



**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL APPEAL NO. 19 OF 2004**

**TRIDENT INSURANCE CO. LTD.....APPELLANT  
VERSUS  
BHUPENDRA N. PATEL.....RESPONDENT**

**JUDGMENT**

Bhupendra N. Patel, the plaintiff/respondent herein filed a suit in the Chief Magistrate's Court Nakuru No.772/2001 for Kshs.163,158/- and costs which the defendant/applicant agreed to pay the respondent as damages resulting from an accident which occurred on 14/2/1997, when the respondent was traveling as a passenger in vehicle registration KAH 928R BMW which colluded with motor vehicle KYB 342B 758 lorry, as a result of which the respondent suffered injuries and was hospitalized. The amount was demanded by the respondent but the appellant declined to pay and that is when the respondent filed this suit.

In the statement of defence the appellant denied the contents of the plaint and stated that there was no enforceable contract between the respondent and the insurance company, the appellant herein, as there was no privity of contract and that even if the appellant had agreed to pay the sums claimed to the respondent, there was no consideration provided by the respondent. Lastly, that the appellant made payment to the Sabatia Saw Mills Ltd which took out the Group Insurance Policy through its agent, Falcon Insurance Agencies. The appellant indicated that it would seek leave to join Sabatia Saw Mills and Falcon Insurance Agencies Ltd as parties to the suit.

At the hearing, the plaintiff testified alone. He said that he is a past director of Sabaita Saw Mills. He recalled having been involved in an accident on 14/2/1997 along Naivasha/Nairobi Road. He was a passenger in KAH 928R BMW driven by his partner G. S. Patel. It collided with a stationary lorry after overtaking a matatu. He was admitted at Aghakan Hospital for 3 days and incurred expenses which totalled to Kshs.120,000/-. He handed over his documents to Jagir Singh of Falcon Insurance Agency though home Group Accident Insurance Policy was taken by Sabatia Saw Mill for the year 1/5/1996 to 30/4/1997. It was policy No. 07/P9500044 for which a premium of Kshs.25,589/- was paid. Two years after he made the claim, Jagir Singh informed him that the appellant had approved the claim and asked him to sign a piece of paper which he did (Exh.2) for Kshs.163,158/-. He told him to go after 2 months and when he went he found that Jagir had died. Jagir's son asked for time to pay but did not do so for 8 months and in 2000 he went to Trident Insurance to pay him (ex.4). He went to see the appellant who informed him that Falcon owed them money and he should pay. He said that the insured was Sabatia Saw Mills which conned the three directors. It was the respondent's contention that Falcon Insurance Agency was the agent of the appellant.

The defence called one witness, Leonard Mwaura Ndungu, a Senior clerk with the appellant. He denied that the respondent was ever insured by the appellant but Sabatia Saw Mills Ltd and the risk covered was Bhupendra N. Patel, Arkesh Patel and Gunjan Sombai Patel. He further testified that Sabatia Saw Mills paid premiums through Falcon Insurance Agency Ltd. He forwarded a discharge voucher for

Kshs.163,158/- (DEx.2) and that payments were made by credit note issued to Falcon Insurance Agency as settlement of the insurance claim by the respondent for Kshs.163,158/- (DEx.3). According to DW1 only Sabatia Saw Mills was entitled to make a claim from the appellant but not the respondent. He confirmed that the credit note was to Falcon Bureau of Insurance but not Falcon Insurance Agency.

DW2, Jeremy Obudo a Claims Supervisor with the appellant identified a copy of the policy to the court. It was his view that any claims had to be lodged by Sabatia Saw Mills but not the beneficiary of the policy. The court entered judgment for the respondent as against the appellant as prayed. But the appellant is aggrieved by the said decision and raised 13 grounds in its memorandum of appeal and prays that the appeal be allowed, judgment against the appellant be set aside and costs of both the appeal and Chief Magistrate's court be granted to the appellant.

Mr. Mahida, counsel for the appellant summarized the grounds during his submissions as follows:-

1. **That no cause of action was disclosed in the plaint (grounds 3-4);**
2. **That the trial court failed to consider the issue of privity of contract (grounds 5, 6 and 12);**
3. **That the trial magistrate erred on the issue of consideration (ground 7);**
4. **That the trial court erred in determining the issue of Law of Agency (grounds 8 and 9).**

The appeal was opposed and Mr. Githui, counsel for the respondent filed written submissions and also highlighted them in court.

This being the first appeal this court has the duty to evaluate the evidence afresh and come up with its own findings and conclusions on the facts on whether there was a cause of action disclosed in the plaint. Mr. Mahida urged that the plaint did not disclose any cause of action as paragraphs 1 and 2 only describe the parties, paragraph 3 states the facts but does not disclose any cause of action against the appellant, paragraph 5 is just a denial while 6 and 7 is a formal declaration that no other suit exists and 10, admits jurisdiction of the court. To the contrary Mr. Githui submitted that whether or not a pleading discloses a cause of action should be raised at the earliest time possible as was held in **Sabayyaga Farmers Co-Operative Society V. Mwitia 1969 EA 38**. That since the issue was raised when we only had pleadings when the court could have struck the pleadings out, evidence having been adduced, the court must look at the evidence. Mr. Githui urged the court to adopt the view espoused in the case of **Odd Jobs V. Mubia (1970) EA 476 and Vyas Industries V. Diocese of Meru (1987) KLR 114**, that issues canvassed in evidence with the full participation of all parties to the suit, the court can make a finding on them irrespective of the fact that such issue was not raised in the pleadings. In the submissions, before the trial court, the issue of whether or not a cause of action was disclosed was raised. The trial court considered that issue and made a finding. The trial court said:-

**“It is clear from the evidence on record that the defendants, according to their own admission, paid the amount under the policy. What caused the problem here was that they paid the amount to Falcon Insurance Agency and the payment was neither by cash nor by cheque but by credit note No. 87696011802. The amount was Kshs.163,158/-. The plaintiff had signed a discharge voucher for that amount but he never received the same. I am therefore satisfied that the plaintiff's claim as framed in the plaint filed in court is proper and competent and discloses a cause of action.”**

In **D.T. Dobie & Co. (K) Ltd V. Muchina (1982) KLR 1** the court held;

**“The words ‘cause of action’ means an act on the part of the defendant which gives the plaintiff cause of complaint.”**

In this regard, PW1 did accept that the three directors of Sabatia Saw Mills were the risk covered by the insurance and it was a personal accident policy and that if there was an accident resulting in injuries, the policy holder would be paid. The trial magistrate was satisfied that the plaintiff's claim as framed in the

plaint filed in court was proper and competent because it was based on the sum reflected in the discharge voucher which the respondent signed but which money he never received. I am in total agreement with the trial magistrate's finding that the plaintiff did disclose a cause of action based on the discharge voucher that the respondent had signed.

It is the applicant's contention that there was no privity of contract between the respondent and the appellant because the contract was between the appellant and Sabatia Saw Mills. Mr. Mahida added that the respondent had no right to claim from the appellant. In reply Mr. Githui argued that this was a personal accident cover, not a contract for indemnity and the contract provided for payment of a specific sum of money to a specific person upon the occurrence of an event. The defence witness (DW1) admitted existence of an insurance policy to cover the three directors of Sabatia Saw Mills, in the event of personal accident. The beneficiary of the contract was therefore the plaintiff. The author of **Halsbury's Laws of England Vol. 22 part 3 para.583**, states that:-

**“personal accident insurance is a contract to pay a sum of money on the happening of a specified event; namely the sustaining by the assured of personal injury by such accidental means as may be defined in the policy ...”**

Personal accident cover is different from general insurance where the insurer is obligated to return the insured in the shoes he was in before the event occurred, against which the insurance policy was taken. I do agree with Mr. Githui's submissions that being a contract for a specified amount to a designated person, privity of contract between the beneficiary and insurer can never be a requirement. In this case, it is Sabatia Saw Mills which took out the policy for the benefit of its three directors. Sabatia Saw Mills is a legal entity which would never have been insured against an accident. The argument that there was no privity of contract between the respondent and the appellant is therefore absurd.

Did the respondent provide any consideration, Mr. Mahida argued that the respondent never paid any consideration to avail him the right to claim. Without meaning to be repetitive, there was no dispute that Sabatia Saw Mills took out a personal contract insurance policy in favour of its three directors of which the respondent was one. The appellant has admitted that fact and even issued a payment voucher acknowledging the contract between the appellant and Sabatia Saw Mills. As observed earlier in this judgment, it was not an ordinary contract where the insured has to be the beneficiary. Once Sabatia Saw Mills paid the premiums that was sufficient consideration.

As to whose agents Falcon Insurance Agency was, the respondent specifically denied that they were acting as the respondent's agent. As pointed out by counsel for the respondent, that evidence was not corroborated. The contract entered into was between Sabatia Saw Mills and the appellant but the appellant made credit notes in favour of Falcon Insurance Agency instead of issuing the cheque to the beneficiary who was the respondent. The voucher clearly indicated that the injured person was the respondent (DEx.3). The defence witness, DW1, denied knowing who authorized payment to Falcon Bureau of Insurance and that Falcon Agency owed monies to the appellant. In the defence filed, the appellant indicated that it would join both Sabatia Saw Mills and Falcon Insurance Agencies Ltd as the person they made payments to but did not do so. The appellant made payments to its own agent and the agent did not pay the insured or beneficiary and that is the basis of the respondent's claim. I do uphold the trial court's finding that the respondent never received any money from Falcon Insurance Agency Ltd and that is why he had a right to claim from the insurer. If the appellant had any claim, then it needed to pursue Falcon Insurance Agency for a refund.

Under **Section 61** of the **Evidence Act**, a party to a suit need not prove a fact that has been admitted at the hearing. The existence of a policy was not in dispute. It was taken by Sabatia Saw Mills Ltd for the benefit of its three directors of which the respondent is one. The appellant issued a discharge voucher for Kshs.163,158/- in satisfaction of the claim made by the respondent after he was injured. There was no need for the respondent to call evidence to prove existence of those facts which existed. The only issue was whether the respondent was the correct person to claim the sum and whether he was actually paid.

After considering all the grounds of appeal, I come to the conclusion that the trial magistrate considered

all the facts and arrived at the correct decision. I uphold the said decision and hereby dismiss the appeal. The appellant will bear costs of the appeal and the lower court.

**DATED and DELIVERED this 28<sup>th</sup> day of March, 2012.**

**R.P.V. WENDOH**  
**JUDGE**

**PRESENT:**

Mr. Njuguna holding brief for Mr. Mahida for the appellant.

Mr. Githui for the respondent.

Kennedy – Court Clerk.