REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NUMBER 232 OF 2018

BRITISH AMERICAN INSURANCE CO.LTD. ..... APPELLANT

VERSUS

GEORGE KINUTHIA NDUNGU. ..... RESPONDENT

(Being an appeal from the judgment and decree of Hon. Atambo, Senior Principal Magistrate, delivered on 3rd August, 2017 in Nairobi CMCC No. 413 of 2002)

J U D G E M E N T

1. George Kinuthia Ndung'u, the Respondent herein, filed an action against British American Insurance Co. (K) Ltd, the Appellant herein vide the Plaint dated 22nd January, 2002, which plaint was amended and re-amended on 28th November, 2002.

2. In the aforesaid plaint, the Respondent sought to be paid compensation as per the insurance contract and damages for loss of income plus aggravated damages.

3. The Appellant denied the Respondent's claim by filing a re-amended defence with a counterclaim, whereof the Appellant sought for a declaration that it is entitled to avoid the contract.

4. The case was heard and determined in favour of the Respondent by Hon. S. Atambo, learned Senior Principal Magistrate.

5. Being aggrieved, the Appellant preferred this appeal and put forward the following grounds: -

i) That the learned magistrate erred in law and fact in holding and finding that the Respondent proved its claim on a balance of probabilities.

ii) That the learned magistrate erred in law and fact in imposing a greater burden of proof than that required in civil matters.

iii) That the learned magistrate erred in law and fact in finding that the Respondent had a valid policy hence entitled to compensation.

iv) That the learned magistrate erred in law and fact in failing to consider the issue of mitigation of loss in insurance policy.

v) That the learned magistrate erred in fact and law in awarding the Respondent damages more that the insured sum contrary to the principle of insurance of taking the insured to his former position instead of enriching an insured.

vi) That the whole judgment was contrary to the principles known in law and failed to consider the evidence on record.

6. When the appeal came up for hearing, this court gave directions to have the appeal disposed of by written submission.

7. I have re-evaluated the case that was before the trial court. I have also considered the rival written submissions plus the authorities cited and supplied.

8. The parties appear to be in agreement that grounds 1, 2 and 3 should be determined together. It is not in dispute that the Respondent took out an insurance cover with the appellant to insure his equipment for a sum of Ksh.80,000/- and signed a domestic package application form.

9. It is the submission of the Appellant that the Respondent having signed the aforesaid policy meant he accepted the terms of the Appellant offered in respect of a private dwelling house which was self contained.

10. The Appellant pointed out that the Respondent had pleaded that on or about 29th December, 1999 his premises were broken into and the insured items namely Panasonic Colour TV, One Sony Radio/Music System and J.V.C Video Deck all valued at Ksh.47,000/- were stolen.

11. It is the submission of the appellant that its investigations revealed that the items were stolen from the Respondent's business premises and not in his house.

12. Based on the above assertions, the Appellant argued that the Respondent was not entitled to compensation from the Appellant since the insurance cover was not valid.

13. In other words, it is argued that the policy taken by the Respondent was a domestic policy and not a commercial policy. The Respondent on the other hand is of the submission that the Appellant had admitted that there was an insurance cover in place to insure the Respondent's equipment hence the Appellant's grounds 1, 2 and 3 do not have any merit.

14. A close perusal of the proceedings of the trial court will reveal that the Respondent summoned one Justus Gaita (PW 2), the Appellant's insurance Agent to testify. PW 2 stated that he in his capacity as an employee and agent of the Appellant delivered insurance proposal forms to the Respondent to be executed.

15. PW 2 said that he took the Respondent through the forms upon which he signed and paid the required premiums. He stated that the Respondent wanted a commercial policy to insure his business where he operated a video show business. PW 2 said that it was only after the Respondent had made a claim later that it was discovered that the Respondent had been made to sign domestic policy forms since at the time the Appellant did not have the commercial policy form.

16. PW 2 produced a letter he wrote on 16th March, 2000 absolving the Respondent from any blame. Upon re-evaluation of the evidence tendered before the trial court, it is clear that the Appellant admitted that it knew that the Respondent all along intended to take out a commercial policy of insurance. The Appellant's agent also admitted that the Appellant supplied forms in respect of a domestic policy instead of that of a commercial policy due to the scarcity of those forms. It cannot, therefore lie in the mouth of the Appellant to purport to repudiate the contract of insurance. It is estopped from doing so by virtue of the doctrine of imputability.

17. The learned Senior Principal Magistrate cannot be faulted. The Respondent made out a prima facie case hence he is entitled to claim under the insurance policy he took having been misrepresented to sign insurance forms in respect of a domestic policy.

18. In the fourth ground, it has been argued that the learned Senior Principal Magistrate failed to consider the issue touching on mitigation of loss in Insurance Policy.

19. The Appellant argued that the Respondent did not mitigate his losses following the loss of the equipment. The Appellant further stated that it would be unreasonable to hold it liable for the delay in filing the suit and in having the suit concluded in court.

20. It was also pointed that it cannot be assumed that the equipment would be in constant use when in reality the same may not be used when it is undergoing maintenance or when there is power outages.

21. It is also argued that the Respondent had failed to establish that he was receiving an average of Ksh.700/-. It is said the Respondent merely relied on an excel spreadsheet without supplying audited accounts to bank it.

22. The Appellant urged this court to adjust the period of the loss to say six months.

23. The Respondent stated that the issue touching on mitigation was never raised by the Appellant before the trial court. It is apparent that the Appellant did not in its defence raise the question of mitigation.

24. The issue only surfaces in the last page of its submissions dated 29th October, 2014 where the Appellant merely stated in part as follows: -

> ***"Indeed the Plaintiff ought to have mitigated his losses."***

25. In respect, I agree with the Respondent's submission that the issue was never pleaded before the trial court to enable the learned Principal Magistrate adjudicate it.

26. In **Guthamed Mohamed Ali Jivanji t/a Jivanji Agencies Vs Sanyo Electrical Co. :td [2003] eKLR,** the court of Appeal held inter alia: -

> ***"Mitigation of damages is a matter of fact and ought, therefore, to be raised in the pleadings. As it did not arise before the superior court we need not deal with it here ....."***

27. Having said nothing in its defence and counter-claim on mitigation, I am not obliged to consider the issue on appeal, consequently, I decline the invitation to venture into the issue.

28. As regards grounds 5 and 6, the Appellant is of the submission that the statement of accounts produced are not backed by any evidence of how many people solicited for the Respondent's services and how much each paid for the same.

29. This court was urged to find that the award of loss of income from 13th March, 2000 till judgment was not proved, hence the award given was unjustly enriching the Respondent. It was further argued that the purpose of taking a policy cover is not to enrich oneself but rather to compensate the insured foe the loss incurred.

30. The Appellant further argued that the Respondent should not have been awarded aggravated damages of Ksh.500,000/- taking into account that the Respondent had been offered Ksh.21,390/- vide a letter dated 19th April, 2000 in settlement of the claim but the Respondent declined the said amount. It is also said that the amount is exorbitant and excessive.

31. The Respondent has argued against the Appellant's submission that the question of unjust enrichment was not pleaded by the Appellant in this re-amended defence and counter-clam neither was it raised in the witness statement.

32. The Respondent pointed out that all the documents presented by both the Appellant and the Respondent were allowed and admitted in evidence as exhibits by consent.

33. The Respondent specifically pleaded loss of income stating that his business on average brought in daily income of Ksh.700/-. The Respondent stated that the averment was never controvented by the Appellant.

34. I have considered the rival submissions over the question of unjust enrichment and with respect, I am persuaded by the arguments put forward by the Respondent, that the he pleaded in the plaint to be paid a sum of Ksh.700/- per day for loss of income.

35. The Respondent submitted statements of accounts which established the figures. The Appellant did not deem it fit to controvert the evidence which in any case were admitted by consent.

36. The Respondent argued that the award of Ksh.500,00/- as aggravated damages was neither excessive nor exorbitant.

37. Considering the conduct of the Appellant, the trial court was right in awarding punitive damages. The amount awarded is neither exorbitant nor excessive.

38. In the end, this appeal is found to be without merit. The same is dismissed with costs to the Respondent.

Dated, signed and delivered in Nairobi this 25th day of September, 2019.

.....

J. K. SERGON

JUDGE

In the presence of

..... for the Appellant

..... for the Respondent