



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CORAM: D.S. MAJANJA J.

CIVIL APPEAL NO. 59 OF 2016

BETWEEN

UAP INSURANCE COMPANY LIMITED.....APPELLANT

AND

LEMMY MUTUA KAVIL.....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. A. G. Munene, SRM

dated 19th October 2016 at the Chief Magistrates Court

at Maua in Civil Case No. 87 of 2012)

JUDGMENT

1. The respondent filed suit against the appellant (“the Company”) for damages following the loss of his motor vehicle registration number T382 BJD Subaru Forester (“the motor vehicle”) in an accident that took place on 23rd January 2011. In his amended plaint, the respondent stated that the Company had issued an insurance policy number 100/070/1/007353/2010 on 23rd June 2010 for the period 23rd June 2010 to 22nd June 2011. He stated that since the accident took place during the pendency of the policy cover, he was entitled to indemnity by the Company for material damage and loss to the vehicle following the accident. The respondent claimed Kshs. 500,000/- being the sum assured together with Kshs. 26,000/- being costs of the breakdown.

2. The Company opposed the claim on the grounds that it had issued the cover to the respondent subject to him obtaining the vehicle in accordance with the law pertaining to registration of motor vehicles in Kenya. It also made a counter claim against the respondent for a declaration that it was not liable to indemnify him for any loss as the respondent had breached the principle of utmost good faith on the ground that the respondent had failed to disclose that the motor vehicle could not be registered in Kenya on account of the age of the vehicle and that he misrepresented that he was in the process of paying duty for the motor vehicle.

3. Before I deal with the issues raised in the appeal, I must point out that I am guided by the principle that as this is a first appeal, it is my duty to reconsider the evidence, evaluate it and reach my conclusion bearing in mind that it is the trial court that saw and heard the witnesses testify and was able to assess their demeanour (see *Selle v Associated Motor Boat Co. [1968] EA 123*).

4. Two witnesses testified at the trial, the respondent (PW 1) and Edward Mwenda (DW 1), the Company’s Meru Branch manager. It was common ground that the insurance cover for the motor vehicle was valid at the time of the accident which was also not disputed. It was also not disputed that Company, by its letter addressed to the respondent dated 29th April 2011, declined to settle the claim. The letter, in part, stated as follows:

It is apparent from the report that your vehicle was registered in Tanzania and could not have been registered in Kenya on reasons of age. At proposal, you noted that you were in the process of paying duty for the vehicle (question 2d of proposal under cover). This prompted us to issue you with an annual cover against our practice. This is in contravention of the principle of utmost good faith.

Your declaration on the proposal form signed off on 23rd June 2010 attests that the information contained therein is true and correct to the best of your knowledge. Distortion of the same amounts to breach of this condition.

In view of the above, we regret to advise that we are unable to deal with the claim to conclusion.

5. PW 1 testified that he had partially filled the proposal form and the remaining parts were filled by the manager, Mr Muthamia. In clause 2(d) of the form which asked whether the customs duty had been paid in full, the manager wrote “*in process.*” PW 1 further testified that on 23rd June 2010, Regent Automobile Valuers and Assessors Ltd valued the motor vehicle at Kshs. 800,000/=. PW 1 testified that he had paid duty in Tanzania and could not pay duty in Kenya. He contended that the Company was aware he could not import a motor vehicle into Kenya which is over 7 years old as it was 10 years old when he applied for cover. He further testified that he had a permit which allowed his vehicle to be in the country for 3 months.

6. DW 1 testified that a proposal form is the basis of the contract between the Company and the insured and that the Company decided give cover based on the information provided in the proposal form. He confirmed that PW 1 had not paid duty yet he had indicated that he was in the process of paying the same. When the respondent raised the claim his vehicle had not been transferred to Kenyan registration and that was information material which was not disclosed that the vehicle could not be registered under Kenyan law.

7. Based on the evidence and the pleadings, the trial court identified two issues for determination; whether there had been material non-disclosure by the respondent and whether the respondent ought to have known and disclosed that the vehicle was not registerable in Kenya. The trial magistrate took note of the proposal form and valuation report adduced as evidence and found that the date of manufacture had been disclosed to the Company before the cover was issued. The trial magistrate further held that the Company being more knowledgeable on the relevant statutes and directives affecting its core business, ought to have decided whether to proceed with the transaction. The trial court held in favour of the respondent and granted him the prayers in the amended plaint.

8. Although the appellant raised several issues in the memorandum of appeal dated 14th November 2016, two issues call for resolution. First, whether the trial court erred in failing to find that the Company was entitled to repudiate the policy on the grounds of non-disclosure of material facts. Second, whether the respondent was entitled to the award of Kshs. 500,000/=.

9. In support of the appeal counsel for the appellant, Mr Kariuki, submitted that the appellant was entitled to avoid the policy on the ground that that the respondent had indicated that the registration of the vehicle was in the process, yet the vehicle could not be registered in Kenya on account of age. He further submitted that the trial magistrate erred in shifting the burden of proof to the Company and that the duty to state the facts and make disclosure was on the respondent as the insured. He further submitted that the award of Kshs. 500,000/= was erroneous as this was the sum insured and not actual loss suffered. He contended that the proper award ought to have been assessment of the vehicle less salvage value.

10. Mr Nyagaka, counsel for the respondent, submitted that the respondent did not breach the policy. He pointed to the fact that the proposal form was provided and filled by the Company’s agent where the details of the vehicle filled revealed that it was a foreign registered vehicle. He submitted that the issue whether the vehicle was registerable in Kenya is moot as at the time of taking out the car policy, the Company was aware of the age of the vehicle and the fact that the vehicle could not be registered in Kenya. He further submitted that the policy was taken on 23rd June 2010 and the document left with the Company which did not take steps to repudiate the cover immediately or soon after and only did so merely because the accident had taken place.

11. It is a conventional principle that full disclosure should be made to the insurer of all material facts and circumstances known to the proposer or insured before an insurance cover is issued. An insurer relies on the good faith of the insured to disclose all information that is likely to affect its decision on whether to incur the risk. The principle was emphasized by the Court of Appeal in the ***Co-operative Insurance Company Ltd v David Wachira Wambugu NYR CA Civil Appeal No. 66 of 2008 [2010] eKLR*** where the court quoted **Bullen and Leake, *Precedents of Pleading*, 14th Edition, Vol. 2**, which states as follows;

Contracts of insurance are contracts of the utmost good faith. This gives rise to a legal obligation upon the insured, prior to the contract being made, to disclose to the insurer all material facts and circumstances known to the insured which affect the risk being run. Lord Mansfield’s words in ***Carter vs Boehm (1766) Burr. 1905*** have stood the test of time:

“Insurance is a contract of speculation. The special facts upon which the contingent chance is to be computed lie most commonly in the knowledge of the assured only; the underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge to mislead the underwriter into a belief that the circumstance does not exist and to induce him to estimate the risk as if it did not exist. The keeping back such circumstance is a fraud, and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention, yet still the underwriter is deceived and the policy is void; because the risk run is really different from the risk understood and intended to be run at the time of the agreement...”

12. The duty to disclose by the insured relates to material facts. A representation is said to be material if it would influence the judgment of a prudent insurer in fixing the premium or determining whether he will take the risk (see ***Sita Steel Rolling Mills Ltd v Jubilee Insurance Co. Limited MSA HCCC No. 86 of 2000 [2007] eKLR***). The burden of proving whether the disputed fact was material in deciding whether or not to issue a policy falls on the insurer. The court in ***Sita Steel Rolling Mills Ltd v Jubilee Insurance Co. Limited (Supra)*** citing **Hardy Ivamy, *Principles of Insurance Law***, held that it was held that where non-disclosure is alleged, the onus is on the insurer to prove that the fact not disclosed was material, that it was within the knowledge of the insured and that it was not communicated to them.

13. In addition, a fact is material for the purposes of both non-disclosure and misrepresentation if it is one that would influence the judgment of a reasonable or prudent insurer in deciding whether or not to accept the risk or what premiums to charge. As was held in ***Pan Atlantic Insurance Co. v Pine Top Insurance Co. Ltd [1994] 3 ALL ER 581, 606***:

Every fact and circumstance, which can possibly influence the mind of a prudent intelligent insurer, in determining whether he will underwrite the policy at all, or at what premium he will underwrite it, is material.

14. The question that I must ask is whether by stating that payment of duty was “*in process*” amounted to material non-disclosure or misrepresentation. From the evidence before the trial court, the respondent disclosed that the motor vehicle was manufactured in the year 2000 when he filled the proposal form in June 2010. The year of manufacture was similarly indicated in the Valuation Report provided when the insurance cover was taken. By the time the proposal form was filled it was 10 years old and the fact that it was registered in Tanzania was obvious as it had been disclosed by giving registration numbers. All the facts disclosed showed that the vehicle was 10 years old and as a matter of law such a vehicle could not be registered in Kenya whether or not duty was paid (*Kenya Bureau of Standards KS1515:2000*). Whether or not duty was paid, the vehicle would not be registered in Kenya.

15. I therefore hold that the answer to the fact that payment of duty was in process was not a material fact in view of all the facts that were disclosed in the proposal form that showed that the vehicle was registered in Tanzania and could not be registered in Kenya. Despite these facts, the Company went ahead and insure the vehicle.

16. I now turn to the issue of damages. The trial magistrate awarded Kshs. 500,000/- being the insured value of the vehicle. The appellant complained that this amount was unsubstantiated while the respondent contended that the value of the vehicle was proved by the valuation report prepared by Regent Automobile Valuers and Assessors. In coming to this decision, the trial court took note of an assessment report by Integrated Motor Assessors based on the pre-accident value. This report was not produced before the trial court.

17. In approaching the issue of compensation, the trial magistrate ought to have taken into account that an insurance contract is a contract of indemnity which means that the insured is compensated for actual loss. The sum assured provides the ceiling for compensation (see *Madison Insurance Limited v Solomon Kinara t/a Kisii Physiotherapy Clinic KSM CA Civil Appeal No. 263 of 2033 [2004]eKLR*). In this case, the value of the vehicle before taking the insurance was Kshs. 800,000/- as evidence by the report dated 9th July 2010 prepared by Regent Automobile Valuers and Assessor. The vehicle was therefore under insured. Although the trial magistrate referred to a report dated 2nd February 2011 by Integrated Motor Assessors which showed that the cost of repair was Kshs. 780,680/- which was thus uneconomical, the report was not produced in evidence and the court erred in referring or relying on it.

18. The only error the trial magistrate committed is to order the appellant to deliver up the salvage. Since the effect of the judgment is to indemnify the respondent, then it is the appellant to pay storage charges at the garage where it took the vehicle and dispose of the salvage as it deems fit. Since the it is obvious that the vehicle was under insured, I allow the appeal only to the extent that the appellant shall pay the respondent Kshs. 500,000/- less the any excess applicable.

19. For the reasons I have set out I now dismiss the appeal with costs to the respondent which I assess at **Ksh. 40,000/-**.

SIGNED AT NAIROBI

D.S. MAJANJA

JUDGE

DATED and DELIVERED at MERU this 29th day of November 2018.

A. MABEYA

JUDGE

Mr Kariuki instructed by Mithega & Kariuki Advocates for the appellant.

Mr Nyagaka instructed by Nyamokeri Ombachi and Company Advocates for the respondent.