



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI**

**CIVIL APPEAL NO. 17 OF 2013**

**MOHANSONS (KENYA) LIMITED.....APPELLANT**

**VERSUS**

**CANNON ASSURANCE (KENYA) LIMITED.....RESPONDENT**

***(An appeal from the Judgment of Hon., TWC Wamae, Chief Magistrate Court at Milimani in CMCC Number 9077 of 2002, delivered on 30<sup>th</sup> November, 2012)***

**JUDGEMENT**

**Background:**

1. The appellant appeals against a judgment entered against it for the sum of Kshs. 485,305/- costs and interest. The genesis of this appeal is the Respondent plaintiff seeking the sum of Kshs. 1,421,485/= plus costs and interest owing from unpaid premiums accruing from their contractual obligations pursuant to a contract of insurance and for unpaid insurance excess. The gist of the respondent case before the lower was that the Respondent provided the appellant with insurance facilities over time, however, the appellant failed or neglected to pay the requisite premiums.
2. The appellant in response to the respondent suit filed an amended defence dated 10<sup>th</sup> September, 2003 denying owing the said sum and further argued that the Respondent claim was time barred under the Limitation of Action Act.
3. As this is the first appeal, this court is called upon to analyse and re-assess the evidence on record and reach its own conclusions bearing in mind that it neither saw nor heard the witnesses testify as was held in *Selle vs Associated Motor Boat Co. [1968] EA 123*. Where the Court held as follows:-

**“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)”.**

4. Consequently it is necessary to outline the evidence as it emerged before the subordinate court. The Respondent called two witnesses, whereas the appellant did not call any witness.

**Evidence:**

5. **Raphael Ochieng (PW1)** testified that he worked with the respondent as an underwriting supervisor, general business. It was his evidence that they had issued various policy covers to the appellant, which included motor vehicles covers and building cover and that they claim the sum of Kshs. 1,271,485/= as outstanding premiums and unpaid excess 150,000/= for a motor vehicle all totaling Kshs. 1,421,485/=. He tendered various Debit notes evidencing the alleged outstanding premiums. On cross examination he admitted that the suit was filed six years after some liabilities therein arose, implying that some claims were time barred.
6. **Gerald Odera Omula(PW2)** testified that he is an accountant working with the Respondent, he reiterated the claim by buttressing the evidence of PW1, and on his part he produced a statement of account relating to the appellant policy number 12/126/480/98 which he claims is owing them the claimed amount herein.
7. The learned trial magistrate considered the evidence and found that the Respondent had proved that they were indebted by the appellant to

the tune of Kshs. 715,347/= and that out of this sum the sum of Kshs. 220,531/= were time barred under section 4(1) and (3) of the limitation of Action Act Cap 22 Laws of Kenya and subtracting the same the Respondents were awarded the sum of Kshs. 485,305/= plus interest.

8. Dissatisfied with the lower court findings herein, the appellant now appeals against the judgment and decree on the grounds set out in the memorandum of appeal dated 16<sup>th</sup> January, 2013, setting out six grounds of appeal.

#### **Submissions:**

9. Both parties herein agreed to dispose of this appeal by way of written submission. The appellant submissions are dated 10<sup>th</sup> September, 2019 whereas the Respondent submissions are dated 5<sup>th</sup> September, 2019.

#### **Appellant's Submissions:**

10. The appellant vide their above written submissions only argued one ground of appeal that is on illegality. In this regard they submitted that the lower court erred and acted contrary to the provisions of section 156 of the Insurance Act which provided that:-

**“no insurer shall assume a risk in Kenya in respect of insurance business unless and until the premiums payable therein is received by him or is guaranteed to be paid by such person in such manner and within such time as may be prescribed, or unless and until a deposit, if prescribed amount, is made in advance in the prescribed manner”**

11. In this regard the appellant submitted that the instant contract herein is contrary to the above section of the law, and enforcement herein amounts to the court enforcing an illegal contract.

12. In support of this proposition the appellant placed reliance in the following cases, *Nazir Virani t/a Kisumu Beach Resort vs Phoenix East Africa Company Limited (2004) eKLR*, *Festus Ogada vs Hans Millin (2009) eKLR*, *Mapis Unvstments (K) Limited vs Kenya Railways Corporation (2006) eKLR* and *Ahmed Nasir Abdikadir & Co. Advocates vs National Bank of Kenya Limited (2006) eKLR*.

13. In sum the appellant submitted that the learned magistrate ignored the above authorities which are binding and which prohibits the courts from enforcing illegal contracts and urged the court to allow the appeal with costs.

#### **Respondents' Submissions:**

14. Vide their filed submissions; the respondents addressed the appellant's grounds as raised in their memorandum of appeal. They summarized grounds 1, 2, 3 and 6 into as to whether the Respondents had proved its claim for the sum awarded. And in this regard they submitted that the respondent had proved their claim as found by the lower court.

15. They allege that the appellant has not denied the existence of their insurance contract and that they did not tender any evidence to rebut their claim and thus the same stands as truthful, arguing that they had satisfied the provisions of section 107 of the evidence Act in that they proved their case to the required standards.

16. The Second ground addressed by the Respondent is on whether the learned magistrate erred in failing to hold that the Respondent was precluded by section 156 of the Insurance Act from assuming risk before the appellant had paid the premiums as cited hereinabove.

17. They argued that section 156 of the Insurance Act cited above avails a defence to an insurer against a claim for indemnity by the assured if the assured on a contract where he has not paid premiums.

18. Additionally, they argued that non-payment of premiums does not vitiate an insurance contract, as the actual payment of premiums is not necessary to the creation of a complete and binding contract of insurance.

19. In this they rely in *Raul Colinvaux's The Law of Insurannce 5h and 8<sup>th</sup> Edition (pages 193 to 204 of the record)* and *C.N Shawcross* in the *Law of Motor Insurance* where it states that the duty of insurers is to issue policy and the assured duty is to pay premiums, and that the two are independent of each other and that the mere non-payment of premiums does not affect the validity of the policy.

20. Further, they submitted that Colinvaux's Law of Insurance provides for the remedies which an insurer can pursue where the assured has failed to pay premiums. They include commencing proceedings for payment, rejecting insurance claims until premiums are paid or forfeiting or determining the policy for breach.

21. In this they state that an assured cannot escape liability by arguing that there was no consideration. In support of this the Respondent relies in the authorities of *Municipal Mutual Insurance Limited vs Pontefract Corporation 1KBD 543* and the case of *Virani t/a Kisumu Beach Resort vs Phoenix of East Africa Assurance Company Limited (2004) 2KLR*.

22. Furthermore, they submitted that the only qualification is where the policy of insurance provides that the failure to pay premiums would amount to repudiation of the contract. In this case they argued that the appellant herein never averred that the same was part of the contract to warrant the repudiation of their insurance contract.

23. However, they argued that even if this was the case, repudiation of a contract does not automatically terminate the contract, as an innocent party has the option of pursuing rights that accrued from the contract including suing to recover unpaid premium. In this they relied

in the case of *Photo Production Limited vs Securicor Transport Limited (1980)*, urging the court to affirm the lower court decision.

24. The final issue addressed by the Respondent is ground 5, which is on whether the trial magistrate erred in failing to dismiss the Respondents claim on the ground of illegality. In this regard they submitted that the insurance contract herein was legal and not vitiated by the appellant's failure to pay premiums.

25. In any event they submitted that the appellant does not deny enjoying the insurance cover from the respondent and ought not to rely on their failure to pay premiums.

26. Additionally, they submitted that there is no provision in the Insurance Act that makes a contract null and void if it is not performed in accordance with the Act. In this they rely in the case of *Shaw vs Groom (1970) 2 QB 504* and *ST John Shipping Corp vs Joseph Rank Ltd (1957) 2 QB 267*.

27. In sum they urged the court to uphold the lower court decision and dismiss the instant appeal with costs.

**Issues and Analysis:**

28. I have considered the parties herein respective submissions and it is clear that the appellant has only pursued one ground of appeal which is as to whether the insurance contract between itself and the Respondent is illegal by dint of section 156 of the Insurance Act.

29. Therefore at this stage there is no dispute as to the existence of the contractual relationship herein for provision of insurance cover and on unpaid premiums, the only issue is the legality and enforcement of the obligations under the contract, which is the payment of premiums.

30. Section 156(1) of the Insurance Act provides as follows: -

**“156 (1) No insurer shall assume a risk in Kenya in respect of insurance business unless and until the premium payable thereon is received by him or is guaranteed to be paid by such person in such manner and within such time as may be prescribed, or unless and until a deposit, of a prescribed amount, is made in advance in the prescribed manner.”**

31. Therefore under Section 156 hereinabove the insurer would not assume the risks until the premium were paid to them. However, it would assume the risk if the same is guaranteed to be paid. So an insurance company can only assume insurance risk when: -

**1) Premium has been paid and received by him or**

**2) Where the premium has been guaranteed by such person or**

**3) A deposit of a prescribed amount is made in advance.**

32. The Appellant submits that since the Respondent was not paid premiums for provision of insurance cover, there was no consideration, and therefore no contractual obligations attached on the basis upon which an Insurance Policy would be issued.

33. The Respondent on the other hand argues that the contract was binding as the appellant benefited from the insurance cover and therefore ought to discharge their obligation under the contract which is the payment of the outstanding premiums.

34. In the case of *Virani t/a Kisumu Beach Resort vs Pheonix of East Africa Assurance Company Ltd (Supra)* the court of appeal in this regard held that;

**“Ordinarily, a policy of insurance remains valid once issued and liability attaches despite non-payment of premiums, so that non-payment of a premium does not amount to a failure of consideration vitiating the contract of insurance. The only qualification to that general proposition of law is that the policy itself may provide that the failure to pay the premium would avoid liability for the insurer or the failure to pay the premium amounts in the circumstances to a repudiation of the contract.”**

35. In this case there is no allegation from the appellant that the policy herein expressly provided that failure to pay premiums vitiated the contract. Therefore, in the circumstances the contract herein cannot be said to be illegal.

**Conclusion:**

36. Guided by the foregoing authorities cited by the parties and more notable the Court of Appeal decision above, it is my finding that the instant appeal lacks merit and is dismissed with costs. Thus the court makes the following orders;

**i) The appeal is dismissed with costs to the respondent.**

**SIGNED, DATED AND DELIVERED AT NAIROBI THIS 20<sup>TH</sup> DAY OF DECEMBER, 2019.**

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**C. KARIUKI**

**JUDGE**