



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL NO. 180 OF 2014

MWITA MASISI.....APPELLANT

VERSUS

APA INSURANCE LIMITEDRESPONDENT

(Being an appeal from the Judgment/Decree delivered on 25th April, 2014 by Hon. Mr. Obulutsa (Ag. Chief Magistrate) Milimani Commercial Courts in CMCC No.4070 of 2008)

JUDGMENT

1. The Appellant, Mwita Masisi was sued by the Respondent APA Insurance Limited. The claim was for:

(a) A declaration that the plaintiff is and has at all material times been entitled to avoid the policy Insurance number P/10/2007/0710/6941 apart from any provision contained therein on the ground that the same was obtained by the non-disclosure and/or by representation of facts which were false in some material particular.

(b) A declaration that the plaintiff has effectively avoided the policy number P/10/2007/0710/6941 and is not liable under the said policy and/or under the provisions of the Insurance (Motor Vehicles) Third Party Risks Act Chapter 405 of the Laws of Kenya to satisfy any third party claim and more specifically third party claims arising out the accident that occurred on 8th August, 2007 involving motor vehicle registration number KAU 666B Toyota Corolla.

2. The Appellant filed a statement of defence and counterclaim. The Appellant denied the Respondent's claim and counter- claimed for:

a. Kshs.520,000/= being the value of the motor vehicle.

b. Loss of user of the motor vehicle from the date of the accident till the date of payment by the plaintiff.

c. A declaration that the plaintiff is liable for all the claims arising out of the accident.

d. General damages for breach of contract.

e. Costs and interest.

f. Such other and/or further orders as this Honourable Court may deem fit and just.

3. The Respondent filed a reply to the defence and defence to the counter-claim. The Respondent joined issues with defence and denied the counter claim.

4. During the trial before the Lower Court, the Respondent's Legal Officer, Patrick Kemboi stated that the Appellant had taken a comprehensive private motor vehicle insurance policy for Motor vehicle Registration No. KAU 666B. That the Appellant was issued with a certificate of insurance for one year. The motor vehicle was involved in an accident on 8th August 2007 during the currency of the policy. That investigations revealed that the motor vehicle had been used as a collateral for a loan and that the Appellant was not the registered owner of the motor vehicle. The Respondent repudiated the policy on grounds of material non-disclosure; lack of insurable interest and lack of the basis to sue under the doctrine of subrogation.

5. The Appellant's case was that he had paid Ksh.400,000/= towards the purchase of the motor vehicle leaving a balance of Ksh.100,000/=

which he paid before the accident and was subsequently issued with a log book. That at the time the motor vehicle was insured, the sale agreement and the transfer forms were shown to the insurance agent. The Appellant denied having made any misrepresentation to the insurance company.

6. After the hearing of the case, the trial magistrate entered judgment in favour of the Respondent. The Appellant's counter claim was dismissed with costs. The Appellant was aggrieved by the said judgment and appealed to this court on the following grounds:

i. That the learned trial magistrate erred in law and in fact by holding that the appellant herein was not the registered owner of Motor vehicle Registration No. KAU 666B.

ii. That the learned trial magistrate erred in law and in fact by considering extraneous facts and in particular by holding that the appellant is guilty of material non-disclosure.

iii. That the learned trial magistrate erred in law and in fact by not finding that the existence of a financier interest did not affect the right of the appellant taking a policy with the respondent and his rights under the policy thereof.

iv. That the learned trial magistrate erred in law and in fact by holding that the motor vehicle was borrowed by Rose Njeri from Bernard Muya and disregarding evidence of the appellant's witness Mr. Gilbert Mutie who confirmed to the court that he personally borrowed the vehicle from the appellant and he was the one driving it on the fateful day.

v. That the learned trial magistrate erred in law and in fact by relying on statements of witnesses who were not called in court to testify and disregarding evidence of the appellant witnesses who came to court and testified.

vi. That the learned trial magistrate erred in law and in fact by holding that the defendant has no insurable interest over the motor vehicle in question.

vii. That the learned trial magistrate erred in his interpretation of the case of Carter vs Boehm where it was held that "the alleged misrepresentation if any does not affect the nature of the risk, the risk run is not different from the risk understood and intended to be run at the time of the agreement."

viii. That the learned trial magistrate erred in law and in fact by relying on an investigation report whose markers were not brought to court to produce it.

ix. That the learned trial magistrate erred in law and in fact by not finding that the respondent's agents "Wing Insurance Agencies ltd agreed to insure the appellant's motor vehicle yet he only produced a sale agreement to prove ownership.

x. That the learned trial magistrate erred in law and in fact by dismissing the appellant's counterclaim without considering its merits.

xi. That the learned trial magistrate erred in law and in fact in failing to appreciate the appellant's submissions and/or failing to give reasons for disregarding the submissions and the authorities in support thereof.

7. The Appeal was canvassed by way of written submissions. I have considered the same together with the authorities cited.

8. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. See for example the case of **Selle v Associated motor Boat Co. & others [1968] E.A. 123** where it was stated 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)".

9. From the evidence adduced by both sides, it is not disputed that the motor vehicle in question was insured by the Respondent when the accident occurred. The bone of contention is whether there was non-disclosure of material facts by the Appellant. *Uberrima fides*, that is utmost good faith is an essential requirement in an insurance contract. The insured therefore has a duty to make a full disclose of all the material facts for the insurer to decide whether to take the risk and if so as what premium (See for example **Blue Shield Insurance Co. Ltd v Richard M Mbondo (Being sued as the Legal Representative of the Estate of Late Elijah Mbondo Ntheketha) & 3 others** HCC Nbi Comm CTS 492/2001: **Carter v Boehm 1776**) 3 Burr 1905)

10. In the case at hand, the proposal form which was filled in by the Appellant and which is not disputed reflects that in answer to the question whether the Appellant was the owner of the motor vehicle and if the motor vehicle was registered in his name, the answer is in the affirmative. The Appellant also answered in the negative to the question whether there was any financiers interest in the vehicle.

11. On the question of ownership and registration of the motor vehicle, I agree with the submissions by the Appellant's side that the registration of the motor vehicle is *prima facie* evidence of ownership Section 8 of the Traffic Act states as follows:

“The person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle.”

12. The Appellant was registered as the owner of the motor vehicle on 8th July, 2008 and issued with logbook. The evidence by the Appellant that he was the owner of the motor vehicle as demonstrated by the sale agreement proved on a balance of probabilities that he was the owner of the motor vehicle. As stated in the case of **Charles Nyambuto Mageto & Another v Peter Njuguna Njathi [2013] eKLR**

“The courts recognize that there are various forms of ownership actual, possessory and beneficial, all of which may be proved in other ways, including by oral or documentary evidence....”

13. I hold that the Appellant had insurable interest in the motor vehicle. The exposition in the case of **Insurance Company of East Africa v Wellington Omodho HCCC 1650 of 2001** while quoting from the book by E.R. Hardy Iramy - General principles of insurance law captures the term insurable interest as follows:

“In the case of goods, or other property, insurable interest may be based on ownership and this ownership may be either sole or joint; absolute or limited; legal or equitable. Ownership is not, however, necessary; insurable interest may be founded on contract...The fact that the interest of the assured is precarious, and that other persons are entitled at any moment to call on him to hand over the object insured to them, does not, therefore prevent his interest from being sufficient to support a contract of insurance.”

14. Not every alleged non-disclosure or breach will entitle an insurer to avoid the policy (See **Elius Gachii Karanja v Concord Co. Ltd H.C.C. 1426 of 1993** case). The issue of non-disclosure or misrepresentation of the registered owner of the motor vehicle would most likely not have altered the terms of the contract.

15. As stated by Maraga, J (as he then was) in the case of **Sita Steel Rolling Mills Ltd v Jubilee Insurance Co. Limited [2007] eKLR** while quoting **Lord Lloyd** in the case of **Pan Atlantic Insurance Co Ltdv Pine Top Insurance Co. ltd [1994] 3 ALLER 581** Court of Appeal

“Whenever an Insurer seeks to avoid a contract of insurance or reinsurance on the ground of misrepresentation or non-disclosure, there will be two separate closely related questions.

1. Did the misrepresentation or non-disclosure induce the actual Insurer to enter into contract on those terms”

2. Would the prudent Insurer have entered into the contract on the same terms if he had known of the misrepresentation or non-disclosure immediately before the contract was concluded” If both questions are answered in favour of the Insurer, he will be entitled to avoid the contract but not otherwise.”

16. Turning back to the instant case, it is clear from the proposal form that the financiers interest was not disclosed by the Appellant. The investigation report produced by the Respondent reflects that the motor vehicle was purchased through a loan by NIC Bank Ltd for the sum of Ksh.370,000/= plus interest which come to a total of Ksh.476,895. The Appellant was also owing the sum of Ksh.100,000/= balance to the seller as per the sale agreement. The specific date when the Ksh.100,000/= balance was paid and the loan with the bank cleared does not come out from the evidence of the Appellant or the seller, DW2 Bernard Muya. The seller’s evidence is that he got the log book on 30th July, 2007. The log book reflects 8th July, 2008as the date of Registration.

17. A review of the evidence confirms that on the date the policy was taken out, the issue of the Bank loan and the balance of the purchase price were not disclosed to the Respondent. This was a material non-disclosure that could have affected the nature of the risk and could have affected the terms of the contract.

18. One of the issues raised by the Appellant was in respect of the holding by the trial magistrate that the motor vehicle was borrowed from the seller and not from the Appellant, thereby raising questions of who had the control of the same. The Appellant in his evidence stated that Bernard the seller “came to hire my motor vehicle to go to a funeral”. The seller (DW2) testified that he had sold the motor vehicle and parted with possession by the time he was asked for it by one Rose Njeri, one of the passengers who were in the motor vehicle at the time of the accident. DW3 Gilbert Mutie Mutuku gave evidence that he borrowed the motor vehicle from Masisi (Appellant). The evidence of Gilbert(DW3) is that he was travelling with his family. The contradictions that come out of the evidence of the defence witnesses is whether the motor vehicle was borrowed or hired and who went to request for the motor vehicle.

19. The judgment of the trial court was attacked on the basis of having relied on the statements recorded by the investigator which reflected contradictions in the evidence of the Appellant’s witnesses as to whether the motor vehicle was obtained from the Appellant or from the seller at the time of the accident. The investigation report was produced in court as an exhibit by the Respondent’s witness, PW1 Patrick Kemboi. The proceedings bear no record of any objections to the production of the said report by the Appellant. The report contains the statements of the various witnesses which lead to the conclusion by the investigator that the motor vehicle was in the possession of the previous owner, Bernard Muya (DW2) by the time it ended up with the users who were involved in the accident. If the Appellant’s side wanted to cross-examine the investigator, then they ought to have objected to the production of the report through the evidence of another witness. The contents of the report were thus unchallenged in cross-examination.

20. With the foregoing, I find no merits in the Appeal and dismiss the same with costs.

Dated, signed and delivered at Nairobi this 31st day of Jan., 2018

B. THURANIRA JADEN

JUDGE