



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 41 OF 2016

UAP INSURANCE CO. LTD.....APPELLANT

VERSUS

CHARLES WANJOHI WATHUKU.....RESPONDENT

(Being an appeal from the judgment in Nyeri Chief Magistrates Court Civil Case No. 234 of 2015 (Hon. Onyiego, Chief Magistrate) delivered on 29th June, 2016)

JUDGMENT

On 16th July, 2015, the respondent instituted in the magistrates' court a claim against the appellant for a sum of Kshs 2,120,000.00. The basis of this claim was an insurance policy which the respondent took from the appellant to cover him against personal accidents; the insured sum was up to Kshs 10,000,000.00.

According to the respondent, on 10th February, 2014, he was attacked and injured by his dog as a result of which he suffered injuries; these injuries, so he averred, were covered under the insurance policy as one of the insured events. He notified the appellant, as he was required to, of this misfortune and as soon as he did so, the appellant investigated and certified the extent of the injuries the respondent had suffered. Consequently, it assessed the respondent's permanent disability at 14% and agreed to pay him the total sum of Kshs 2,120,000.00 in indemnity.

However, for some unspecified reason, the appellant reneged on its commitment and neglected or refused to indemnify the respondent. It is for this reason that the respondent instituted the suit for the aforesaid sum together with interest at court rates and costs for the suit.

The appellant denied the claim and filed a statement of defence in that regard. It denied having insured the respondent as alleged by the respondent or at all. In particular, it denied the existence of a personal accident insurance cover for the respondent or that the respondent made payment for such cover. It also denied that the respondent raised any claim on any insurance cover. Neither did it admit having conducted any assessment of any accident involving the respondent, and more so, it denied having admitted to pay the respondent the sum of Kshs 2,120,000.

The respondent also averred that if there was any insurance cover, it could not honour it because of the respondent's breach of his duty of utmost good faith; in this regard the appellant alleged that the respondent failed to disclose other injuries sustained prior to those for which he was covered; that he intentionally and negligently misled the examining doctors on the extent of the injuries he sustained; that he exaggerated the nature and extent of the injuries he sustained; that he negligently failed to attend the appellant's physician when he was called upon to do so; and finally, he failed to disclose to the appellant

or its agents the fact that he had received other compensation arising out of the injuries he sustained earlier.

At the conclusion of the case, the learned magistrate found for the respondent and awarded him the sum prayed for in the plaint. It is this decision that the appellant was aggrieved by and therefore filed the present appeal against it. According to the memorandum of appeal filed in court on 28th July, 2016, the appellant raised the following grounds:

1. The learned magistrate erred both in law and in fact when he held that the plaintiff had proved his case against the defendant.
2. The learned magistrate erred both in law and in fact when he held that the defendant was 100% liable to settle the plaintiff's claim without any basis.
3. The learned magistrate erred both in law and in fact when he failed to appreciate the fact that there was an arbitration clause in the policy which automatically ousted the court's jurisdiction in the first instance.
4. The learned magistrate erred both in law and in fact when he failed to appreciate the fact that the suit as drawn disclosed no cause of action as against the defendant hence no judgment (against it) could be sustained.
5. The learned magistrate erred in law and in fact in failing to consider or adopt and appreciate the written submissions of the defendant together with the cited authorities.
6. The learned trial magistrate erred both in law and in fact for considering irrelevant matters in arriving at the decision in favour of the respondent against the appellant.

The record shows that only the respondent testified; the appellant chose not to testify or call any evidence in support of its case. Amongst the documents the respondent relied on and which were admitted in evidence was an insurance policy document showing that he was covered by the appellant for the period between 17th December, 2013 and 16th December, 2014 for accidental bodily injuries resulting to temporary or permanent disability and death. He also produced medical evidence showing that he was admitted in hospital on 10th February, 2014 for treatment of multiple injuries arising from mauling by a dog. There was also a claim form addressed to the appellant by the respondent, which among other things, showed the extent of the injuries the respondent sustained.

The other evidence produced by the respondent was a letter by the appellant asking the respondent to visit the appellant's doctor for medical examination. The letter stated in part:

Please arrange with the prior appointment to visit Dr R.K. Kabugi for medical examination. We would like to have a second opinion on how well his injuries have healed to enable us consider permanent disability. Kindly carry your ID card and previous medical reports.

In the meantime, confirm if you were ever issued with the sick off slips (total rest from your duties) from the attending doctor to enable us process temporary disability aspect.

By a copy of this letter Dr Kabugi was instructed to examine the respondent and assess the degree of his permanent incapacity which he suffered as a result of the accident that occurred on 14th May, 2013. The doctor was also asked to assess the likely period of total disability which the respondent suffered to enable the appellant conclude the respondent's case.

The respondent also produced correspondences by the appellant showing that the appellant appointed investigators to establish the circumstances under which he was injured; there was also communication to the respondent by the appellant acknowledging the respondent's claim and requesting the respondent to

be patient as the appellant processed his claim. The culmination of this correspondence acknowledging the appellant's claim was a letter dated 23rd January, 2015 by the appellant addressed to the respondent in which it stated as follows:

Charles Wanjohi Wathuku

PO Box 2531-101000

Nyeri

Dear sirs

OUR REF: 070093/9/004220/2014

INJURY CAUSED BY A DOG ON 10/02/2014

We refer to the above matter.

Please find attached our loss discharge for Kshs. 2,120,000/= for your execution and return.

The amount is arrived at as below

24 Weeks sick off

TTD benefits = 30,000 x 24 weeks = 720,000.00

PTD benefits at 14% = 1,400,000.00

Total payable = 2,120,000.00

Thank you for your continued business support.

Yours faithfully

signed

Sammy Kamau

Assistant Claims Manager

All this evidence was not controverted; as a matter of fact, it was admitted in evidence with the consent of the appellant. The implication of this is that contrary to the appellant's denial, there was a contract of insurance between it and the defendant; that the insured event occurred; and most importantly, the appellant not only investigated and established this event to have occurred but it also assessed the amount of money payable to the respondent in compensation for the damages he suffered.

As noted, the appellant did not call any evidence and therefore the allegations against the respondent that he acted *mala fides* and failed to declare or disclose prior injuries; or that he intentionally misled the doctors as to the true extent of his injuries; or that he exaggerated the nature and extent of the injuries; or that he failed to attend to the appellant's physician when he was required to do so; or that he negligently failed to disclose to the appellant or his agents the fact that he had received the compensation for some other injuries were all not proved.

In the circumstances, I must agree with the learned magistrate that the appellant proved his case on a balance of probabilities and therefore he was entitled to his claim.

Although the appellant also questioned the jurisdiction of the magistrates' court to determine the respondent's claim and submitted that the court was deprived of jurisdiction by virtue of an arbitration clause in the contract between the appellant and the claimant, I doubt this should be an issue at this particular stage. For one, the appellant never questioned the jurisdiction of the court in its defence; to the contrary this is what it said:

“12. The jurisdiction of this honourable court is admitted although it is denied that any cause of action has arisen in favour of the plaintiff.”

This averment is plain that the appellant not only acknowledged and submitted itself to the jurisdiction of the court but it also implies that the appellant waived its rights to have the dispute resolved through arbitration. In any event, having investigated, established and admitted the respondent's claim, there was basically no dispute between the appellant and the respondent for resolution by an arbitrator.

Again, as the learned counsel for the respondent submitted, correctly in my humble view, if the appellant was intent on having the dispute resolved by an arbitrator, assuming there such an arbitrable dispute, then the respondent ought to have applied to have the matter referred to an arbitrator as soon as it entered appearance. This is what was required of it by **section 6** of the **Arbitration Act, Cap.**

That provision states:

6. Stay of legal proceedings

(1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds—

(a) that the arbitration agreement is null and void, inoperative or incapable of being performed; or

(b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.

(2) Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined.

(3) If the court declines to stay legal proceedings, any provision of the arbitration agreement to the effect that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings.

I understand this provision of the law to say that a court shall stay legal proceedings on the basis that issue in dispute is subject to an arbitration agreement if an application for the stay order in that regard is made by a party; I suppose 'the party' here would be a party to the arbitration agreement or a party to the suit.

In the case of **University of Nairobi versus N.K. Brothers (2009) eKLR** which the appellant cited, a claim was lodged against the appellant by the respondent. The respondent entered appearance but immediately filed a motion in which it sought to stay the proceedings in court and asked the court to refer the matter to an arbitrator because the contracts out of which the dispute arose provided for arbitration. The application was dismissed by this court but its decision was set aside by the Court of Appeal which went further to refer the dispute to an arbitrator. The court found as a fact that the arbitration clause referred to disputes as well "differences" as issues to be resolved by arbitration.

In allowing the appellant's appeal, there is no doubt that the Court of Appeal noted that the appellant had invoked **section 6(1)** of the Arbitration Act and sought to have the dispute referred to an arbitrator at the

earliest opportunity possible. On the contrary, the appellant in the present appeal never made such an application; rather than apply for the court to refer the dispute to arbitration immediately it entered appearance, it not only filed a defence but in that same defence, it also expressly embraced the jurisdiction of the court to determine the respondent's claim. It even went further and actively participated in the ensuing court proceedings. In this state of affairs, I reckon it is a bit late in the day for the appellant to question the court's jurisdiction. For this reason, I do not find any merit in the appellant's ground that the court ought to have referred the respondent's claim to an arbitrator or that, by the same token, it lacked jurisdiction to determine the dispute.

All in all, do not find any merit in the appellant's appeal; I hereby dismiss it with costs to the respondent.

Dated, signed and delivered in open court this 18th day of August, 2017

Ngaah Jairus

JUDGE