REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE NO. 254 OF 2012

JOSEPH MACHARIA NDERITU.....PLAINTIFF

VERSUS

REAL INSURANCE COMPANY LIMITED.....DEFENDANT

JUDGMENT

The plaintiff, Joseph Macharia Nderitu, instituted the suit herein against the respondent, Real Insurance Company Ltd, for recovery of Kshs.4,328,000 / = plus interest thereon at the rate of 14°/o per annum from 9th January, 2012 till full payment. The plaintiff also wants the respondent to re imburse all expenses, interest and penalties he paid or levied on him by his financiers (NIC Bank Ltd) from 9th January, 2012 to the date of full payment.

The plaintiffs case is that in 2011 he bought motor vehicle registration number KBV 192V, Land Cruiser pick up at Kshs.4,328,000/=. After the motor vehicle was fitted with all the necessary accessories and insurance in respect thereof obtained, he went to the seller (Bhogal Auto Garage, and picked the motor vehicle. He was issued with a delivery note which he produced as PEX1. He was also issued with a certificate of insurance, No.B532l695 and policy No. COMP.NKU/MCOM/POL/2046570 dated 25th July, 2011 being a comprehensive cover (PEX 2). The policy commenced on 25th July, 2011 and was in force to 24th July, 2012.

The plaintiff contends that under the policy of insurance herein, the defendant comprehensively covered him for any loss, damage and theft occurring during the period it was in force (25th July, 2011 to 24th July, 2012). In this regard, he referred the court to section 1 of the policy document, which inter alia provides as follows:-

> **"The company will indemnify the Insured against loss of or damage to the Motor Vehicle and its accessories and spare parts whilst thereon."**

The plaintiff produced the policy document as PEX 3.

Barely 7 months after the policy herein was executed, one of the covered risks to wit, theft occurred.As required of him, the plaintiff reported the theft of the motor vehicle to the authorities (Pangani Police Station) and shortly thereafter, to the defendant. Later on, he made a formal report through his agent, New Corona Insurance Agencies).

The agent formally reported the loss to the defendant and made arrangements for the plaintiff to fill the necessary claim forms. As the motor vehicle was never traced or recovered, the defendant offered to settle his claim at Kshs.2,974,500/= after deducting the applicable excess.

Contending that he was neither given an assessment report nor an explanation as to how the defendant arrived at the proposed payment of Kshs.3,305,000 /= the plaintiff argues that since the motor vehicle was as good as new (having covered less than 10,000 /= kilometres and not having been serviced at the time it was stolen), he was entitled to the full value of the motor vehicle, that is, Kshs.4,328,000/=. Further that the defendant had no basis for deducting nearly a million shillings from the sum assured. To prove that fact, the plaintiff produced the defendant's letter of offer as PEX 6. Vide his letter dated 3rd May, 2012 (PEX 7) the plaintiff rejected the Defendant's said offer.

Subsequently, the defendant revised its earlier offer upwards to Kshs.3,420,000/= being Kshs.3, 800,000 less the excess payable in respect of the claim. That was done through a letter dated letter dated 30th May, 2012 (PEX 8).

Dissatisfied by the said offer, the plaintiff sought counsel from a lawyer who wrote a demand letter to the defendant, PEX9.

It is the plaintiffs case that owing to the loss of the motor vehicle herein and the defendant's failure to compensate him within a reasonable time, he was unable to meet his financial obligations to his financier (NIC Bank). Consequently, his said financier began levying default interest. It was the plaintiffs testimony that his financial obligations rose from Kshs.71,000 /= per month to Kshs.77,600/= because of default interest. To prove this fact he produced bank statements and a letter from his financier, PEX 10. He was also referred to the Credit Reference Bureau. To attest that fact he produced a letter from his financier to that effect (PEX 11).

In addition to the documents cited herein above, the plaintiff produced copies of photographs of the motor vehicle before it was stolen (PEX 12), certificate of installation of a tracking device (PEX 13), a record from registrar of motor vehicles and log book showing that his financier (NIC Bank) and himself were the registered owners of the motor vehicle (PEX 14(a) and (b) respectively.

The plaintiff denied the defendant's contention that he was responsible for the delay in settlement of his claim and reiterated that under the policy herein he was entitled to the sum assured subject to 10°/o deduction of excess.

Explaining that his financier has threatened to attach his property owing to his inability to meet his financial obligations, the plaintiff urged the court to award him all the reliefs sought in the plaint.

In its defence the defendant called its legal officer, **Anthony Kariuki Njoroge (D.W.1)** who acknowledged that the defendant had insured the motor vehicle herein. D.W.1 also acknowledged that the defendant received the plaintiffs claim for settlement of the loss and made offers for settlement but the plaintiff rejected those offers arguing that he was entitled to the total sum assured and not the pre-theft value of the motor vehicle.

He explained that in determining the amount to pay, when the insured risk occurred, the defendant is guided by the policy document (PEX 1), in particular, a clause therein which provides as follows:-

> **"....the company's liability shall be limited to the reasonable value of the motor vehicle at the time of loss or damage but not exceeding the insured's estimate of value stated in the schedule."**

He argued that there is nowhere in the policy where the defendant is required to pay the sum assured.

Further that the contract being one of indemnity, the defendant’s obligation was to restore the plaintiff to the position that existed immediately prior to the loss. He distinguished the policy herein from an agreed value policy, wherein the figure payable at the time of loss is agreed on the time of entering into the contract.

It was his case that where the amount payable is the pre loss value, the reasonable market value is determined by appointing an assessor who gives an estimate of the value of the property at the time of loss. In this case, he explained that an assessment was done which put the estimated value at Kshs.3.3 million. On the basis of that estimate, the defendant made the first offer to the plaintiff, which the plaintiff rejected.

Following the rejection of the first offer, the defendant commissioned another assessment which assessed the loss at between Kshs.3.8m and 3.6m. On the basis of that assessment, the defendant raised its initial offer to Kshs.3.8 million, which offer the plaintiff yet again rejected.

According to D.W.1 the plaintiff could not be paid the purchase price in a contract of indemnity because doing so would benefit him (at the time the loss occurred, the motor vehicle had lost some value through depreciation).

With regard to the plaintiffs claim for interest and penalties charged by his financier, D.W.1, argued that it would be unfair to load the interest charged by the plaintiffs financier on the defendant, when the plaintiff had refused to mitigate his loss.

Terming the plaintiffs refusal of the defendant’s offer unreasonable, D.W.1, opined that the plaintiff should have taken the amount offered by the defendant and sued for the balance (Kshs.500,000/=). This way, he would have avoided the bank interests he now claims from the defendant. He argued that the interest was in any event, not payable under the contract as it is excluded in the policy as consequential loss.

As for the differences in the assessed pre-accident value of the motor vehicle, he explained that the 1st assessor misapprehended the purchase price of the motor vehicle and based his assessment on Kshs.3.8m as opposed to Kshs.4.328m. In his view, the 2nd assessment was the correct one as it was based on the correct purchase price of the motor vehicle.

Although the policy document does not explain how the market value is to be arrived at, he explained that customarily, an assessor determines that value.

Admitting that the plaintiff was not involved in the assessment, D.W.1 stated that the defendant never stopped the plaintiff from commissioning an alternative assessment.

On examination by the court, D.W.1 explained that the sum insured is a term used in long term insurance like life benefits and that it is important for purposes of calculating the premium payable.

D.W. 2, John Waweru Njoroge, informed the court that he received instructions from the defendant to assess the pre theft value of the motor vehicle herein. Using the motor vehicles logbook and the guidelines gIven by the Automobiles Association he assessed the pre-theft value of the motor vehicle at Kshs.3,895,000 / =.

He explained that the purpose of assessment is to establish the estimated value of the motor vehicle before the theft for purpose of compensation. Like D.W.1, his testimony was to the effect that there are instances when an insured is paid the total sum assured. According to him, that occurs when is indicated in the policy that the total sum assured would be payable. Maintaining that his assessment was fair and that he did not favour any of the parties to the dispute, he produced the assessment report he prepared as DEX 1.

I have read and considered the rival arguments by the parties and the submissions filed in respect thereof. The issues for consideration are:-

1. Whether the plaintiff was entitled to the total sum assured or the pre-theft value of the motor vehicle?

2. Whether in the absence of the motor vehicle, it was possible to determine the pre-theft value of the motor vehicle?

3. Whether the plaintiff is entitled to interest on the sum assured or any consequential expenses or losses?

4. What order(s) should the court make?

Whether the plaintiff was entitled to the total sum assured or the pre-theft value of the motor vehicle;

On behalf of the plaintiff, it is submitted that the contract signed between the plaintiff and the defendant expressly provided for what the plaintiff would be paid in the event the covered risk occurred. Contrary to the defendant's contention that the plaintiff was entitled to the pre-theft value of the motor vehicle, the plaintiff maintains that under the contract he executed with the defendant he was entitled to the full sum insured. That is to say the total value of the motor vehicle at the time of taking the cover.

As the parties herein had executed a contract to guide their affairs, the duty of this court with regard to that contract is limited to giving effect to the clear intention, in as far as it can be ascertained. In this regard **see Jiwaji & others v. Jiwaji & another (1968) E.A 547** where the Court of Appeal for Eastern Africa **(Clement De Lestang, V.P)** held:-

> **"The courts will not, of course, make contracts for the parties but they will give effect to their clear intention...."**

In the instant case, the contract signed by the parties, inter alia, provided as follows:-

> **"The company will indemnify the insured against loss of damage to the motor vehicle and its parts accessories and spare whilst thereon.....**
>
> **.....**
>
> **The Liability of the Company shall not exceed the value of the parts lost or damaged and the reasonable cost of fitting such parts it being understood that the Company's liability shall be limited to the reasonable market value of the motor vehicle at the time of the loss or damage but not exceeding the insured's estimate of the value stated in the schedule."**(Emphasis supplied**).**

It is clear from the foregoing section of the policy that the duty of the defendant was to indemnify the plaintiff.

In **Civil Appeal No. 263 of 2003; Madison Insurance Company Ltd** v **Solomon Kinara t/a Kisii Physiotherapy Clinic** the Court of Appeal quoted with approval a passage

in Preston and Colinvaux book; **"THE LAW OF INSURANCE**", 2nd Edition, under the heading**, "THE CONTRACT OF INSURANCE**," and Sub-heading **"INDEMNITY**" Page 4 thus:-

> **"lndemnity, it has been said, is the controlling principle in insurance law, and by reference to that principle a great many difficulties arising on insurance contracts can be settled. Except in insurance on life and against accident the insurer contracts to indemnify the assured for what he may actually lose by the happening of the events upon which the insurer's liability is to arise, and in no circumstances, is the assured in theory entitled to make a profit of his loss. That rule might be inferred as being the intention of the parties, having regard to the aim of the contract of insurance, but there are further powerful reasons for its application. Were it not so, the two parties to the contract would not have common interest in the preservation of the thing insured and the contract would create a desire for the happening of the event insured against. Where infact the assured has a prospect of profit, there and there only can arise the temptation to crime, fraud or such carelessness as may bring about the destruction of the thing insured."**

The defendant's liability under the contract herein was expressly stated to be limited to the reasonable market value of the motor vehicle at the time of loss or damage but not exceeding the insured's estimate of the value stated in the schedule.

Given the fact that the contract herein was one for indemnity, my interpretation of the foregoing section of the contract, and the obligations created thereunder is that the defendant was not obliged to pay the plaintiff the total sum assured, if at the time the loss occurred the value of the motor vehicle had gone down.

Although the contract does not state how the reasonable market price would be arrived at, by providing for payment of the reasonable market price at the time of loss or damage, the parties must have contemplated that a valuation would be done to

ascertain what the reasonable market price of the motor vehicle was at the time of loss.

Since the motor vehicle herein had been in use for nearly seven months before it got lost, I agree with the defendant that under the contract, the amount payable was its pre theft value.

Whether in the absence of the motor vehicle, it was possible to determine the pre-theft value of the motor vehicle;

Having found that the amount payable under the contract herein was the pre-theft value of the motor vehicle, the question that arises is whether, in the absence of the motor vehicle, it was possible to determine the pre-theft value of the motor vehicle.

Concerning this question, D.W.2's testimony was to the effect that by using the guidelines provided by the Automobiles Association and other considerations like fluctuations in currency exchange rates and wear and tear, it is possible to determine the reasonable market price of a motor vehicle. In this regard, using the said guidelines and considerations D.W.2 was able to assess the pre-theft value of the motor vehicle herein at between Kshs.3,893, 424 and 3, 810, 246/=.

Under **Section 60(1) (m)** of the **Evidence Act, Cap 80 Laws of Kenya**, courts are obliged to take judicial notice of the ordinary course of nature. In the circumstances of this case, I take judicial notice that machines lose their value when in use. In the circumstances of this case, the subject, motor vehicle had been in use for 7 months. According to the testimony of the plaintiff, the motor vehicle had covered approximately 8000km at the time of loss. That being the case, by the time it was lost, it had lost some value.

Although the plaintiff was not involved in the assessment of the motor vehicle, having read and considered the testimony of D.W.2, and there being no evidence to prove that he was biased in his assessment of the motor vehicle, I am persuaded that his assessment was a fair representation of the reasonable market price of the motor vehicle at the time of loss.

Whether the plaintiff is entitled to interest on the sum assured or any consequential expenses or losses;

It is contended that since the defendant was aware that the motor vehicle was financed by a third party (NIC Bank), it has an obligation to meet all the expenses, interest and penalties levied by the plaintiffs financiers. That obligation is said to have arisen from the defendant's failure to promptly compensate the plaintiff.

In reply, it is submitted that the contract executed between the plaintiff and the defendant did not cover consequential loss; and that the plaintiff failed to mitigate his losses. It is the defendant's case that, as a way of mitigating his loss, the plaintiff should have taken the amount offered by the defendant and only sued for the balance and that having failed to do so, he cannot be had to say that he is entitled to re-imbursement of such costs.

The defendant argues that if the plaintiffs claim for interest is allowed, he would benefit from the loss and his failure to mitigate the loss. The court is urged to disallow that claim and/ or if inclined it, to peg the award thereon, on the amount the plaintiff is entitled to over and above the offer the he rejected.

In considering the dispute herein the court is urged to be guided by the decision of the court of Appeal in **Civil Appeal No. 263 of 2003; Madison Insurance Company Ltd** v. **Solomon Kinara t/a Kisii Physiotherapy Clinic** (supra). In that case it was held:-

> **"...one thing is clear from this text; ordinary or standard form policies or contracts of insurance do not cover consequential loss unless the parties specifically contract that such loss would be covered. The 4th Edition of Denis Riley's book "CONSEQUENTIAL LOSS INSURANCES & CLAIMS" specifically deals with such policies, namely consequential loss policies.**
>
> **The policy of insurance between the Appellant and Respondent was an ordinary or standard form contract and as such there was nothing to import into that policy the element of consequential loss. The Respondent's claim was that the loss was occasioned by the Appellant's wrongful refusal to pay for the loss of the items of the policy covered, but we do not think this takes the matter any further. The parties could have covered such an eventuality in their policy of insurance and in absence of such a provision, the Respondent was not entitled to claim consequential loss of profits."**

In the policy executed between the parties herein, the defendant was not liable for:-

> **"(a) consequential losses,**
>
> **(b) depreciation wear and tear mechanical**
>
> **or electrical breakdown failures or breakages..."**

See exceptions to section 1 (page 4 of the policy document).

That being the case, and there being no justification for deviating from the holding of the Court of Appeal in **Madison Insurance Company** (supra), I find the plaintiffs claim for consequential losses to be unmaintainable.

What order(s) should the court make?

As pointed out above, under clause 1 of the policy of insurance executed between the plaintiff and defendant, the defendant's liability was limited to the reasonable market value of the motor vehicle at the time of loss or damage.

D.W.2, who assessed the motor vehicle recommended payment of Kshs.3,895,000/= less the applicable excess. Being persuaded that his estimate is reasonable, I enter judgment in favour of the Plaintiff and against the defendant for the said amount, subject to payment of the applicable excess.

As concerns costs of the suit, D.W.1 admitted that the defendant neither replied to the plaintiffs demand letter nor offered any explanation to the plaintiff concerning its rejected offer. Without such explanation, the plaintiff cannot be blamed for having chosen to take the dispute to court for determination of his perceived rights under the contract he had executed with the defendant. Having failed to respond to the plaintiffs demand and/ or failed to offer any explanation as to how it had arrived at its rejected offer it should, and is hereby condemned to pay the costs of the suit.

Dated, Signed and and Delivered at Nakuru this 13th day of August 2014

H A OMONDI

JUDGE