



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
CIVIL APPEAL NO.62 OF 2015

JUBILEE INSURANCE CO. LTD APPELLANT

VERSUS

STEPHEN NG'ANG'A KAMAU RESPONDENT

JUDGEMENT

1. This is an appeal arising from the judgement of Senior Resident Magistrate, in Bungoma Civil Suit No.80 of 2013 that was delivered on 12th August, 2015.
2. The Appellant herein Jubilee Insurance Company Limited then a defendant (Appellant) was sued by the respondent Stephen Ng'ang'a Kamau then a plaintiff (respondent) for failing to pay an insurance claim raised by the respondent arising from a burglary at the respondent's business premises during the pendency of an insurance cover number P/KSM/250/2012/90928 where the appellant was to indemnify the respondent against any burglary and incidental costs.
3. The respondent's case briefly was that on the 12th of October 2012 during the lifespan of the Insurance cover there was theft at his Go down situated on Plot No.937 South Kanduyi where he lost goods worth Kshs.2,408,100. The respondent reported the matter at Bungoma police station and to the Appellant who has since refused to settle the claim alleging that the respondent was in breach of the policy as he failed to observe conditions and clauses under the "watchman warranty". The respondent / plaintiff sought for a declaration that the Appellant was liable to pay the claim, for costs and interest.
4. In its defence the Appellant denied that the alleged theft took place in the alternative the Appellant admitted receiving a claim but contended that the respondent was in breach of the conditions of the policy specifically the watchman warranty which was a fundamental and express term of the conditions of the said policy and therefore the appellant was entitled to decline the claim, further in the alternative that the respondent had failed to disclose that there were inadequate safety precautions at the premises; the alleged burglary did not take place; the claim was exaggerated; that the policy had been cancelled for non payment; the burglary was an attempt by the respondent to benefit from fraud; the theft was an internal job; there was no CCTV camera; no day guard at the premises; and the respondent did not employ a Professional guard and therefore liability was denied *in toto*.
5. At the hearing each of the parties called one witness.

The respondent gave evidence to the effect that he took out a policy with the appellant against fire and burglary dated 18th October, 2012 having paid the sum of Kshs.24,148 against a debit note dated 16th August, 2012. He insured good whose value was Kshs.10,000,000 and the policy was to run between 16th August 2012 and 15th August 2013.

On 2nd October 2012 he learnt from his wife that his store had been burgled and goods worth Kshs.2,408,100/- stolen. He reported the matter to the police and the Appellant. The appellant appointed a firm of investigators, when an issue of breach of contract arose as it was alleged that he did not comply with the requirements under the 'watchman warranty'.

6. The defence witness **Edrim Okusi** admitted that at the time of the alleged burglary there existed a Burglary Policy between the parties and that a claim had been made. He also confirmed that upon the Appellant receiving the claim, it appointed a loss adjuster to investigate the claim and in its report, the loss adjuster reported that the respondent had breached the watchman warranty condition as he was required to have his premises guarded by a watchman from a recognized firm for 24 hours. The Appellant for the reason of the alleged breach declined to settle the claim.

7. The trial Court entered judgement in favour of the respondent which gave rise to this appeal on grounds that; the Appellant's evidence and submissions were not considered, the trial Court failed to consider that the appellant breached the terms of contract and the plaintiff had failed to prove his case to the required standard.

8. This Court as the first appellate Court has a duty to reconsider the evidence afresh, analyse and evaluate the same in order to arrive at an independent opinion see **Selle Vs Associated Motor Boat Company Limited (1968)E.A. 123.**

9. From the evidence of both sides there did exist a policy covering burglary at the respondent's premises. There is also consensus that a claim was raised and a loss adjuster appointed who investigated the matter and raised the issue of breach of the "watchman warranty".

Clearly therefore the issue for determination is whether there was breach of the watchman warranty or not.

10. From the record no Policy document nor the watchman warranty were produced in evidence to show the conditions that were allegedly breached. The appellant asserted the breach and it was upon it to produce the documents if any in evidence.

In his evidence the Respondent informed the Court that after paying the Premium no document was issued to him until the 19th of October 2012 when The 'Policy' was handed to him. He produced a schedule dated 18th October, 2012 as the "policy" which gave only one condition "watchman warranty" and a part from the Evidence of the defence witness and the report by the loss adjusting no document from the Appellant elaborates on this "watchman warranty".

Ordinarily it is expected that a Policy would have issued giving terms and conditions to the Policy holder which did not happen in this case. How then, was the respondent to know what was expected of him?

In any event the schedule to the Policy (Policy) was given to respondent after the alleged burglary. It is this piece of paper that gave the condition as "watchman warranty" without any definition or explanation of what it entails.

The whole thing of the "watchman warranty" appears to be an afterthought so as not to honour the claim.

11. With the above analysis I would align myself with the trial Court's finding to the extent that the respondent proved his case on a balance of probabilities and enter judgement in his favour for the sum of Kshs.2,000,000 less the 10% excess payment which brings the sum payable to Kshs.1,800,000/- and costs.

The appeal only succeeds to the extent that the excess of 10% ought to have been factored. The rest of the appeal is dismissed with costs.

DATED and DELIVERED at BUNGOMA this 16th day of November 2017

ALI-ARONI

JUDGE