REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL APPEAL NO. 302 OF 2015

UAP INSURANCE COMPANY LIMITED.....APPELLANT

VERSUS

DAQARE TRANSPORTERS LIMITED.....RESPONDENT

(*Appeal from the judgment and decree of Hon. Mrs Onganyo CM in Milimani Chief Magistrates Court at Nairobi Civil Case No. 3711 of 2000 delivered on 27/5/15*)

JUDGEMENT

1. Daqare Transporters Ltd, the Respondent herein, filed an action before the Chief Magistrate's Court Nairobi against UAP Provincial Insurance Co. Ltd, the Appellant claiming general damages and special damages together with costs and interest. The Respondent's claim arose out of an alleged breach of the terms of an insurance policy issued by the Appellant. The Respondent pleaded that policy cover no. 010/062/1/00003/2002 covered goods on transit under the business of transport but the Appellant filed to indemnify the alleged loss of 48,000 litres of fuel which spilled when the Respondent's motor vehicle registration no. KAK 482G-ZB9780 veered off the road while plying Lodwar-Kakuma road thus landing in a ditch. The Respondent pleaded that the Appellant breached the terms of the insurance contract by failing to indemnify the Respondent despite having been notified.

2. The Appellant filed a defence to deny the Respondent's claim. The Appellant pleaded that it received late notification of claim from the Respondent contrary to the requirements of the policy. It was the submission of the Appellant that the Respondent was in breach of its obligations under the policy cover. In essence the Appellant repudiated the claim arguing that the same was extinguished lapse of time. Each side presented the evidence of a single witness. Hon. Onganyo, (Mrs) learned Chief Magistrate after considering the evidence from both sides came to the conclusion that the Respondent had properly notified the Appellant about the claim and provided all the details including reports made to Kakuma police station and the Ministry of Environment and Natural Resources and assessment of the damage on environment done by the spillage due to the accident. In short, the learned Chief Magistrate found the Respondent not in breach of the contract of insurance and proceeded to dismiss the Appellant's defence. The Respondent was awarded judgement in the sum of ksh.1,600,000/= being the sum insured under the insurance policy cover in question. Being aggrieved, the Appellant preferred this appeal.

3. On appeal, the Appellant put forward the following grounds:

1. ***That the learned magistrate erred in fact and in law in finding that the accident was allegedly occurred on 15.6.2004 was reported the 21.6.2004 in the absence of evidence in support.***
2. ***That the learned magistrate erred in fact and in law in failing to hold that under the insurance policy, it was a condition precedent that written notice of claim was required and that written notice was given out of time.***

3. ***That the learned magistrate erred in fact and in law in determining the actual date of the operation of the security clause in the policy document.***
4. ***That the learned magistrate erred in fact and in law in failing to analyse the evidence tendered in respect to when and how the accident occurred, when the accident was reported and if the terms of the policy were fulfilled.***
5. ***That the learned magistrate erred in fact and in law in determining the effect of the arbitration clause or any dispute pertaining to the policy as between the Appellant and Respondent.***
6. ***That the learned magistrate erred in fact and in law in finding the plaintiff's claim was proven to the required standard.***
7. ***That the learned magistrate erred in fact and in law in awarding damages of kssh.1,600,000.00 and interest thereon backdated to prior filing of suit.***

4. When the appeal came up for hearing, learned counsels recorded a consent order to have the appeal disposed of by written submissions. It is the submission of the Appellant that the learned trial magistrate erred when she failed to find that under the insurance policy, it was a condition precedent that written notice of the claim was required and that the written notice was given out of time hence the Appellant was entitled to repudiate the insurance contract. The Appellant made reference to page 3 condition 3 of the policy cover where it stated that the insured shall on the happening of any loss or damage to the property insured give immediate notice thereof in writing to the company and shall be within seven days after the happening of such a loss deliver to the company a claim in writing. The Appellant's advocate pointed out that the only letter notifying the accident of the subject accident is dated 21.6.2004. By its letters of 11.06.2008, Appellant notified the Respondent of its repudiation of the claim. The Appellant further argued that the learned trial magistrate had erred to take into account phone calls made by the Respondent to the Appellant on the time of the accident as part of the process of notifying the Appellant of the claim. The Appellant further argued that the trail magistrate erred when she failed to analyse the evidence tendered in respect as to when and how the accident occurred and when the accident ws reported and if the terms of the policy document were fulfilled before concluding that the Respondent's case was proved to the required standards. It is also pointed out that the veracity of the loss was in issue. Phanuel Ondieki PW1 is said to have admitted in cross-examination that a spill of 48,000/= litres of fuel would not cause a small spill. It is said that though PW1 visited the scene of the accident on 17.6.2004 and took photographs he surprisingly omitted to produce the same in evidence as exhibits to show the extent of the alleged spillage and could not give a good reason to justify the failure to tender in court those photographs.

5. One of the grounds of appeal which has been put forward is the question as to whether or not the dispute should have been sent to arbitration. The Appellant is of the the view that the Respondent should have involved the arbitration clause once the claim was repudiated by the Appellant.

6. The Respondent argued against each of the grounds of appeal put forward by the Appellant. The question as to whether or not the Respondent breached the terms of the insurance cover by notifying the Appellant of the insurance claim was outside the period prescribed by the insurance policy. The Respondent pointed out that there is evidence that the accident occurred on 15.6.2004 and that the same was verbally reported to the Appellant via a telephone call on the date of the accident. It is said that a letter dated 21.6.2004 was issued to the Appellant and received on 22.6.2004, a period within 7 days of the happening of the accident.

7. I have re-evaluated the documentary evidence and I am satisfied that the Respondent formerly notified the Appellant of its claim in writing within 7 days of the insured risk attaching. That was in accordance with condition 3 of the insurance policy. I therefore find no merit in this ground. After a further re-evaluation of the evidence tendered before the trial court and it is apparent that the if indeed there was a delay in notification of the claim, the Appellant could have simply issued a notice cancelling and repudiating the policy by registered post within 7days of receipt of the delayed notification as per clause 8 of the policy documents, but the Appellant did not deem it fit to do so or show credible evidence to prove it did. With respect, I agree with the Respondent's argument that the Appellant was stopped from stating otherwise by dint of Section 120 of the Evidence Act.

8. I have already outlined the Appellant's arguments which is to the effect that the trial magistrate did not analyze the evidence tendered. This being the first appellate court, the parties are entitled to a re-evaluation by this court of the case that was before the trial court. A careful re-consideration of the evidence tendered by PW1, will reveal that this witness produced documents which were actually forwarded to the Appellant in support of the claim to prove that the loss of fuel valued ksh.1,600,000/= from Caltex. I therefore find no merit in this ground.

9. The Appellant raised the issue touching on the question as to whether or not the dispute should have been sent for arbitration. The Respondent pointed out that the moment the Appellant entered appearance and filed a defence it waived the right to rely on the arbitration clause. With respect, I entirely agree with the Respondent's submissions.

10. In the end and on the basis of the above reasons, I find the appeal to be without merit. It is dismissed in its entirety with costs to the Respondent.

Dated, Signed and Delivered in open court this 27th day of May, 2016.

J. K. SERGON

JUDGE

In the presence of:

.....for the Appellant.

..... for the Respondent.