



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 175 OF 2001

GEORGE ONYANGO LIEWA.....PLAINTIFF/APPLICANT

VERSUS

MADISON INSURANCE CO. KENYA LTD.....DEFENDANT/RESPONDENT

JUDGMENT OF THE COURT

Pleadings

1. The proceedings herein commenced via a plaint dated and filed herein on 9th February, 2001. The Plaintiff's case is that by a policy of Insurance P/N 08/080/10545/98 the Defendant insured motor vehicle registration number KAK 895H for private use in consideration of a premium of Kshs. 72,000/=. Pursuant thereto, and upon payment of the said premium a comprehensive cover for Kshs. 750,000/= was effected by the Defendant to cover the said motor vehicle registration number KAK 895H. It was therefore one of the terms of the said policy that the Defendant would indemnify the Plaintiff (Insured) against loss or damage to the said motor vehicle Registration number KAK 895H. The said motor vehicle was allegedly stolen on 18th September, 1998 at Masandukuini in Nairobi and the Plaintiff duly reported the theft to the Defendant. The Plaintiff thereafter demanded to be indemnified by the Defendant on a total loss basis, a demand which the Defendant refused or failed to acknowledge. The Plaintiff contends that continued refusal by the Defendant to settle his claim is wrongful and unlawful. As a consequence of this the Plaintiff alleges that he continues to suffer Kshs. 6,000/= per day on account of loss of use of the said motor vehicle. In the premises the Plaintiff brings this suit for an order declaring that the Defendant is under statutory duty to pay him the sum of Kshs. 750,000/= being the alleged sum assured together with costs and interest. The Plaintiff prays for Judgment against the Defendant for

(a) Kshs. 750,000/=;

(b) Loss of user at a rate of Kshs. 6,000/= per day with effect from 1st October, 1998;

(c) Costs of and incidental to the suit;

(d) Interest on the sum assured. Damages and cost until payment in full.

2. The Plaintiff's suit is controverted by the Defendant via a defence dated 9th March, 2001 and filed herein on 14th March, 2001. The Defendant denies the Plaintiff's claim and avers that at the material time the alleged policy was taken out the Plaintiff wrongfully concealed from the Defendant a material fact namely that the motor vehicle allegedly insured at that material time had been stolen. The Defendant's case is that the Plaintiff falsely represented to the Defendant and/or its agent that he still had the motor vehicle and that the same was capable of being insured whereas the Plaintiff knew the same had been stolen on the night of 8th/9th February, 1998. The Defendant states that the said policy was subject to utmost good faith and that it shall be void if the Plaintiff made fraudulent declaration to the Defendant. The Defendant further denies that the Plaintiff suffered any loss as alleged or at all.

The hearing

3. The hearing of the suit commenced on 7th April, 2003 and was concluded on 10th November, 2016. The Plaintiff was the sole witness for himself. He testified as PW1. He testified on 7th April, 2003 that he was a computer consultant. In 1997 he was importing motor vehicles from Dubai and selling them in Kenya. The suit motor vehicle arrived in Kenya in January, 1988. The

Plaintiff took periodical temporary insurance covers with various brokers fronting for particular insurance companies. On 31st March, 1998 as per Plaintiff exhibit No. 4 the Plaintiff insured the suit motor vehicle with the Defendant. This temporary cover was extended from 13th May, 1998 to 16th March, 1999. The Plaintiff produced exhibit No. 5 to prove this.

4. PW 1 testified that he took a policy of Insurance of motor vehicle registration number KAK 898H for private use in consideration of a premium of Kshs 72,000/- which he paid a Comprehensive cover for Kshs 750,000/- was effected by the defendant to cover the said motor vehicle registration Number KAK 895H.

5. PW1 testified that it was trite term of the said contract of insurance that the defendant would indemnify the Plaintiff against loss and damage to the said motor vehicle. He testified that the said motor vehicle was stolen on 18th September, 1998 at Masandukuni Nairobi and the Plaintiff duly reported the same to the defendant. The defendant has however refused and/or neglected to make good the Plaintiffs Claim as a result of which he has continued to suffer loss and damages for which he solely holds the defendant liable. The Plaintiff testified that the defendant is under statutory duty to indemnify him for the loss so far suffered. The defendant is in breach of the contract of Insurance.

6. The Plaintiffs claim therefore is for Kshs 750,000/- being the value of the Motor vehicle and loss of user at the cost of Kshs 6,000/- per day with effect from 1st October, 1998 until payment is made in full.

7. The defendant filed defense on 14th March, 2001 and stated that the Plaintiff concealed from or failed to disclose to the defendant which was then known to the Plaintiff but unknown to the defendants which was material for them to know namely that the motor vehicle allegedly insured at that material time had been stolen. The particulars of fraud are stated in paragraph 3 of the defense. However, the Defendant did not call any witnesses. The Defendant has not led any evidence to controvert the Plaintiff's case. However, in its statement of defence, the Defendant states that by policy of insurance P/N 08/080/10545/98 the Defendant comprehensively insured the motor vehicle registration number KAK 895H for private use in consideration of a premium of Kshs. 72,000/= for a sum of Kshs. 750,000. The Defendant's case however, is that on the night of 8th/9th February, 1998 at Komarock Estate Nairobi the motor vehicle was reportedly stolen, while still bearing the foreign registration number UAE 3156 and was on the material night parked at a neighbor's house for the night. The house was owned by **Johnstone Keffar Tasso** who in his statement to the police stated that he allowed the Insured to use his parking as there was not enough space at the Insured's house. At the time of the loss, the Plaintiff then resided at House No.275. The Defendant's case is that on the material day, one **Tom Nyanaro**, the insured's driver parked the vehicle for the night at House No. 306 and went to his house with the car keys. At the time of the parking, the house owners were present. The following morning, the vehicle was missing from the parking lot. The Defendant's case is that the loss was reported at Buru Buru Police station on 9th February, 1998 at 7:05 a.m. by Tom Nyanaro, but no progress was made on the recovery. The Defendant states that the proposal form was signed on 17th March, 1998 which is more than a month from the date of the loss. In his statement the Plaintiff alleges that his motor vehicle was stolen on 18th September, 1998. Soon thereafter the Plaintiff approached the Defendants and requested them to indemnify him on his total loss. In his signed statement, the Plaintiff stated that the loss was at Kenyatta Market along Mbagathi Way and that the matter was then reported at the Kenyatta Hospital Police Post. The Defendant's case is that investigations were carried out, and it was found that there was no police file opened for that particular case. The officer in-charge at the time became hostile when the investigators demanded to know why there was no action taken after the report. The Defendant's case is that the Plaintiff's story is contradicting the investigation report and that the dates do not add up.

8. In support of its defence the Defendant on several occasions successfully applied for court summons to issue to police officer of Buru Buru Police Station, but these officers did not attend. However, the Defendant never sought any sanctioning orders from the court against the said police officer.

Submissions

9. Parties filed submissions which I have carefully considered. It is worth the emphasis that apart from the defence on record the Defendant did not call any evidence to controvert the Plaintiff's claim. There were no witnesses to testify on the contents of the defence. The Defendant has used submissions to try to dismiss the Plaintiff's claim. The documents, which include the said Investigating Report by **M/S Clarity Loss Assessors** dated 29th November, 1999, and statement of **Johnstone Keffar Tasso** dated 22nd November, 1999 are merely attached to the Defendant's submission. The authors of the said report and statement have not been called to testify in this court. Neither has the Plaintiff been given a chance to cross-examine the authors of those documents on the contents thereof. Further, there was no single witness from the Defendant Company called to contradict the statements of facts arising both from the Plaintiff and the testimony of the Plaintiff. In these circumstances the Plaintiff's testimony stands unchallenged. A court of law cannot allow uncontested testimony of a witness to be challenged by statements of fact which have not been presented as evidence by their author, and which have not been examined in cross-examination and which documents are merely attached to the submissions. It is to be noted carefully that in its defence the Defendant listed particulars of fraud against the Plaintiff. The same was not proved as the Defendant never called any witness to testify. On the other hand, it does not escape the attention of this court that when the Plaintiff gave evidence on 7th April, 2003, his testimony was cross-examined by the defence. It is therefore clear to this court that as things stand, the Plaintiff testimony remains uncontroverted. Therefore, the issues I raise for determination are as follows:

(i) Whether the Defendant vide policy insurance P/N 08/080/10545/98 insured motor vehicle registration No. KAK 895H for Kshs. 750,000/=

(ii) Whether the said motor vehicle KAK 895H was stolen during the tenancy of the said insurance policy.

10. On the first issue, there is no controversy. All parties agree that the Defendant insured the said motor vehicle comprehensively for Kshs. 750,000/=. Further, the documents presented to court by the Plaintiff prove the said insurance.

Those documents have not been challenged by the Defendant. The only point of departure by the Defendant is that the said motor vehicle was actually stolen before the said cover was effected, and that the insurance was secured vide non-disclosure of material facts, and that at the time of alleged insurance policy the subject matter of insurance was not there. The truth of the matter is that where there is proof of non-disclosure of material particular of a subject matter of insurance, a court of law will not allow an insurance policy to take effect. This is also the law where there is proof that at the time the policy was being effected the subject matter of insurance was not there. To this end the Defendant's counsel has submitted good law supported with judicial authorities.

11. However, before we establish the position of the law, the facts must be proved; that is, it has to be proved the non-disclosure of material particulars; it has to be proved that on the date of cover, the subject matter was not available; it has to be proved the bad faith of the insured, and where fraud it alleged, the same must be proved. It is these proofs that have eluded the Defendant not because it was difficult to prove the same, but due to wanton negligence for failure to prosecute its defence and to avail the witnesses to prove those allegations. In fact, the Plaintiff's case is totally unchallenged, and his testimony that the subject matter of insurance was available on the date the cover was taken is accepted by the court as the truth. The Plaintiff has in effect proved his case on a balance of probability and due to failure by the Defendant to provide evidence to sustain their defence. This court is entitled to infer that the Defendant has no evidence to controvert the facts as put forward by the Plaintiff. The Plaintiff claims Kshs. 6,000/= per day as loss of use. The Plaintiff did not provide proof that indeed it was earning Kshs. 6,000/= per day. However, this court has already found out that the Plaintiff lost the said motor vehicle. The vehicle was not to be idle. It was made in the structure of a matatu but was not yet being used as a matatu, but was being used for transporting beer in the Plaintiff's bar business. So, it is true that the Plaintiff lost income. However, the period for that loss cannot be perpetual. 90 days is enough time for an insurance company to do investigations and where necessary, compensate an insured. It is the finding of this court that the Plaintiff should be compensated for loss for 90 days. As for the amount of loss, this court assesses the same at a reasonable sum of Kshs. 3,000/= per day. That is the reasonable income of a matatu per day in those days.

Determination

12. Arising from the foregoing paragraphs of this Judgment, this court makes Judgment in favour of the Plaintiff against the Defendant as follows:-

- (a) Kshs. 750,000/=
- (b) Loss of user at the rate of Kshs. 3,000/= per day for 90 days.
- (c) Interests on (a) above at court rates from 1st October, 1998 till payment in full.
- (d) Interest on (b) above at court rates from January, 1999 till payment in full.
- (e) Costs of this suit and interests thereon at court rate.

E. K. O. OGOLA

JUDGE

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 12TH DAY OF APRIL, 2017.

LADY JUSTICE G. NZIOKA

JUDGE

In the presence of: