



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 230 OF 2007

APOLLO INSURANCE CO. LTD.....APPELLANT

VERSUS

IRENE NTHENYA MAITHYA.....1ST RESPONDENT

THABITI INSURANCE BROKERS LIMITED.....2ND RESPONDENT

JUDGMENT

1. On the 20th of March 2007 judgment was entered for the 1st Respondent /Plaintiff hereinafter referred to as the 1st Respondent for the sum of Kshs. 470,000/- plus costs and interest. The 1st Respondent had sued the Appellant and the 2nd Respondent for breach of contract and claimed the sum of Kshs. 470,000/- as special damages. In a plaint dated 26th March 2003, the 1st Respondent claimed that she was the insured of the Appellant through the 2nd Respondent who was an agent/broker of the appellant.

The Appellant filed a memorandum of appeal on the 3rd of April 2007. The grounds of appeal are as follows;

- i. That the learned Magistrate erred in holding and finding that the 1st Respondent had established her claim against the appellant.
- ii. That the learned Magistrate erred in holding and finding that the 1st Respondent has established the existence of an insurance cover issued by the Appellant and was entitled to indemnity on the basis of that cover.
- iii. That the learned Magistrate erred in holding and finding that the 1st Respondent had established and proved to the trial court terms of cover that inter alia provided for indemnity.
- iv. That the learned Magistrate erred in holding and finding that the 1st Respondent had complied with any terms of cover with the Appellant that would entitle her to indemnity.
- v. That the learned Magistrate erred in holding and finding that any premiums were paid by the 1st Respondent to the Appellant or that such premiums as were alleged to have been paid to the 2nd Respondent were paid to the Appellant.
- vi. That the learned Magistrate erred in holding and finding that the 2nd Respondent was the Appellants agent for purposes of the facts giving rise to the present suit.
- vii. That the learned Magistrate misdirected herself into failing to appreciate that the evidence presented by the 1st Respondent was not sufficient to sustain a finding in favour of the 1st Respondent.
- viii. That the learned Magistrate misdirected herself in taking into account extraneous matters in

arriving at her decision.

Parties agreed to proceed by way of submissions. the Appellant file their submissions on the 8th of October 2010 and the 1st Respondent on the 14th of October 2010, they also adopted their submissions filed in the lower court. The Appellant submitted as follows; that the 1st Respondent needed to prove the following;

- i. That she was the owner or insurer of the subject vehicle.
 - ii. That she had in place a valid insurance cover.
 - iii. That she had complied with the terms of insurance cover with regard to the appellant.
2. It was submitted further that the claim being a special damage claim the 1st Respondent needed to prove the extent of loss; that the evidence presented before the trial court could not prove the nexus between the 1st Respondent and the appellant. The submissions of the Appellant in the lower court were as follows; that the 1st Respondent was not the owner of the registered vehicle neither did she prove that she had taken out a cover in her name with the Appellant as the log book produced showed that the registered owner was Peter Maithya; that even though the 1st Respondent claimed that the said Peter was a consignee no consignment note was tabled to prove the same. That having failed to show that she had a policy document with the Appellant she failed to show that she was entitled to the compensation; that the 1st Respondent only produced PE3 a proposal payment schedule to prove the alleged cover with the appellant and that the schedule made no mention of the Appellant or a cover with the Appellant but the same relates to premiums in excess of Ksh.50,000/- yet the plaintiff alleged that the total premiums were about Kshs.18,000/-; that if indeed the Plaintiff had such a cover then she should have to established that she had paid for it and that in the 1st Respondent's evidence she stated she had made payments to the 2nd Respondent and that no mention was made of any contractual association with the Appellant until after the alleged loss thus no link was established between the Appellant and the 2nd Respondent or document presented to show that for purposes of the association with the 2nd Respondent was acting as the agent of the Appellant; that the payments by the 2nd Respondent made no reference to a cover by the Appellant; that according to their records there is no record of payment of premiums by the 1st Respondent on the alleged account and that any alleged cover could not apply to account for lack of consideration.
3. The 1st Respondent reiterated their submissions in the lower court. The 1st Respondent summarized the grounds as follows;
- i. That the Learned Magistrate erred in finding that the 1st Respondent was entitled to indemnity
 - ii. That the Learned Magistrate erred in finding that 1st Respondent had complied with the terms of the cover in particular payment of the requisite premium
 - iii. That the Learned Magistrate erred in finding that the 2nd Respondent was the Appellant agent.

It was further submitted that the Appellant's witness on being cross examined confirmed that the 2nd Respondent was the Appellant's agent and under the Insurance Act the 2nd Respondent being a broker had a running account with the Appellant where payment of premium was payable by the 2nd Respondent over a grace period of 60 days. That DW1 Samson Musembi a senior claims officer confirmed that the proposal form did not impose condition or term that the 1st Respondent was to install an anti theft device in her vehicle and that the Appellant did not prepare or send any policy document to the 1st Respondent to show that it was a term of police that an anti theft device was to be installed in the vehicle. That DW1 also confirmed that no specific amount of outstanding premium was asked by the Appellant nor did the Appellant cancel or liquidate the police as a result of nonpayment of the premium. The 1st Respondent relied on section 77 of the Insurance Act Cap 487 that protects innocent insured persons against acts of omissions by insurance brokers. It was therefore argued that even if the 2nd Respondent failed to remit premiums to the appellant then the

said action could not invalidate the policy. The 1st Respondent also relied on section 156 (2) of the Insurance Act that states that once a policy is placed through an insurance broker then whether or not premiums are received by the insurance company, the insurance company is deemed to have received the premiums. The 1st Respondent relied on the case of **Virani t/a Kisumu Beach Resort Vs. Phoenix of East Africa Assurance Company (2004) 2KLR** where the Court of Appeal held that an Insurance policy remains valid once insured on liability attaches despite nonpayment of premiums. Lastly it was argued that the attempt by the Appellant to raise the issue of non payment of premium after the theft of motor vehicle has no bases in law.

4. This being the first appeal this court is under a duty to reconsider and re-evaluate the evidence on record and to draw its own conclusions. The evidence adduced by the 1st Respondent in the lower court is follows; on the 29th of September 2000 she imported a vehicle Toyota 101 from Japan. The consignee was Peter Maithya her brother. She insured the vehicle through Thabiti Insurance Brokers for two weeks and she was given a certificate from Apollo Insurance Company. She paid Thabiti Insurance Brokers Kshs 21,000/-, exhibits (a) to (c) for the premium. She also filed the proposal form and gave Thabiti Insurance Brokers the original. She obtained a policy schedule exhibit 3. On the 19th of October 2000 the vehicle was stolen at her brother's parking and she reported the theft to the police on the 20th October 2000. She was issued with a police abstract, exhibit 4. She reported the loss to the insurance company and completed a claims form, exhibit 5. Later on she took the log book (copy exhibit 6), to the insurance broker. The registration number was KAM 828W and the chassis engine number was EE1013071914. It was in the name of the consignee her brother Peter Maithya. She was not paid the sum insured. Apollo Insurance wrote a letter dated 30th October 2009 offering to pay Kshs. 375,000/- and not Kshs. 470,000 the insured sum.
5. During cross examination she admitted that there was an offer made of Kshs. 375,000/- by the Appellant, that the 2nd Respondent did not give her a document showing the terms of the cover. She stated that the certificate was stolen with the vehicle, that the policy schedule had a logo of the Appellant Company; that after the vehicle was stolen she was asked to top up the premium. She stated that officially the vehicle was not hers.
6. The Appellant witness an employee of Apollo Insurance Claims Department testified that they received correspondence relating to the claim through Thabiti Insurance Brokers; that the 1st Respondent was a proposer of a policy. The same was accepted on condition it was on payment of premiums. The 1st Respondent did not pay the premiums. They had no payments through Thabiti to them. On receiving the claim they wrote seeking what they needed from the broker. All were not complied with. They had no report and there was a requirement of anti-theft device. They declined to settle the claim because of non-payment of the premium. The Premiums were to be paid within 30 days. The cover the 1st Respondent had was for a month from 2nd of October 2000 to 30th of October 2000.
7. From the lower court record interlocutory judgment was entered against the 2nd Respondent on the 13th of August 2003.

I will now consider the issues raised in this appeal which I consolidate as follows;

- i. Whether the 1st Respondent was the owner or insurer of the subject motor vehicle.
 - ii. Whether she had complied with the terms of the policy cover.
 - iii. Whether the 2nd Respondent was the Appellant's agent.
8. The 1st Respondent's evidence was that she imported the vehicle and that Peter Maithya her brother was the consignee. There was no evidence adduced by the 1st Respondent to show that Peter Maithya was the consignee but there is evidence that the vehicle the subject matter was registered in the name of Peter Maithya. From the log book produced in court Peter Maithya was the owner of the said motor vehicle and the 1st Respondent was the person who insured the vehicle. The 1st Respondent attached a policy schedule that shows that she was the insured

through Thabiti Insurance Brokers and had insured a vehicle with chasis no.EE101-3071914 Toyota Corolla. This chasis number is the same number in the log book that was issued to Peter Maithya. The Claims Manager DW1 admitted during cross examination that the 1st Respondent was a proposer of a policy and that they had correspondence with Thabiti Insurance over the claim. This is evident from the letter dated 30th October 2001. He also admitted that Thabiti Insurance had an account with them and that there was a grace period of 60 days for them to settle the claims. He further admitted that there was a letter written by them requesting for documents, that they did not cancel the policy which was for a month and that they did not state any outstanding premium. He also stated that had the 1st Respondent complied they would have paid out Ksh.375, 000/-. From the letter dated 6th of November 2001, it is evident that Thabiti had received a letter from the Appellant which they sent to the insured the 1st Respondent. The letter they referred to is the letter dated 30th October 2001. The contents of the said letter refers to the claim that had been made over motor vehicle registration no. KAM 828W on 19th October 2000 the insured is referred to as Irene M. Mulekyo. In the said letter they offer a sum of Kshs. 375,000/- as compensation. By this letter the Appellant did recognize the 1st Respondent as their insured and also that their agent the 2nd Respondent had been dealing with the 1st Respondent over the claim the 1st Respondent had made. The 1st Respondent's evidence was that she was not supplied with any policy document but the policy schedule and that she paid Thabiti the sums of kshs.21,000/-.She produced receipts to prove she paid Thabiti Insurance Brokers the said sum. There is judgment against the said agent; I also note that the Appellant's made no claim against the 2nd Respondent. The 1st Respondent was to prove her case on a balance of probability and not beyond reasonable doubt. She adduced evidence to show she was the insurer of the vehicle that was stolen that she made payments to the brokers and she produced the documents in her possession given to her by the appellant's agents. Section 77 of the Insurance Act Cap 487 provides that the failure on the part of an insurer, broker or agent to comply with the provisions of the Act shall not invalidate any policy issued by an insurer. The fact that Thabiti did not submit the monies paid for the premium to the Appellant does not invalidate their obligation as the insurers. The Learned Magistrate therefore did not err in finding that section 77 applied in the case. I further agree with her that the provisions of sections 156 (2) applied. The said section provides as follows;

(2) Where a risk is placed with an insurer by a broker which the insurer has directly or by implication accepted, the insurer shall, for purposes of subsection (1) be deemed to have received the premium thereon on the date on which the risk is so placed with tat insure, but notwithstanding this subsection, the broker shall remit the amount of premium to the insurer before the last day of the month next following that in which the risk commences.

Further the Court of Appeal held as follows in the case of Virani t/a Kisumu Beach Resort V. Pheonix of East Africa Assurance Company Ltd (supra) that;

“Ordinarily, a policy of insurance remains valid once issued and liability attaches despite non-payment of premiums, so that non-payment of a premium does not amount to a failure of consideration vitiating the contract of insurance. The only qualification to that general proposition of law is that the policy itself may provide that the failure to pay the premium would avoid liability for the insurer or the failure to pay the premium amounts in the circumstances to a repudiation of the contract.

Guided by the above decision and on the findings I have made on the evidence adduced i if find no merit in this appeal. The appeal is dismissed with costs to the 1st Respondent.

Orders accordingly.

Dated, signed and delivered this 16th Day of December 2014.

R. E. OUGO

JUDGE

In the Presence of:

.....**Appellant**

.....**1st Respondent**

.....**2nd Respondent**

.....**Court Clerk**