



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 91 OF 2014

GATEWAY INSURANCE COMPANY LIMITED.....APPLICANT

VERSUS

JULIUS OKEYO OWIDI.....RESPONDENT

JUDGMENT

(From original conviction and sentence in criminal case Number 1251 of 2004 in the Milimani Commercial Court - Before S. Atambo, P.M. on 28th February, 2014)

The appellant had insured the respondent's motor vehicle registration No. KAP 240N for the sum of Kshs. 1.4 Million. This was after the respondent had filled the Proposal Form and paid the required premium of Kshs. 71,180/=. The said motor vehicle was stolen while parked at the Law Courts, Taifa Road, Nairobi. Following the theft, the respondent demanded payment from the appellant which was declined forcing the respondent to file the suit in the lower court.

It was pleaded that the respondents claim was based on the fact that at the time of the theft, the policy was in full force and therefore the respondent was entitled to be reimbursed for the insured value of Kshs. 1,400,000/=. The appellant filed a defence to the claim where liability was denied and that it was entitled to repudiate the claim. It was specifically pleaded in the defence that, there was no proof the car was parked outside the Nairobi Law Courts, and there was no reason why the motor vehicle could have been stolen without anyone taking notice, as it was fitted with a high quality anti-theft devices, a gear shift lock and immobilizer among other devices.

The value was also denied and the respondent was accused of fraudulent mis- representation. Particulars thereof were that the vehicle was bought for a sum of Kshs. 201,050/= in February, 2001 and the plaintiff alleged to have carried out repairs and bought a new chassis bringing the total value at Kshs. 1,400,000/= while the alleged repairs and costs of replacement of the chassis and other parts were found to be false.

The respondent was also accused of knowingly misrepresenting to the appellant that the value of the motor vehicle was Kshs. 1,400,000/= knowing the same to be false.

The appellant also pleaded that the claim, if proved, is inadmissible and in any case, the respondent forfeited all his rights under the policy by knowingly, dishonestly and fraudulently grossly misrepresenting the actual value of the subject motor vehicle. It was also pleaded that, it is against public policy for the respondent to recover a loss he has not suffered or to benefit from his own wrong doing.

The lower court heard the evidence of the plaintiff and his witnesses while the appellant called no evidence. In finding for the respondent, the trial magistrate stated as follows,

“The defendant is liable to compensate the plaintiff for loss suffered since this was a comprehensive policy cover and the same was still subsisting at the time of the theft. The defendant does not deny that the cover was in force at the time the motor vehicle went missing.

In absence of any evidence of mis-representation of the value of the motor vehicle, this court is only left with the plaintiff’s evidence that it is un challenged.

Conclusion

Going the above observations, the plaintiff has a valid claim that he has proved on a balance of probabilities. Judgment is as such dented in favour of the plaintiff as against the defendant for the sum of Kshs. 1,400,000/= as pleaded in paragraph 9 of the plaint. The plaintiff shall have the costs of the suit together with interest at courts rate.”

In the memorandum of appeal, the appellant faults the trial magistrate for failing to appreciate and consider the evidence before entering judgment in favour of the respondent, yet the respondent failed to prove his case. She is also faulted to failing to consider the defendant’s submissions and authorities cited, and also failing to critically examine the factual issues brought out in cross-examination of the respondent’s witnesses, which established that he did not have a valid case against the appellant.

The trial court was also faulted for failing to find that the respondent was guilty of fraudulent of misrepresentation of material fact which formed the basis of the material insurance policy.

It is my duty to go through the record of the lower court, with a view to arriving at independent conclusions. As already observed, the appellant did not call any evidence and therefore the court relied on the pleadings and evidence as presented by the respondent.

Proof in civil cases is based on the balance of probability. The respondent produced the police abstract to show that his motor vehicle was stolen. He produced also some receipts to show the spares purchased and repairs made.

After the theft of the motor vehicle, a motor accident report form issued by the appellant was duly filed and presented. This form also covers cases of theft. The respondent called P.W. 2 Elijah Wanjoya a motor assessor who prepared a report and placed the value of the stolen motor vehicle at Kshs. 890,000/=.

A party is bound by the pleadings filed but pleadings alone are not sufficient to prove a parties case. The appellant was supposed to call evidence to prove all the allegation raised in the statement of defence. This was not done. In any case, it is common knowledge, insurance companies which valuation reports not the value given by the insured before a cover is given.

The trial magistrate was therefore correct to find that the respondent had proved his case against the appellant. I have also come to the same conclusion. There is only one difference however in that, the value of the respondents’ motor vehicle at the time it was stolen was not the insured value but what P.W. 2 assessed to be, and that is Kshs. 890.000/=. Accordingly, this appeal is dismissed except that the respondent shall be entitled to Kshs. 890,000/= plus costs and interest and court rates.

Dated and delivered at Nairobi this 25th day of July, 2016.

A.MBOGHOLI MSAGHA

JUDGE