



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT ELDORET

CIVIL APPEAL NO. 154 OF 2013

ALFRED IDUVAGWA SAVATIA.....APPELLANT

VERSUS

NANDI TEA ESTATES.....1ST RESPONDENT

INSURANCE COMPANY OF EAST AFRICA.....2ND RESPONDENT

(Being an appeal from the original judgment and decree of G. Adhiambo, Ag. Senior Resident Magistrate, in Kapsabet CMCC No. 358 of 2011 delivered on 13th May 2013)

JUDGMENT

1. The appellant is aggrieved by the judgment and decree in the Senior Resident Magistrates Court dated 13th May 2013. The appellant's suit in the lower court was for recovery of premiums under a *Group Life Insurance Scheme* underwritten by the 2nd respondent. The learned trial magistrate found that the appellant failed to prove liability against both respondents. The suit was dismissed with costs.
2. The appellant's suit was filed on 18th August 2011. The plaint was not dated; but the verifying affidavit was sworn on 30th May 2011. There was no serious contest that the appellant was employed by the 1st respondent on 1st January 1985; and that his services were terminated on 12th October 2009. The insurance cover in issue commenced in 1985. The appellant testified that from the year 1987, he paid monthly premiums of Kshs 51. It was remitted by the 1st respondent to the 2nd respondent together with "other premiums". The appellant's case was that the defendants defaulted to pay him his benefits amounting to Kshs 615,360 as at 29th May 2007. In separate statements of defence dated 14th and 20th December 2011 respectively, the defendants denied the claim *in toto*.
3. The appellant filed a memorandum of appeal on 11th December 2013. It raises five grounds. I will condense them into four: first, that the evidence of the respondents was highly dishonest and riddled with falsehoods; secondly, that the learned trial magistrate misapprehended the nature or extent of the insurance cover; thirdly, that the lower court failed to take into account the Pensions Act leading to a miscarriage of justice; and, fourthly, that the learned trial magistrate disregarded the evidence of the appellant.
4. The appeal is contested by the respondents. The respondents submitted that the burden of proof was always on the appellant; and, that the appellant failed to discharge it. The respondents' case was that benefits under the cover were "*employer driven*"; and, only payable upon the death or disability of an employee. The benefits would be recoverable by the beneficiaries. As none of those events had occurred, the suit and this appeal were hopeless. I was implored to dismiss the appeal.

5. On 22nd September 2015, I heard oral submissions by the appellant and the learned counsel for the respondents. I have considered the appeal, the record of appeal, the pleadings in the lower court, the evidence and the rival submissions.
6. This a first appeal to the High Court. It is thus an appeal on both facts and the law. I am required to re-evaluate all the evidence on record and to draw independent conclusions. There is a caveat because I have neither seen nor heard the witnesses. See *Peters v Sunday Post Limited* [1958] E.A 424, *Selle v Associated Motor Boat Company Ltd* [1968] EA 123, *Williamson Diamonds Ltd v Brown* [1970] EA 1, *Mwanasokoni v Kenya Bus Services Ltd* [1985] KLR 931.
7. As I have stated, it is common ground that the appellant was employed by the 1st respondent as an electrician. He was employed on 1st January 1985. His services were terminated on 12th October 2009. The disputed insurance scheme commenced in 1985. From plaintiff's *exhibit 6A* at the trial, there was no doubt that he was a member of the life assurance scheme. The exhibit shows he was member number 00177. The policy number was 020/GLS/004012. As at 29th May 2007, the certificate stated that his "*life assurance benefit under this scheme is sum assured of Kshs 615,360*". The certificate is on the note paper of the 2nd respondent.
8. The appellant claimed the benefits of Kshs 615,360 in the lower court. A plain reading of the certificate shows that the sum was a *life assurance* benefit. The amount did *not* represent the total *premiums* paid by the appellant. I have studied the policy itself as it appears in the record of appeal. The policy number was 020/GLS/004012 was titled *Group Last Expense Protection Cover*. There is a further an endorsement in favour of the 1st defendant from 1st April 2006. The *policy holder* was thus the company. Under clause 4, the premiums were payable by the company. The policy was open to the 1st respondent's employees under the age of 60. The policy covered the *life* of the employee. Under clause 13, the benefits were payable to a beneficiary designated by the employee. The policy would lapse if the employee's employment was terminated. However, an employee who was disabled, or on leave of absence, for instance, would still be covered.
9. From the plain and ordinary meaning of the policy, this was a *group life cover* for employees of the 1st respondent. When the services of the appellant were terminated on 12th October 2009, he *ipso facto*, and by dint of clause 12 of the policy, *ceased* to be a member. The appellant could only have received the benefits under the policy upon his death or disability during the *subsistence* of this employment. The benefits would be payable to his nominee or estate as may be appropriate. Happily, the appellant is still *alive*.
10. The contract of insurance was between the two respondents. The appellant did not show in the lower court that he had a *personal* or separate cover with the 2nd respondent. So much so that the appellant had *no* privity of contract with the 2nd respondent. Although the appellant claimed that he paid monthly premiums of Kshs 51 from 1987 to his termination, he did not produce evidence of such payment or deductions. It would have been quite easy. The appellant claimed the premiums were remitted together with other payments by his employer. Pay slips for the relevant period showing such deductions would have been sufficient. The respondents' witness, Bernard Lagat (DW1), was categorical that the premiums were met by the 1st defendant company.
11. The appellant's submission that the benefits were recoverable in a like manner to a *pension* finds no support in evidence or the law. The Pensions Act was irrelevant to the matter at hand. The appellant's pension, as he correctly told the trial court (for example the payment of Kshs 139, 830 at page 6 of the typed record) was from a *retirement benefits scheme*. The latter is different from the *life assurance scheme* which was material to the appellant's case in the lower court. When cross-examined at the trial, the appellant conceded that the *staff retirement scheme* was *distinct*. The respondent's witness DW1 told the court the *pension* to the appellant was *paid* in full. Fundamentally, the *plaint* did not plead a case for retirement benefits or pension: it was a claim for *premium dues under the group life assurance scheme*. Parties are bound by their pleadings.
12. The legal burden to prove the allegations in the plaint fell squarely upon the plaintiff's shoulders. He who alleges must prove. See sections 107 and 109 of the Evidence Act. See also *Evans Nyakwana v Cleophas Ongaro*, High Court, Homa bay, Civil Appeal 7 of 2014 [2015] eKLR. I commiserate with the appellant; but I find that he failed to discharge that onus. The defendants were not obligated to assist him in his case. That is the sad reality of our adversarial justice. In a synopsis, I am unable to find fault in the decision of the lower court. There was *no* cogent evidence that the respondents owed the appellant Kshs 615,360 or such other sum under the life

assurance cover.

13. The upshot is that the entire appeal lacks merit. It is dismissed. Costs are at the discretion of the court. The respondents were granted costs in the lower court. Considering the predicament the appellant now finds himself in; and, in the interests of justice, I order that each party shall bear its own costs in this appeal.

It is so ordered.

DATED, SIGNED and DELIVERED at **ELDORET** this 17th day of November 2015.

GEORGE KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of:-

The appellant in person.

Ms. Nasiloli for Mr. Kamau for the respondents instructed by Kamau Lagat & Company Advocates.

Mr. J. Kemboi, Court clerk.