



REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CIVIL APPEAL NO. 51 OF 2015
(FORMERLY KISII HCCA NO. 48 OF 2009)

BETWEEN

INSURANCE COMPANY OF EAST AFRICA APPELLANT

AND

MARWA DISTRIBUTORS LIMITED RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. K. Sambu, RM at the Senior Principal Magistrates Court at Migori in Civil Case No. 122 of 2007 dated 2nd March 2009)

JUDGMENT

1. The appellant appeals against a judgment entered against it for the sum of Kshs. 174,000/- costs and interest. The circumstances leading up to the appeal are set out in the plaint dated 11th June 2011 where the respondent (“the Company”) averred that on 10th April 2005, the appellant (“ICEA”) issued a money insurance policy No. 021/914/10/21974/2005 covering the period 10th April 2005 to 9th April 2006. The Company stated that on 9th April 2009, Kshs. 174,000/- was stolen from its salesman, Jared Odhiambo Ambrose. As a result the Company lodged a claim for the stolen money but ICEA refused or ignored to settle the same. It filed the suit and prayed for a declaration that ICEA was in breach of the policy and for judgment for the sum of Kshs. 174,000/-.
2. ICEA, in its statement of defence dated 13th August 2007, denied that the Company took out the insurance policy as alleged or at all and averred that it was a stranger to all the allegations in the plaint. In the alternative, it pleaded that if in fact the Company took out an insurance policy, it was not supported by any consideration.
3. As this is the first appeal, this court is called upon to analyse and re-assess the evidence on record and reach its own conclusions bearing in mind that it neither saw nor heard the witnesses testify (see *Selle v Associated Motor Boat Co. [1968] EA 123*). In order to deal with this task it is necessary to outline the evidence as it emerged before the subordinate court. Each side called one witness.
4. David Kerario Marwa (PW 1), a director of the Company, testified that in the month of April 2005, it took up 3 insurance policies with ICEA. The Company paid premiums by two cheques of Kshs. 77,830/- each totaling Kshs. 155,660/- for the said policies which covered the period 10th

- April 2005 to 9th April 2006. He further testified that on 9th April 2006, while the policy was still in force, an employee of the Company, Jared Odhiambo Ambrose, was robbed of Kshs. 174,000/- at Awendo while headed to Migori. He stated that the matter was reported to Migori Police Station. He duly notified ICEA and lodged the claim by filling the claim form. Thereafter, ICEA appointed General Adjusters Kenya Limited to investigate the loss. He testified that he co-operated with them by furnishing the necessary documents but despite such co-operation ICEA did not settle the claim causing him to file suit.
5. Dennis Onyango (DW 1), a legal officer with ICEA, confirmed that that it received a claim from the Company to the effect that it had lost property through a robbery on 9th April 2006. He further confirmed that the company had taken out a Policy No. 021/914/10/21974/2005 on 10th April 2005 which was to run to 9th April 2006. He testified that Kshs 35,000/- being the premium due on the policy was not paid though the policy was issued. He maintained that the payments made by the Company and the receipts issued to it did not relate to the subject policy though he admitted that the Company had several policies issued to it and which were paid for.
 6. DW 1 also testified that there conflicting reports of robbery. He noted that according to the claim form, the Company employee was robbed of the sum of Kshs. 174,000/- while going to catch a matatu at Awendo. The employee, in his own handwritten statement, stated that he was robbed at Kakrao Area. The loss adjuster confirmed from Migori Police Station that the robbery was reported but neither the amount stolen nor the driver of the matatu in which the Company employee was travelling disclosed in the report. DW 1 testified that given these conflicting reports, they suspected fraud. He also stated ICEA could not settle the claim as there was breach of the escort warranty which required that any money over Kshs. 100,000/- be escorted in transit by two able bodied adults and conveyed in a guarded motor vehicle. In the circumstances, the claim could not be paid.
 7. The learned trial magistrate considered the evidence and found as a fact that there was no dispute that there was an insurance policy issued by ICEA running from 10th April 2005 and 9th April 2006. The court framed three issues for determination. First, whether the company had paid consideration for the policy in the form of premium. Second, whether the plaintiff had breached the warranties rendering the policy voidable by way cancellation or rescission and third, whether the respondent had communicated the loss within the time stipulated by the policy.
 8. On the first issue, the learned magistrate held that it was common business practice in the insurance industry that premiums are paid upon issuance of insurance cover and not vice versa and it was inconceivable for ICEA to have issued and executed a policy without payment of the requisite premium. On the second and third issues, the trial court held that the claim was reported timeously and although the suit was instituted after one year, ICEA did not cancel or rescind the policy either on grounds of non-payment of premiums or on the basis of fraud but instead opted not to honour the respondent's claim. The learned magistrate concluded that ICEA failed to issue a cancellation notice in accordance with the policy and it was therefore liable to settle the claim.
 9. The appellant now appeals against the judgment and decree on the grounds set out in the memorandum of appeal dated 17th March 2009 which were condensed into three grounds urged by the appellant's counsel, Mr Kimanga. He argued that consideration is an important aspect of an insurance contract and that the respondent did not pay the sum of Kshs. 35,000/ which was the premium for the policy. He submitted that the payments made by the respondent were in respect of other policies hence without consideration, the contract was void. The second ground urged by the appellant was that on the balance of probabilities and based on the material before the court, the robbery could not have taken place in view of the contradictory evidence in the manner the robbery is said to have occurred. Counsel contended that the claim was fraudulent and as such the appellant was entitled to avoid a fraudulent claim. The appellant also submitted that it was entitled to avoid the policy as the respondent breached the escort warranty. The appellant further contended the policy had an arbitration clause which required that the matter be taken to

arbitration.

10. Mr Marwa, learned counsel for the respondent, opposed the appeal on the ground that the appellant issued a policy. He contended that in the event the premium was not paid, it was the appellant's duty to show that it could not have issued a policy on credit. He noted that the policy was not cancelled during its currency. He submitted that on the basis of the evidence, the appellant proved that its money was stolen. He concluded by stating that the appellant waived the arbitration clause by filing the defence.
11. The main issue for consideration is whether the policy issued by ICEA was valid for non-payment of the premium. It is not in dispute that ICEA issued a policy to the Company. According to the schedule to the policy the premium to be paid was Kshs. 35,000/-. The receipts produced by the Company confirm that it paid two instalments of Kshs. 77,830.00 but the policy numbers reflect other policies other than Policy No. 021/914/10/21974/2005 which was the policy subject of this suit. ICEA had raised an affirmative defence that the Company had not paid the premium hence the Company had to produce evidence to rebut this contention. It did not do so hence I find and hold that the premium was not paid for the specific policy.
12. What then is the effect of non-payment of the premium? In *Nizar Virani t/a Kisumu Beach Resort v Phoenix of East Africa Assurance Company Ltd* KSM CA Civil Appeal No. 88 of 2002 [2004]eKLR the Court of Appeal held that the law of Kenya is that the non-payment of premium does not invalidate the insurance contract. It quoted and agreed with *MacGillivray & Parkington on Insurance Law, 7th Edition* paragraph 861 which states as follows:

There is no rule of law to the effect that there cannot be a complete contract of insurance concluded until the premium is paid, and it has been held in several jurisdictions that the courts will not imply a condition that the insurance is not to attach until payment. It would seem to follow that, if credit has been given for the premium, the insurer is liable to pay in the event of a loss before payment, although, as has been held in a South African decision, the insurer would be entitled to deduct the amount of the premium from the loss payable, at least where the period of credit had expired by that time, since the assured could not insist on payment when in breach of any obligation assumed on his part under the contract.

13. In my understanding, the case does not set out a hard and fast rule that failure to pay premium does not invalidate the policy but underpins the general contract principle that parties are bound by their obligations recorded in the agreement. It means that if the parties do not make provision for the effect of non-payment of the premium, the court will not necessarily imply that the policy is invalid. The effect of non-payment of premium on the policy depends on the intention of the parties expressed in the contract.
14. The recital of the policy subject of the suit states as follows;

Now therefore in consideration of the payment to the company of the premium for the period of insurance mentioned in the schedule and for any subsequent period for which the Company shall accept renewal premium the Company agrees to pay or make good to the Insured or otherwise compensate or indemnify the Insured as hereinafter provided
[Emphasis mine]

15. The ordinary and unvarnished meaning of the clause is that the insured must have paid the premium for the period of insurance in order to be indemnified for any loss or damage that occurs during the period of cover. In other words, the policy document issued by the insurer constitutes a contract to insure and the premium is the consideration for the promise to indemnify the insured if the event takes place.
16. Since the premium was not paid, there was no obligation on ICEA to settle the claim by the company. Since the contract was not consummated by the payment of the premium, ICEA could

not invoke the cancellation clause in the policy which was invalid in the first place. The trial court therefore erred as it did not direct its mind to the terms of the policy to determine whether in fact the policy was invalid for non-payment of consideration. In coming to the conclusion it did, the subordinate court also erred in relying on common business practice which is in effect custom and usage which was neither pleaded nor proved by evidence (see **Harilal and Co & Another v Standard Bank Ltd [1967] EA 512**). As a result I find and hold that the policy was invalid for want of consideration.

17. The finding that the policy was invalid for want of consideration is sufficient to dispose of this appeal. Having made a general denial, the appellant did not plead any other affirmative defence to defeat the respondent's claim. The appellant did not plead fraud or breach of the warranty clause by the insured as alternative defences to the respondent's claim hence it was not open for the subordinate court to consider the same. If any authority were required to support this proposition it is the case of **Nizar Virani t/a Kisumu Beach Resort v Phoenix of East Africa Assurance Company Ltd (Supra)** where the Court of Appeal dealt held that;

Firstly, there is no denying that there were no particulars supplied in the defence pleading under Order VI rule 8(1) (of the Civil Procedure Rules) which requires in mandatory terms that:

Every pleading shall contain the necessary particulars of any claim defence or other matter pleaded including, without prejudice to the generality of the foregoing: –

(a) particulars of any ... fraud ... on which the party relies.

(b) Where a party pleading alleges ... fraudulent intention ... particulars of the facts on which the party relies.

In the absence of such pleading, the insurer is not at liberty to agitate the allegation of fraud or fraudulent intention. Fraud is a serious quasi-criminal imputation and it requires more than proof on a balance of probability though not beyond reasonable doubt. Sufficient notice and particulars must therefore be supplied to the party charged for rebuttal of such allegation.

18. In **Abdulkadir Shariff Abdirahim & Another v Awo Shariff Mohammed T/A A. S. Mohammed Investments NRB CA Civil Appeal No. 1 of 2008 [2014] eKLR**, the Court of Appeal extensively discussed the role of pleadings and held that special grounds of defence are required to be specifically pleaded. It quoted, with approval, the learned authors of **Bullen and Leake And Jacob's Precedents of Pleadings, Sweet & Maxwell, 12th Ed., page 6-7** which states that:

These requirements operate to compel the defendant, who intended to raise a special ground of defence or to raise an affirmative case to destroy any claim of the plaintiff, to plead specifically the matter he relies on for such purpose. The effect of the rule is for reasons of practice and justice and convenience, to require the defendant to tell his opponent what he is going to the court to prove. Thus, when a contract, promise, or agreement is alleged in the statement of claim, a bare denial by the defendant will be construed only as a denial in fact of the express contract, promise or agreement alleged or of the matters of fact from which the same may be implied by law, and not as a denial of the legality or sufficiency in law of such contract, promise or agreement. It is, therefore, often not enough for the defendant to deny an allegation in the statement of claim; he must go further and dispute its validity in law or set up some affirmative case of his own in answer to it. Accordingly, the defendant has the duty to state any special defence or any new fact on which he will rely at the trial, as otherwise a plaintiff may legitimately complain that he has been taken by surprise.

19. In summary fraud and breach of warranty are affirmative defences which the appellant ought to

have pleaded in its defence. As these were not pleaded, it was not open for the court to consider the issues raised on that account.

20.The appellant also averred that the suit was fatally and incurably defective, that the verifying affidavit in support of the plaint was defective and that the court did not have jurisdiction to entertain the claim. The parties did not submit on these matters and the trial court did not rule on them and consequently, I decline to express my views on the matters.

21.As I have found that the policy subject of the suit was invalid for want of payment of the premium, I allow the appeal and substitute the judgment of the subordinate court with an order dismissing the suit with costs to the appellant.

22.The appellant shall also have costs of this appeal.

DATED and DELIVERED at MIGORI this 19th day of June 2015.

D.S. MAJANJA

JUDGE

Mr Kimanga instructed by Kimanga & Company Advocates for the appellant.

Mr Marwa instructed by Kerario Marwa & Company Advocates for the respondent.