and he should not visit the same on the 2nd Respondent. It has denied the alleged market value of the Appellant's motor vehicle and has averred that the claim of loss of user is one for consequential loss which is specifically excluded under the terms and conditions of the policy and therefore not recoverable.

At the hearing, the Appellant gave evidence in support of his case and also called the motor vehicle assessor who assessed the motor vehicle while the 1st Respondent testified as the only witness. The 2nd Respondent called one witness in support of its case. Upon hearing the parties, the Learned Magistrate in his judgment delivered on the 1st day of October 2008 found that the appellant's case had no legs to stand on, and dismissed the case. That judgment, is the subject of the appeal herein which was filed on 14th November, 2008 by the Plaintiff/Appellant.

In the memorandum of appeal dated the 14th November, 2008 he has set out ten (10) grounds of appeal which can be collapsed into the following grounds;

1. The Learned Trial Magistrate erred in law and in fact in failing to appreciate that the plaintiff had proved his case on a balance of probabilities

2. The Learned Magistrate erred in law and in fact in ordering parties to make written submissions instead of oral submissions and in failing to consider the parties written submissions.

3. The Learned Trial Magistrate erred in Law and in fact in applying the arbitration clause in the contract.

4. The Learned Trial Magistrate erred in law and in fact in failing to find that the Appellant is entitled to be indemnified by the 2nd Respondent.

The appeal was canvassed by way of written submissions, which the parties filed, and which the court has duly considered alongside the grounds of appeal. The court has also re-evaluated the evidence on record as adduced before the trial court as required on appeal. I propose to consider all the grounds of appeal together.

From the evidence on record, it is not in dispute that the Appellant had taken out an insurance cover with the 2nd Respondent which was in force at the time the accident occurred on the 9th day of March, 1993, for motor vehicle KTA 201 under policy number 14/07220.

Under the policy, the 2nd Respondent was required to pay any loss or damage occasioned by the aforesaid motor vehicle including third party liabilities and at the time the accident occurred the insurance policy was still valid. According to the Appellant the 2nd Respondent should be ordered to satisfy the decree plus all incidental costs and interest.

The 2nd Respondent has avoided the Appellants claim on the grounds that:

a. The Appellant failed to refer the dispute to arbitration within the prescribed period as required under the policy of insurance.

b. The Appellant failed to report to the 2nd Respondent the occurrence of the accident

c. The Appellant failed to pay excess premium.

d. The Appellant failed to forward the summons to enter appearance in civil suit number 4322 of 1996 arising from the alleged accident.

e. The 2nd Respondent was not notified of the claim as required under Cap 405 Laws of Kenya.

In considering the grounds of appeal, this court shall in essence be answering the questions aforesaid. On the issue of arbitration, the 2nd Respondent has referred to condition 9 of the policy of insurance and submitted that the appellant ought to have referred the matter to arbitration which he failed to, and twelve months having lapsed, the same should be deemed to have been abandoned.

The court has perused the policy document and has confirmed the existence of the arbitration clause. It is clear that the Plaintiff did not invoke the same before filing the present suit. Section 6 of the Arbitration Act Cap 49 Laws of Kenya provides for staying of court

proceedings where there is an Arbitration Agreement. Section 6(1) states:

> ***"if a party to an arbitration agreement or a person claiming through or under him, commences any legal proceedings in any court against any other party to the agreement, or against a person claiming through or under him in respect of a matter agreed to be referred***
>
> ***a. Any party to those proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings apply to that court to stay the proceedings;***

The 2nd Respondent has argued that by failing to refer the dispute to arbitration within one year, the claim was deemed to have been abandoned. In my view, the claim could only be deemed to have been abandoned if the 2nd Respondent disclaimed liability for the claim and if the Appellant failed to refer it to arbitration within one year thereafter. From the evidence on record there is no indication when the 2nd Respondent disclaimed liability, if at all, and therefore, the court is not in a position to tell when the one year period started to run for purposes of computation of time.

Secondly, under Section 6(a) of the Arbitration Act, any party to the proceedings may apply for stay of proceedings and refer the matter for arbitration. There is no doubt that the Appellant was the aggrieved party and ought to have taken advantage of the arbitration clause before filing the suit, but even then, the 2nd Respondent could also have referred the same to arbitration. In any event, it is my considered view that proceedings in this court are not barred by the provisions of Section 6 of the Arbitration Act which only entitles a party to an agreement containing an arbitration clause to apply to the court for an order that proceedings filed in court be stayed pending the exhaustion of arbitral process as provided for by the agreement. The jurisdiction of the court can never be ousted by existence of an arbitration clause in an agreement see the case of ***Hon. Michael Christopher S. Kijana Wamalwa & Others Vs. Hon. Amolo Raila Odinga & Others civil Misc. Application number 1356/1995***

It is therefore the finding of this court that the Appellant is properly before the court notwithstanding the existence of the arbitration clause in the agreement.

On grounds (b) and (c) above, there is ample evidence that the Appellant reported the occurrence of the accident to the 2nd Respondent and even paid the excess premium under the policy of insurance. Among the documents that form the record of appeal is a receipt dated the 13th day of April 1993 issued to the appellant for kshs. Five thousand. The same was issued by 2nd Respondent to the Appellant. Though the 2nd Respondent has alleged that the Appellant did not pay the excess, it has not denied having issued that receipt and therefore, as far as this court is concerned, the receipt is conclusive evidence of such payment.

In order for the Appellant to pay the excess, it would then follow that he must have reported the accident first because he could not have paid for the excess without having reported the accident. I have not seen any assertion by the 1st Respondent that the excess was paid for a different accident altogether.

On whether the appellant forwarded the summons to enter appearance in Civil suit number 4322 of 1996, the court has had the benefit of perusing the original record in the primary suit, ie RMCC No. 4322/1996. That matter proceeded by way of formal proof after interlocutory judgment was entered against the Appellant on the 25th May, 1998 for failure to enter appearance. The court has perused the affidavit of service on the strength of which the said judgment was entered into, sworn by one Denial Nyachuba on the 16th April, 1998 and filed in court on the 20th May, 1998.

Therein, he depones that he served summons to enter appearance upon the Appellant at his home in Uthiru near the old Chief's camp. The process server stated that he was accompanied by the Plaintiff in RCMCC no. 4322/1996, who is the first Respondent in this appeal and that the first Respondent knew the appellant's home. The summons were served on 2nd April, 1998 upon one Mary Wairimo who is the mother of the Appellant and he, the Appellant was not at home at the material time. He was said to have been on a safari and his mother received the summons on his behalf.

Though the Appellant has denied having been served with the said summons, he has however, admitted having been served with a notice of execution which according to the record and the affidavit of Daniel Nyachuba was served upon him on the 13th day of February, 1999. The court notes that the notice was served upon him personally at his home and on the same physical address as the summons to enter appearance.

The court has also noted that the Appellant filed an application dated 16th June, 1999 to restrain the first Respondent from seizing, selling or disposing or in any other way dealing, interfering with his household goods or any other properties and that the 1st Respondent be ordered to return his motor vehicle registration number KTA 201 which had been attached on the 16th June, 1999.

In the affidavit in support of that application, he has deponed that he reported the accident to his insurers and paid the required excess premium of Kshs. 5,000/-. I note from the said affidavit that he did not deny some very crucial facts in the affidavit of service by the process server who served the summons to wit;

1. That his home is in Uthiru near old Chief's camp

2. He never denied knowledge of the lady by name Mrs. Mary Wairimo and that she is his mother

Infact, his was just a general denial of having been served without denying the specifics, which leaves the court wondering whether indeed he

was being truthful to the court.

In view of the aforegoing, it is my considered view that he was served with the summons but failed to forward the same to the 2nd Respondent.

According to the record, the Appellant was served with notice of execution on the 13th February, 1999. His goods and motor vehicle were proclaimed on 7th June, 1999 by Agita General Merchants.

He filed his application for injunction on the 17th June, 1999 after the Auctioneer had already carried away his motor vehicle. In his evidence in RMCC number 4322/1996 he stated that he took the proclamation to the 2nd Respondent who advised him to get a lawyer. He did not explain the period between 13th February, 1999 when he was served with the notice of execution and 7th June, 1999 when his motor vehicle was proclaimed during which period, he would have been reasonably expected to take action to forestall execution. He waited for too long before taking action in the matter yet he was to blame for failing to forward the summons to the 2nd Respondent and therefore, the logical conclusion is that he was the author of his misfortunes. He was in breach of the terms of the policy as he was under an obligation to forward the summons to the 2nd Respondent to enable them defend the suit against him, he failed to do so. He cannot therefore blame the 2nd Respondent for failing to meet its obligation under the policy. There is also no evidence that he applied to set aside the interlocutory judgment that had been entered against him in 4322/1996.

Though the Appellant has sought to rely on Section 10 of Cap 403, and has relied on the holding in the case of ***Joseph Mwangi Gitundu vs. Gateway Insurance Company Limited (2015) eKLR*** on an insurers statutory obligation to pay claims, this court cannot shut its eyes to the fact that the insured is also under an equal obligation to meet his part of the bargain of co-operating with the insurers in the event of a claim being filed against him. Part of that co-operation includes but is not limited to forwarding of summons to enter appearance to the insurers to enable them to effectively defend the claim under principle of subrogation. Such is a central duty imposed on the insured that failure to do so would give an insurer an upper hand in disclaiming liability should a declaratory suit be brought against it. It is one thing to report an accident but a different thing altogether to forward the summons to the insurer, as that is the only way they can be able to defend their insured's interest and mitigate the loss if any. Infact, I would not hesitate to state that the failure is fatal and the insured cannot blame the insurers for his own mistake.

As to whether the 2nd Respondent was notified of the claim under the policy, the evidence available is that of the 1st Respondent who has annexed a copy of the statutory notice said to have been given to the 2nd Respondent. That notice is not stamped by the 2nd Respondent and there is no indication how it was served. Whereas, there is no prescribed mode of service of the statutory notice, it would have helped if the 1st Respondent had explained to the court how the service was effected. This was not done. To that extent, it remains unclear whether the same was served.

In the end, I find that the appeal has no merits and the same is hereby dismissed but with no orders as to costs.

Dated, Signed and Delivered at Nairobi this 25TH Day of JULY, 2019.

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L. NJUGUNA

JUDGE

In the Presence of

.....For the Applicant

.....For the Respondent