REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 1097 OF 2005

JOSEPH MAINGI THUO …….. PLAINTIFF

VERSUS

OCCIDENTAL INSURANCE CO. LTD ……DEFENDANT

JUDGMENT

The plaintiff was the owner of motor vehicle registration no. KAN 622N which was involved in a road traffic accident on 10th August, 2002. The motor vehicle was insured under an insurance policy issued by the defendant herein. After the accident the motor vehicle was extensively damaged, and the plaintiff is said to have reported the accident to the defendant on 12th August, 2002.

In his plaint dated 26th August and filed on 7th September, 2005 he pleaded that the defendant took over the motor vehicle on 25th September, 2002 through the appointed accessors, on the understanding the vehicle would be repaired within a period of 4 to 6 weeks.

The vehicle had been purchased using a bank loan provided by NIC Bank, and at the time of the accident the outstanding balance of the loan was Kshs. 1,441,533/= attracting 30% interest on late payment, on top of the interest charged on the loan account.

It was the plaintiff's case that he never delayed and or defaulted in paying the premiums to the defendant as against the policy, but it took the defendant up to 16th June, 2003 to have the motor vehicle repaired. As a result he suffered loss and damages. The plaintiff blamed the defendant for negligence and breach of implied contract for failing to repair the motor vehicle within the 4 to 6 weeks as undertaken, and failing to deliver the same in time and instead held it for more than a year.

Further, the defendant failed to inform the plaintiff of the progress of the repair work and in any case, the repairs were done with substandard components. He added that, the damaged components in the motor vehicle were replaced with components not meant for the vehicle, and that the vehicle was not referred to proper assessors and or mechanical engineers, thereby delaying the repairs of which the plaintiff was not informed about.

Particulars of loss have been tabulated as involving loss of business for 270 days at Kshs. 12020/= per day amounting to Kshs. 3,172,400/=, service of the loan account amounting to Kshs. 1,441,533/=, loss of use amounting to Kshs. 1,500,000/= giving a total of Kshs. 6,113,933/=. On the basis of the foregoing he claimed general and special damages costs of the suit and interest at court rates.

In the statement of defence dated and filed on 7th November, 2015 the defendant denied the plaintiff's claim and called for strict proof thereof. Further, the defendant pleaded that if there was any agreement between the plaintiff and NIC Bank, it had nothing to do with it and cannot be binding. Any loss and damages pleaded and any alleged negligence, and breach of implied alleged contract were also denied by the defendant. If anything, the defendant stated, it did not breach any contract with the plaintiff and therefore was not responsible for any alleged loss of business, service of his loan account with NIC and loss of use of the motor vehicle.

The defendant further pleaded that if at all the plaintiff suffered any losses, which in any case were not admitted, those were not recoverable from the defendant. Additionally, while making no admission of any losses, the defendant pleaded that if the plaintiff suffered any losses, then such loses were avoidable and the plaintiff had a duty in law to mitigate the same.

The plaintiff gave evidence and called one witnesses while the defendant also called two witnesses in support of the defence case. Both parties have filed submissions and cited some authorities which I have on record. For the plaintiff to succeed he had a duty to prove that whatever loss he sustained was covered in the policy, and where special damages are involved they must be specifically pleaded and strictly proved.

Having particularised damages under paragraph 9 of the plaint with specific figures, then the plaintiff was required to prove by mathematical precision, each and every single cent pleaded. The starting point in my view is what measure of damages is recoverable in insurance claims. In the case of **Concord Insurance Company limited vs. David Otieno Alinyo & others** the Court of Appeal in Civil Appeal No. 30 of

2005 held as follows,

> ***"1 The normal measure of damages in insurance claims is the cost of repairing the damaged article, but there is an exception if it can be proved that the cost of repairs greatly exceed the value in the market of the damaged article.***
>
> ***2. Where a vehicle is damaged by the negligence of a 3rd party the owner suffers an immediate loss representing the diminution in value of the damaged vehicle.***
>
> ***3. Consequential loss is not recoverable in a standard form policy of insurance unless expressly covered by the policy.***
>
> ***4. Claims based on loss of user of the insured article occur subsequently to the breach of policy and is in essence, consequential loss which is irrecoverable under a standard form policy.***
>
> ***5. An insured cannot recover losses which were avoidable and which he had a duty in law to mitigate***."

There is evidence on record that the defendant paid a sum of Kshs. 1,344,823/= being the cost of repair of the plaintiff's motor vehicle under the policy to M/S Rallye Spray Painters (1984) Limited. A payment voucher No. 3189 dated 23rd July, 2003 appears in the bundle of documents prepared by the defendant at page 50. It will be noted that this was against the invoice raised by the said company on 27th May, 2003.

There was a covering letter addressed to the same company by the defendant which was collected on the same date. Earlier on, the defendant had written to the insurance brokers on 17th June, 2003 informing them to advice the plaintiff to collect the motor vehicle because the repairs had been completed. Before then, the repairing company had communicated with the defendant about the progress of the repairs and when the same were completed a letter was dispatched to the defendant dated 19th May, 2003 informing the defendant that the repairs had been finalised and the insured could pick the same.

All this while, it is the defendant's case that since the plaintiff knew or ought to have known that the motor vehicle had been repaired and should have made efforts to collect the same. This he did not do in time.

There has been some dispute as to who referred the motor vehicle to M/s Rallye Spray Painters Limited, but my assessment of the evidence is that it was the plaintiff who did so. I say so because the plaintiff had intended to call one Ida Kagendo who unfortunately passed on before the case was heard. This proposed witness was personally known to the plaintiff as he admitted in his evidence in the court. She had actually made a statement for that purpose and was supposed to give evidence. That statement showed that she worked for Rally Spray painters who repaired the plaintiff's motor vehicle.

The plaintiff had been a customer in that firm. The decision to refer the plaintiff's motor vehicle to this firm was made by the plaintiff. DW 1 Richard Mombo confirmed that it is the plaintiff who selected that firm to repair the motor vehicle as the defendant had no relationship with the said firm. It is the plaintiff who transferred the motor vehicle from Crystal Motors to Rallye Spray Painters. From the evidence on record and evidence produced the plaintiff took a cover from the defendant through a broker known as Kingsgate Insurance brokers limited. They are the ones who informed the defendants of the accident and then forwarded the accident abstract and the claim form. They also paid the excess charge to the defendant.

The defendant had a duty and mandate to appoint an assessor which it did. The repairer of the damage however was appointed by the plaintiff. If there is any doubt in that regard on 9th September, 2002 Kings gate Brokers informed the defendant that their insured wanted his vehicle to be repaired at crystal motors and that the defendant should appoint an assessor.

There is now evidence that when the assessor went to crystal motors the plaintiff had transferred the same to a garage of his choice namely Rally Painters Limited. If there was any delay it cannot be attributed to the defendant.

The plaintiff after the motor vehicle was repaired signed a satisfaction note. It too late in the day for the plaintiff to raise any concern and more so that substandard parts were used. The plaintiff has not established the nexus between his loan account and the insurance policy or any breach on the part of the defendant. it is too remote to allege that the defendant can shoulder a loan that it was not a party to. On the other losses the policy document provided at page 1 Section1 that

> **"The company shall not be liable to pay;**
>
> i. **Consequential loss, depreciation wear, tear, mechanical or electrical breakdown, failures or breakages**."

There are then general exception set out in number 5 of the policy which reads as follows,

> **"The company shall not be liable in respect of;-**
>
> **5(a) any accident, loss or damage to any property whatsoever or any loss or expense whatsoever resulting or arising therefrom or any consequential loss."**

D.W. 1 told the court that an insured may opt to pay more premiums to cover consequential loss. This was not the case here. On the loss of

business and loss of the use of the vehicle pleaded in the plaint the plaintiff P.W. 2 whose evidence related to earnings in the year 2001 yet this accident took place in the year 2002. This witness is not of any assistance to the plaintiff and to the court. I have no hesitation in disregarding this evidence.

What comes to light is that the plaintiff's evidence is not persuasive and he should have been contented with the payment made by the defendant for the repair of his motor vehicle. Beyond that, I see no basis whatsoever for granting him the prayers sought in the plaint. He has not met the threshold of proof on a balance of probability. His suit is therefore dismissed with costs to the defendant.

Dated, signed and delivered at Nairobi this 19th Day of December, 2019.

A. MBOGHOLI MSAGHA

JUDGE