



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 331 OF 2016

JOSEPH MUNYINYI MUCHAI.....APPELLANT

VERSUS

KENYA ORIENT INSURANCE COMPANY LIMITED.....RESPONDENT

(Being an appeal from the judgment of Hon M. Obura delivered in CMCC No. 5545 of 2014

dated 27th May 2014)

JUDGMENT

1. The appellant, *Joseph Munyinyi Muchai* was the plaintiff in Milimani CMCC No. 5845 of 2014. He had sued the respondent, *Kenya Orient Insurance Company Limited* seeking to recover a sum of KShs.1,919,767.22 together with costs and interest. The sum claimed was allegedly owed to him by the respondent being costs incurred in the repair of his motor vehicle which the respondent was bound to reimburse under the terms of an insurance contract executed by the parties on 29th July 2013.

2. In his plaint dated 17th September 2014, the appellant contended that pursuant to the aforesaid contract, the respondent comprehensively insured his motor vehicle registration number KBQ 609 J Land Cruiser for one year as evidenced by policy no. HGS/104/002430/2013; that under the terms of the policy, the respondent was required to meet repair costs of accidental damage to the vehicle if it was involved in a road accident within the Republic of Kenya or within the COMESA region provided that he had a COMESA yellow card. He was also supposed to be indemnified for medical expenses limited to KShs.30,000 in the event that he sustained personal injuries as a result of an accident.

3. Further, the appellant averred that on or about 25th April 2014 when the policy of insurance was in force, his vehicle was involved in an accident in the Republic of Tanzania following which he sustained personal injuries and his vehicle was extensively damaged; that at the time of the accident, he had in his possession a COMESA yellow card but upon making a claim for indemnity for repair costs in the sum of KSh.1,883,967.22; assessors fees of KShs.5,800 and refund of medical expenses as per the contract, the respondent in breach of its obligations under the contract refused and/or neglected to make good his claim.

4. In its statement of defence dated 17th October 2014 and amended on 3rd November 2014, the respondent admitted having comprehensively insured the appellant's vehicle and the terms of the insurance contract as stated in the plaint as well as the occurrence of the accident as alleged but denied the claim that at the time of the accident, the appellant had in his possession a COMESA yellow card issued under the policy to cover accidents occurring within East Africa, Southern Sudan and the COMESA region.

5. The respondent further stated that its decision not to pay the appellant's claim did not amount to breach of contract since it is the appellant who refused or neglected to submit a COMESA yellow card in sufficient time as requested and he is therefore the one who was in breach of the terms of the policy. The respondent thus prayed for dismissal of the suit with costs.

6. After a full hearing, the learned trial magistrate (*Hon. M. Obura (Mrs.) Principal Magistrate*) found that the appellant had failed to prove his claim against the respondent and dismissed it with costs.

7. The appellant was aggrieved by the trial court's decision. He proffered the instant appeal relying on nine grounds which are replicated hereunder:

i. That the learned magistrate erred in law and in fact in finding that only the defendant could issue the plaintiff with the Comesa yellow card.

ii. That the learned magistrate erred in law and in fact in finding that the plaintiff could not obtain the Comesa yellow card from another insurer.

iii. That the learned magistrate erred in law and in fact in failing to find since the policy document did not specify that the plaintiff was obligated to obtain the Comesa yellow card from the defendant, then the defendant was liable to compensate the plaintiff under the policy.

iv. That the learned magistrate erred in law and in fact in failing to find that the defendant had not issued the plaintiff with manual from the Kenya National Bureau and was therefore in breach of the policy conditions.

v. That the learned magistrate erred in law and in fact in failing to find that the defendant was in breach of the policy conditions in so far as it failed to advise the plaintiff that only the defendant could issue the Comesa yellow card.

vi. That the learned magistrate erred in law and in fact in failing to find that the defendant's insurance policy did not any conditions relating to territorial limits.

vii. That the learned magistrate erred in law and in fact in failing to find that the plaintiff proved his case on the balance of probability.

viii. That the learned magistrate erred in law and in fact in failing to award the plaintiff KShs.1,919,762.22 together with costs and interest.

ix. That the learned magistrate erred in law and in fact in failing to consider or have any or any sufficient regard to the submissions filed on behalf of the plaintiff.

8. By consent of the parties, the appeal was prosecuted by way of written submissions which both parties duly filed. The written submissions were orally highlighted before me on 28th March 2019 by learned counsel Mr. Sewe instructed by *Wanyonyi Mulwa & Company Advocates* who appeared for the appellant and learned counsel Mr. Kiplagat instructed by *Munene Wambugu & Kiplagat Advocates* who represented the respondent.

9. This is a first appeal to the High Court. It is therefore an appeal on both facts and the law. As the first appellate court, I am enjoined to subject all the evidence presented before the lower court to a thorough re-examination and re-evaluation and arrive at my own independent conclusions bearing in mind that unlike the trial court, I did not have the advantage of seeing and hearing the witnesses and give allowance for that disadvantage. See: *Selle & Another V Associated Motor Boat Company Limited & Others, [1968] EA 123.*

10. I have carefully considered the grounds of appeal, the evidence adduced before the trial court, the rival submissions made by the parties and the authorities cited by each party. I have also read the judgment of the trial court.

11. Having done so, I find that it was not disputed that an accident occurred on the date alleged in the Republic of Tanzania (hereinafter Tanzania) involving the appellant's aforesaid motor vehicle which at the time was comprehensively insured by the respondent on terms which were pleaded in the plaint. It was also not disputed that as a result of the accident, the appellant sustained personal injuries and his vehicle was damaged.

12. What was contested and what constituted the key issue for determination by the trial court was whether the respondent was entitled to repudiate the appellant's claim given the undisputed fact that at the time of the accident, the appellant had not obtained a COMESA yellow card insurance cover from the respondent but had obtained it from a different insurance company.

13. The appellant was the only witness who testified in support of his case. In his evidence, he confirmed that prior to departing the country for his trip to Tanzania, he did not notify the respondent of his intention to travel outside the country; that since the insurance policy did not specify that he had to obtain the COMESA yellow card from the respondent in order for him and his vehicle to be covered against the insured risks while outside the territorial limits of the policy, he obtained one at the Kenya-Tanzania border from *Bamaco Insurance Company Limited*. In his view, the yellow card from *Bamaco Insurance Company Limited* was valid and the respondent's action of repudiating his claim in the circumstances amounted to breach of contract which entitled him to the sums claimed.

14. *Caren Wambura Njagi*, the respondent's Assistant Manager testified in support of the respondent's case. In her evidence, she buttressed the position taken by the respondent that it was not bound to pay the appellant's claim since the accident in question occurred outside the territorial limits of the policy and the appellant had not obtained a COMESA yellow card from it as required under the policy as read with the rules prescribed in the Operation's Manual of the Yellow Card Scheme and Reinsurance Pool (hereinafter the manual).

15. After considering the evidence tendered by both parties and analysing the policy document produced by the appellant as Pexbt 1, the learned trial magistrate agreed with the position taken by the respondent and concluded that as the accident occurred outside Kenya and the appellant had not obtained a COMESA yellow card from the respondent, the respondent was entitled to reject his claim for indemnity and that its action of repudiating the claim did not amount to a breach of the terms of their insurance contract.

16. I have on my part studied the provisions of the parties' insurance contract as evidenced by the policy produced as Pexbt 1. I agree with the learned trial magistrate that the policy issued by the respondent contained a jurisdiction clause which limited its application to "**geographical limits within which the insured event or loss must occur**". The learned trial magistrate also correctly noted that the policy had general exceptions which *inter alia* provided that the respondent will not be liable for any accident occurring, loss, damage or liability caused or sustained outside the territorial limits of its application.

17. The territorial limits within which the policy was to apply were defined in the Motor Pool – PSV policy schedule as “**East Africa, Southern Sudan and COMESA Countries (subject to issuance of COMESA card and vehicles being towed to the nearest Kenyan border in case of an accident)**”.

18. The COMESA card is a product of Protocol Number 9 on third party motor vehicle insurance which was established pursuant to *Article 29 of the Northern Corridor Transit Agreement of 1985* (hereinafter the agreement). According to *Article 2* of the agreement, the purpose of the protocol was to provide for the establishment of an international compulsory motor vehicle third party liability insurance scheme to enable road carriers and motorists from each of the contracting parties to be adequately insured against third party liability risks if they were involved in road traffic accidents in the territory of the other contracting parties.

19. It is common ground that Kenya ratified the above protocol on 10th September 1986. And following the promulgation of the Constitution of Kenya 2010, international treaties or conventions ratified by Kenya and general rules of international law became part of the Laws of Kenya. This is on the strength of *Article 2 (5) and (6) of the Constitution of Kenya 2010*.

20. To illustrate this point, it is important to reproduce the two Articles of the Constitution. *Article 2 (5)* provides that:

“The general rules of international law shall form part of the law of Kenya” ;

while *Article 2 (6)* states that:

“Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution”.

Kenya having signed the agreement and the protocol established under it was bound by the provisions of the agreement and Protocol and by virtue of the aforesaid constitutional provisions, the two formed part of the Law of Kenya.

21. The operations manual of the yellow card scheme reinsurance pool which was established under the authority of *inter alia* the protocol defines the yellow card as an equivalent of a policy of insurance recognized as a valid motor insurance certificate and evidence of a guarantee to provide the compulsory minimum insurance cover required by the laws of the state’s party to the scheme in which accidents occur involving vehicles from other member countries. Under the protocol, contracting member states which included Kenya and Tanzania were to establish national bureaus which were to be in charge of processing and settling claims made on the COMESA yellow card scheme.

22. A close scrutiny of *Section 1 sub section 1.4; Section 2.7 (d) and (e)* of the manual clearly shows and leaves no room for doubt that for a COMESA yellow card to be valid and to be used as a basis for compensation under the policy for accidents occurring outside the policy’s territorial limits, it had to be issued by the insurance company which had issued the primary policy. In order to appreciate the true import of the above provisions and to buttress the above finding, I think it is important to reproduce in full the said provisions.

Section 1.4 on eligibility states as follows:

“Any legal or natural person is eligible to be issued with a Yellow Card if the vehicle to be covered by the Yellow Card is insured under a current prime policy. A member insurer of a National Bureau shall have issued the prime policy. Where this requirement cannot be met, a Yellow Card shall not be issued.”

Section 2.7 (d) states that:

“Only the insurer that issued the prime policy shall issue a yellow card in respect of a vehicle insured thereunder; and

Section 2.7 (e) states that:

“Only insurance companies, that are members of the National Bureau, shall issue yellow cards and only to their primary insurance policy holders.”

(Emphasis added)

23. It is pertinent to note that the above provisions are couched in mandatory terms connoting the seriousness with which the contracting parties to the protocol took the issue of the entity which was tasked with the responsibility of issuing the COMESA yellow cards.

24. As stated earlier, the appellant admitted in his evidence that he had obtained the COMESA yellow card produced as Pexbt 2 from *Bamaco Insurance Company Limited* and not from the respondent who had issued him with the prime policy. The effect of the appellant’s failure to seek and obtain a yellow card from the respondent was that the insurance policy which is what constituted a contract between the parties continued to be in force in the Republic of Kenya but ceased to provide cover to the appellant when he entered the Republic of Tanzania. The policy ended at the border of Tanzania since the appellant did not request the respondent to issue him with a COMESA yellow card which would have provided him with insurance cover under the yellow card scheme and reinsurance pool.

25. Given the foregoing and considering that the accident forming the genesis of the appellant’s claim occurred in Tanzania, I have come to the same conclusion as the learned trial magistrate that in the circumstances of this case, the respondent was not obligated under the terms of the policy to indemnify the appellant for any loss suffered as a result of the accident.

I am thus unable to fault the trial magistrate's finding that the appellant had failed to prove his claim against the respondent to the required legal standard.

26. The appellant's claim that he was unaware of the procedures required under the law for obtaining COMESA yellow cards is immaterial because as correctly pointed out by the respondent in its submissions, ignorance of the law is not a defence or an excuse in law. In any event, the appellant admitted under cross-examination knowledge of the regulations which governed the operation of the yellow card scheme.

27. For all the above reasons, I am satisfied that this appeal is devoid of merit and it is hereby dismissed with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY OF SEPTEMBER, 2019.

C. W. GITHUA

JUDGE

In the presence of:

Ms Nzioka holding brief for Ms Beacco for the appellant

Mr. Kiplagat for the respondent

Mr. Salach: Court Assistant