



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAROK

CIVIL APPEAL NO. 6 OF 2015

BENSON MWANGI MACHARIA.....APPELANT

- VERSUS -

CO-OPERATIVE INSURANCE CO. LTD.....RESPONDENT

**[BEING AN APPEAL FROM THE JUDGEMENT AND DECREE OF
THE RESIDENT MAGISTRATE (HON. ZAINAB ABDUL RAHAMAN)
DELIVERED ON 25/3/2015 IN NAROK CMCC NO.155 OF 2015]**

JUDGEMENT

1. The appellant has appealed the magisterial judgement and decree, which dismissed his claim of Shs.610,000 with costs and interest in respect of an insurance cover for a bad harvest of his barley. The appellant has filed written submissions in support of the appeal.
2. The respondent has opposed the appeal. He has filed written submissions in opposition to the appeal.
3. The appellant has raised seven grounds in his memorandum of appeal to this court.
4. The judgement and decree is based on the evidence of the appellant (PW1) and Grace Njoki Ndurumo (PW2) who testified on behalf of the appellant.
5. The respondent called one witness namely Michael Waigwa (DW1) in support of its case. Counsel for the respondent filed written submissions in opposition to the appeal.
6. In ground one, the appellant has faulted the trial court both in law and fact in holding that the appellant had failed to prove his case. In this regard, the evidence of the appellant was that he took an agricultural insurance cover for bad harvests in respect of his barley crop. The appellant was then issued with an insurance cover by the respondent.
7. The insurance cover was arranged as follows. The appellant used to take loans from Kenya-Breweries Ltd – East Africa Malting Ltd. The agreement with them was for the appellant to take seeds and chemicals on credit. The money would be repaid by Co-operative Bank. He was to be compensated if he did not get seven sacks per an acre.
8. Furthermore, the respondent had insured the crops against bad yields. The appellant had planted 61 acres. The appellant put in evidence the insurance cover as exb.1.
9. The appellant continued to testify that in 2011 there was drought. He then informed Waigwa (DW.1), an employee of the respondent before harvesting the barley.
10. Waigwa (DW.1) in the company of the appellant, George Kosen and Grace Ndurumo (PW2) inspected the barley and took photographs. He harvested three (3) sacks per an acre which harvest he took to East Africa Malting Ltd, who issued him with a farm input statement dated 15/8/2011 – exh.2. He was unable to repay the loan to East Africa Malting Ltd.
11. While under cross examination, the appellant (PW.1) testified that according to Exb.1 the payment of the claims was to be done by Co-

operative Bank. He also added that he did not produce a letter to show a debt at Co-operative Bank arising from this insurance cover (or policy). The appellant testified that he had not involved the Co-operative Bank in the instant case.

12. It was also his evidence that it was the Co-operative Bank that was to pay East Africa Malting Ltd. He also testified that Waigwa inspected the farm.

13. Furthermore, it was also his evidence that he owes East African Malting Ltd a sum of Sh.571,796/=. It was the respondent who was to pay Co-operative Bank. In re-examination the appellant testified that it was the insurance that was required to pay the Co-operative Bank, which he owes money. It was also his evidence that the insurance was aware of the crop failure.

14. The appellant called Grace Njoki Ndurumo (PW.2) as his witness. She testified that in 2011 there was a crop failure due to inadequate rainfall. She supported the evidence of the appellant. It was her evidence that her debt at the bank was paid by the respondent.

15. The respondent gave evidence through DW.1. He testified that he was in charge of crop insurance in the employment of the respondent. He testified that they had insured Co-operative Bank and East Africa Malting as for the barley that was being grown by farmers. He testified that the appellant was covered by the insurance.

16. DW.1 continued to testify that he inspected the appellant's farm on 16/4/2011. His findings were that the crop was good and that there was no stress. He carried out another inspection on 11/8/2011 and he estimated the yields at 7 bags an acre. More importantly he testified that: "... the effect of 7 bags for Benson would mean that he had exceeded the 6½ bags insured hence there would be no claim."

It was also his evidence (DW.1) that the appellant did not suffer any loss as per D.exb.1. He did not communicate his loss to the respondent. After they had paid, the respondent was served with a demand letter – P.exb.3 from the advocate for the appellant. This letter – P.Exb.3 was contrary to the policy of insurance [the cover].

17. It was the evidence of DW.1 that:

“The defendant expected to receive notification of harvest showing that he does not expect to get the insured yields so that we go back to the farm and undertake an inspection. P.Exb.1- states that the insured should notify CIC in case he does not get expected yields. The notification must be written. It must be issued before harvest.”

DW.1 continued to testify that:

“..... The policy was issued to Co-operative Bank and a copy to East Africa Malting. The insured under the policy was Co-operative Bank. The claims were payable to Co-operative Bank. I wish to produce the policy document as D.Exb.3. The precondition for settlement of claims is covered under page 1.”

18. He continued to testify that CIC had not received any claim for compensation from the appellant. He also testified that CIC had not received any claim from East Africa Malting on account of the appellant. He also testified that all payments were supposed to be paid by Co-operative Bank Ltd.

In re-examination DW.1 testified that a farmer such as the appellant was required to give notice to the insurance company to enable them to go and conduct an inspection of the crop. There was no such communication from the appellant.

19. The trial court dismissed the appellant's claim for breach of contract of insurance based on the foregoing evidence. This is a first appeal court. As a first appeal court according to *Peters V. Sunday Post Ltd (1958) E.A. 424*, I am required to re-assess the evidence tendered at trial and make an own independent findings. I have done so. I have also considered the rival submissions of both counsels.

As a result I have come to the conclusion that the appellant failed to prove his case on a balance of probabilities.

The upshot of the foregoing is that ground one lacks merit and is hereby dismissed. This finding in respect of ground one covers grounds 2,4,5,6 and 7 which I hereby similarly dismiss for lacking in merit.

In ground 3, the appellant has faulted the trial court both in law and fact in disbelieving the appellant's uncontroverted and corroborated evidence that the appellant's witnesses were compensated for their losses without following the procedure of communication.

In this regard, I find that the appellant did not comply with his insurance obligations. Hence the court finding that the appellant was in breach of his insurance obligations as testified to by Waigwa (DW.1). The trial court rightly believed Waigwa (DW.1) and rightly disbelieved the appellant and his witnesses.

The upshot of the foregoing is that the appellant's appeal fails. It is hereby dismissed with costs to respondent.

Judgement delivered in open court this 31st day of May, 2018 in the presence of Mr. Kombe holding brief for Mr. Ntabo for appellant.

J. M. BWONWONGA

JUDGE

31/5/2018