



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL SUIT NO. 178 OF 2010

BETWEEN

HESBON ONYURO & EUNICE AKINYI

suing as the administrators of

ALICE AKOTH OKONG'O (Deceased)
PLAINTIFF

AND

FIRST ASSURANCE COMPANY LIMITED
DEFENDANT

JUDGMENT

1. Alice Akoth Akongo (“the deceased”) was the registered owner of single story building known as Rozy Lodge situated on land parcel KISUMU MUNICIPALITY BLOCK 7/148. She took out insurance policy no. 08/10/001/548/07 from the defendant for a period of 12 months from 25th August 2008 to 25th August 2009 to indemnify the property against damage caused by fire and other industrial related accidents for Kshs. 14,000,000/-. On 13th October 2008, the property caught fire and was damaged as a result. The deceased lodged her claim for loss and damage with the defendant but it declined to settle the claim. In the amended plaint, the plaintiff claimed the sum assured and loss of rent amounting to Kshs. 94,530/- per month until payment in full.

2. Although the defendant, in its defence, denied that there was insurance policy or that the fire incident took place or that it was liable, at the pre-trial conference, it was agreed that the policy issued was valid and that the fire incident took place. The defendant contended that the deceased failed to disclose material facts in contravention of the policy, that she did not act in good faith and that the claim was fraudulently exaggerated contrary to the policy. The defendant further averred that the loss and damage was caused by an act of arson and as such the claim was fraudulent. Finally, the defendant denied that the deceased suffered loss or damage entitling her to compensation.

3. Following the pre-trial conference, the following issue was agreed for trial, “*Whether the fire was caused by a deliberate or intentional act of the insured and if so, whether the defendant was entitled to avoid liability under the policy.*”

4. The collective effect of **sections 107, 108 and 109** of the **Evidence Act (Chapter 80 of the Laws of Kenya)** is that the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. Since the policy and the fire were not disputed, it fell

upon the defendant to prove the reasons for avoiding or repudiating the policy. This principle was summarized in ***Slattery v Mance* [1962] 1 All ER 525, 526** as follows:

[O]nce it is shown that the loss had been caused by fire, the Plaintiff has made out a prima facie case and the onus is on the Defendant to show on the balance of probabilities that the fire was caused or connived at by the Plaintiff.

5/ In ***Globe Trawlers Pte Ltd v National Employers' Mutual General Insurance Association Ltd & Anor* [1989] 1 MLJ 463** the court allowed the plaintiff's claim against the insurance company. At the end of the trial, the trial judge, who was still in doubt as to how the fire started, held that where there is a doubt, the benefit of that doubt should go to the plaintiff. He observed as follows:

Having reviewed the evidence of both the experts I am still left in grave doubt as to where and how precisely the fire started. But the burden of proving that the fire was caused by the wilful act of the plaintiffs or with their connivance lies with the first defendants. In my judgment, once it is shown that the loss has been caused by fire, the plaintiff has made out a prima facie case and the onus is upon the defendant to show on a balance of probabilities that the fire was caused or connived at by the plaintiff. Accordingly, if at the end of the day the jury come to the conclusion that the loss is equally consistent with arson as it is with an accidental fire, the onus being on the defendant, the plaintiff would win on that issue.

6. With the aforementioned principles in mind, I now turn to consider the evidence. Both sides called witnesses and filed written submissions. Amos Okeyo Odago (PW 1) testified on behalf of the plaintiffs while Raphael Abaya (DW 1), James Ndavi (DW 2) and Kigo Kariuki (DW 3) and Simon Nandi Sunguti (DW 4) testified on behalf of the defendant. After the hearing both sides filed written submissions which I have considered in reaching this judgment.

7. PW 1 established that the deceased had passed away and her estate was under administration. Apart from producing the policy schedule and claim form, he produced a valuation report dated 31st July 2008 which confirmed that the deceased owned the suit property. According to the report the monthly rent was estimated at Kshs. 94,530/-. PW 1 told the court that the deceased had complained to the Insurance Regulatory Authority ("IRA") that the defendant had not settled the claim despite arson charges against the deceased's husband being dropped. He produced a letter from IRA dated 26th August 2009 to the defendant informing it that since the charge of arson against the deceased's husband had been dropped, the defendant should settle the claim.

8. DW 1, an underwriter with the defendant, testified that after the fire took place, the deceased reported the fire incident on the same date and the defendant instructed two investigators to look into the cause of fire; Windscope Assessors Ltd and Safety Surveyors Limited. He confirmed that both reports concluded that the fire was not accidental and on the basis of both reports, the defendant declined to settle the deceased's claim.

9. An investigator with Windscope Assessors Limited, DW 2, recalled that the company received instructions from the defendant to investigate the fire incident that took place at the deceased's premises. He told the court that he established that cause of fire by making inquiries from the neighbourhood. He noted that there was a fire in the roof causing part of the ceiling and timber trusses to burn but that the roof did not collapse. The fire was put off before it could spread. In the report dated 7th November 2008, he concluded that the fire was as a result of arson and not an accidental or a result of an electrical fault. In cross-examination, DW 2 admitted that the Kisumu Fire Brigade was called to put off the fire and in it's the report dated 27th October 2008, noted that the electrical installation was destroyed but that it could not immediately establish the cause of the fire. DW 2 also admitted that the deceased husband was initially suspected on suspicion of arson but was released after the charge was withdrawn.

10. DW 3, a Risk Surveyor with Safety Surveyors Limited, confirmed that the company was instructed to investigate the cause of the fire incident. He told that court that the officer who visited the fire engineer

who visited the scene on 24th January 2009, Mr Mwangi, had died in 2013. By the time Mr Mwangi visited the premises, they had been vandalized and all doors save one had been removed. He produced the report dated 13th March 2009 generated as a result of the investigation from which he gave an account of the evidence found at the premises.

11. According to DW 3, the fire was concentrated on ceiling and was scattered along the rooms irregularly and not moving from room to room. He opined that fire would ordinarily follow a defined pattern by spreading from room to room. In this instance, he noted that these were in fact separate fires in different non-contiguous rooms showing that the fire was not behaving naturally. Because of this, they decided to climb into the ceiling to investigate further whereupon they recovered a bottles containing a liquid. They also collected debris samples from the building which were was sent to the Government Chemist for forensic analysis. The Government Chemist concluded that the substance in the bottle was kerosene. Taking all the evidence into account DW 3 concluded that the cause of fire was not accidental but deliberate.

12. DW 4, a Government Analyst, told the court that he received samples four samples of debris from Safety Surveyors Limited to test whether they contained common accelerants. He conducted an analysis and found that the samples 1, 2 and 3 contained kerosene which is a well-known accelerant while sample 4 did not contain any. He produced his certificate of analysis in evidence.

13. As I alluded to earlier in this judgment, the issue for consideration revolves around the cause of fire and whether it was set deliberately. It is worth noting that none of the witnesses gave direct evidence hence the cause of fire is to be established from inferences drawn from primary facts namely the state of the property after the fire and finding of accelerants. The defendant also relied on expert testimony to buttress its case.

14. Both DW 1 and DW 2 testified that fire was concentrated in ceiling and underside of the roof as evidenced by photographs contained on the report by Safety Surveyors dated 13th March 2009. The photographs show that the deceased's premises comprised a row of single lodging rooms and the damage to the ceiling on the underside. This part of the evidence is not in dispute and I accept the explanation by DW 3 that had the fire been natural, it would have spread naturally and not intermittently and definitely not in a non-contiguous manner from room to room. The defendant's case was buttressed by examination of the samples collected from the scene which evidenced that the fire must have been caused by kerosene which is a common accelerant.

15. Counsel for the plaintiff, challenged the veracity of the evidence in cross-examination. He suggested that the samples could have been denatured by the fact that they were collected four months after the incident. DW 3 told the court that a fire will decompose any product which remains despite the fact that the scene is visited much later. The samples were examined by the Government Chemist who concluded that there was presence of an accelerant.

16. DW 3 testified that he was an expert in the field of Fire engineering and was duly registered by the Ministry of Labour, Department of Occupational Health and Safety. Although his testimony as an expert was largely a matter of opinion, I accept that it was supported by the primary facts and I accept the conclusion reached that fire was not accidental. While cross-examining DW 2, counsel for the plaintiff suggested that the cause of fire was unknown and the fact that the charge of arson against the deceased's husband was withdrawn entitles the court to find that the fire was accidental. In addition, the report prepared by the Municipal Council of Kisumu was prepared on 27th October 2008 stated that, "*The cause [of fire] was not immediately established pending further investigations.*" I find and hold that the report by the Municipal Council of Kisumu is of little assistance as the report was inconclusive and the final investigation was not produced. Likewise, the fact that the deceased husband was not prosecuted does not lessen the available evidence regarding the cause of fire.

17. Taking the evidence as I whole, I find that the defendant has proved on the balance of probabilities that the fire was caused by a deliberate act and was not accidental. Since the policy does not cover a deliberate act, the defendant was entitled to avoid the policy and decline the deceased's claim.

18. Despite the conclusion I have reached, I still have a duty to consider whether the plaintiffs are entitled to the sum of Kshs. 14,000,000/- and rent from the premises as prayed in the amended plaint. Kshs. 14,000,000/- is the sum assured and not a quantification of the loss and damage. It is well established 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. In **Madison Insurance Limited v Solomon Kinara t/a Kisii Physiotherapy Clinic KSM CA Civil Appeal No. 263 of 2033 [2004]eKLR**, the Court of Appeal expressed this position as follows:

In their book “The Law of Insurance”, 2nd Edition, under the heading “The Contract of Insurance” and sub-heading “Indemnity” at page 4, Preston and Colinvaux state as follows:

Indemnity, it has been said, is the controlling principle in insurance law, and by reference to that principle a great many difficulties arising on insurance contracts can be settled. Except in insurance on life and against accident the insurer contracts to indemnify the assured for what he may actually lose by the happening of the events upon which the insurer’s liability is to arise, and in no circumstances, is the assured in theory entitled to make a profit of his loss. That rule might be inferred as being the intention of the parties, having regard to the aim of a contract of insurance, but there are further powerful reasons for its application. Were it not so, the two parties to the contract would not have a common interest in the preservation of the thing insured and the contract would create a desire for the happening of the event insured against. Where in fact the assured has a prospect of profit, there and there only can arise the temptation to crime, fraud or such carelessness as may bring about the destruction of the thing insured.

That is very powerful language, but the passage nevertheless brings out the basic concept underlying a contract of insurance, namely that the party whose property is being insured pays premium not with the intention of making any profit out of the transaction but rather with the intention that were the items assured to be destroyed, stolen or damaged, the other party offering the policy would replace the stolen or destroyed item or pay the reasonable charges for its repair. [Emphasis mine]

19. The plaintiff did not set out the nature and extent of the loss it suffered as a result of the fire. Under the principles of indemnity, the plaintiff could not claim the full sum assured. Its claim could only be limited to such loss as for example, the cost of repair of the premises to put them to the condition they were prior to the fire. Such loss and damage, being in the nature of special damages, ought to have been pleaded, particularized and proved to the required standard (see **Maritim & Another v Anjere [1990-1994] EA 312, 316**).

20. As regards the loss of rent, I agree with the submission by the defendant that Condition No. 5(i)(a) of the Special Conditions in the Policy provides that the insurance cover does not cover, “*Loss of earnings, loss of delay, loss of market or other consequential or indirect loss of damage of any kind or description whatsoever.*” In this instance, the insurance contract expressly excludes consequential loss like loss of rents and these can neither be claimed nor awarded by the court.

21. In answer to the issue framed for trial, I find that the fire was caused by a deliberate or intentional act of the insured and as a result the defendant was entitled to avoid liability under the policy.

22. I have no option but to dismiss the plaintiffs’ claim with costs to the defendant.

DATED and DELIVERED at KISUMU this 4th day of August 2017.

D.S. MAJANJA

JUDGE

Mr Odeny instructed by Bruce Odeny and Company Advocates for the plaintiff.

Mr Maganga instructed by L.G. Menezes and Company Advocates for the defendant.