



## REPUBLIC OF KENYA

### High Court at Nairobi (Nairobi Law Courts)

#### Civil Appeal 131 of 2010

#### Editorial Summary

1. *Civil Appeal*
2. *Subject of Subordinate court case*

#### The Law of Insurance Contract

2.1 *Appellant/original plaintiff takes out an insurance policy with intention of covering his business equipment.*

2.2 *Insurance policy renewed for a further year from 1998 to 1999.*

2.3 *Theft occurs at business premises – namely a hall to show video movie cinemas.*

2.4 *Insurance investigations/assessors confirm theft occurred at premises BUT recommend repudiation of the insurance contract.*

2.5 *Reasons given to repudiate insurance policy contract is the policy taken was for domestic package and not commercial package.*

2.6 *Insurance company repudiates insurance policy but later offers 50% of the policy's worth.*

2.7 *Sum rejected by insured, who files suit.*

2.8 *No trial held by way of sworn evidence.*

2.9 *Parties agree on documents to be used together with submissions filed by consent.*

2.10 *Judgment by magistrate was to dismiss the suit on grounds that the policy taken out was a domestic policy not a commercial policy.*

2.11 *Being dissatisfied original plaintiff appeals.*

#### 3. *Appeal*

3.1 *The Hon. Magistrate erred in law and in fact in dismissing the plaintiff's suit contrary to the weight of the evidence and submissions.*

3.2 *... in entering judgment against the plaintiff in terms of counter-claim.*

3.3 *Letter dated 16<sup>th</sup> March 2000 by one Justus Gaita ... did not constitute written*

submissions of this representation on the part of respondent.

3.4 ...by the said letter dated 16<sup>th</sup> March 2000 did not bind the respondent, when in fact author of the said letter did not recant or disown it.

3.5 In selectively interpreting the contents of the said letter dated 16<sup>th</sup> March 2000.

3.6 ... in failing to take into account that the appellant was not the author of the text and language of insurance package.

4. Argument:

4.1 Insurance company through its representative clearly admitted by its letter of 16<sup>th</sup> March 2000 that it erred on the insurance policy issued to the appellant.

4.2 Claim for Ksh. 47,000/- being sum to be compensated for insurance lost

ii) Loss of income 13<sup>th</sup> march 2000 to 22<sup>nd</sup> January 2002 at Ksh. 700/- per month thereafter from 23<sup>rd</sup> January 2002 to date.

5. Respondent failed to attend court Order 42 r 20 (2) Civil Procedure Rules Applies.

6. Held:

6.1 No trial was conducted in subordinate court.

6.2 Facts require to be proved by way of trial.

6.3 Case remitted to the subordinate court to take down evidence on oath of the appellant and determine suit on both points of law and facts.

6.4 Order 42 r 26 Civil Procedure Rules applies.

7. Case Law:

8. Advocates :

i) G. Karungo instructed by M/s Walker Kontos & Co Advocates for appellant/original plaintiff

ii) A.W. Kimani instructed by A.W. Kimani & Co Advocates for respondent/respondent.

**GEORGE KINUTHIA**

**NDUNGU.....APPELLANT/ORIGINAL  
PLAINTIFF**

**VERSUS**

**BRITISH AMERICAN INSURANCE (K) CO  
LTD.....RESPONDENT/ORIGINAL DEFENDANT**

**(Being an appeal from the judgment and decree of Hon. S.N. Riechi Chief Magistrate in Civil Case  
No. 413 of 2002**

**dated 16<sup>th</sup> March 2010 at Milimani Commercial Courts)**

**J U D G M E N T**

**I. INTRODUCTION**

1. Order 42 rule 26 Civil Procedure Rules Cap 21 laws of Kenya reads:

***“If upon the hearing of an appeal it shall appear to the court to which the appeal is preferred that a new trial ought to be had, it shall be lawful for the said court, if it shall think fit, to order that judgment and decree shall be set aside, and that a new trial shall be had.”***

2. This court on appeal is of the view and duly thinks fit that the judgment and decree of the subordinate court be set aside and that a new trial be had.

3. The reasons given is as follows: the subordinate court case concerned the Law of Insurance contract. The appellant, one George Kinuthia Ndungu operated a video cinema business at Thogoto Trading centre. He insured his electronic equipment with the respondent M/s British American Insurance Co Ltd for a sum valued at Ksh. 47,000/- for a period of 24<sup>th</sup> April 1999 to 23<sup>rd</sup> April 2000.

4. A burglary occurred at his business premises and the electronics stolen. He is alleged to make claim. The insurance assessors sent to investigate the claim confirmed the electronics were stolen but on perusal of the insurance policy noted that it was for a domestic package. The electronic not being at the appellant’s residence, they recommended that the claim should not be honoured.

5. Being aggrieved, the appellant filed suit on 23<sup>rd</sup> January 2002 claiming the sum assured of Ksh. 47,000/- being his entitlement as compensation for the loss of his electronics. He later amended his plaint to include the loss of earnings he incurred from 13<sup>th</sup> March 2000 to 22<sup>nd</sup> January 2002 when he filed suit. Then from 23<sup>rd</sup> January 2002 to date at the rate of Ksh. 700/- per day.

6. The respondent filed defence and later counter claim.

## **II PROCEDURE**

7. The parties agreed on documents that would be relied on and admitted to court. They further written submissions and authorities. The trial magistrate came up with a judgment in which he dismissed the suit stating that a domestic package was taken out instead of a commercial package for the appellant’s business. This therefore means that the insurance company had a right to repudiate and or rescind the insurance policy and not pay for it.

8. Upon perusal of the lower court proceedings, this court noted that at no time did the appellant/plaintiff give evidence on facts. He was never put on the witness box nor cross examined by the other party. The respondent’s/defendants also did not call evidence nor put a witness on their behalf in the witness box nor call evidence to prove their counter claim.

9. The appeal challenges the judgment on facts allegedly proved before the subordinate court. Those facts are missing.

10. In preparing for a trial in civil cases parties are permitted to agree on documents. These documents are put in without calling the maker thereof. The plaintiff nonetheless must give evidence on oath and produce the documents to court. He or she must then be subjected to cross examination.

11. He need not call witnesses if the statements and or documents have been agreed to be documents admitted as genuine and true.

12. There was admission by the respondent’s representative that the wrong policy document had been put and or forwarded to the appellant. No judgment or admission had been applied for. There was alleged that an offer to pay 50% of sum insured was made. No judgment or admission had also been made.

13. The fact that no trial had been held renders the judgment unsustainable. Written submission are not a substitute to evidence required to be called to court.

14. A trial is to be conducted under Order 18 Civil Procedure rules (formerly Order VII r 1&2 Civil Procedure Rules) whereby an opening address is given, the party beginning in this case the plaintiff would give an opening address and call evidence (witnesses). If other party (defendant) does not call evidence then the party beginning (plaintiff) would submit and the other party (defendant) replies. If there are case law quoted, the party beginning (plaintiff) would have a right of reply. If no cases are quoted, the party beginning (plaintiff) would have no right of reply.

15. If the other party (defendant) calls evidence. He is the one who would begin to submit and the party beginning (plaintiff) would reply. Thereafter there would be no right by the defendant.

16. Where submissions is mentioned, this may be mentioned but exchanged in advance. The following above format be followed at all times.

17. The purpose of agreeing on documents, agreed issues and authorities is to shorten the time a trial should taken.

18. In this appeal, a lot of effort has been put on the point of law with very good authorities and text books relied on. The facts are lacking.

19. This appeal is allowed, the judgment is set aside and under Order 42 r 26 Civil Procedure Rules, this court orders that a new trial shall be had.

### **IN CONCLUSION**

20. The costs of this appeal is awarded to the appellant/original plaintiff. The costs in the subordinate court is to abide the new trial.

DATED THIS 13<sup>th</sup> DAY OF JUNE 2012 AT NAIROBI

**M.A. ANG'AWA**  
**JUDGE**

*Advocates* :

- i) *G. Karungo instructed by M/s Walker Kontos & Co Advocates for appellant/original plaintiff*
- ii) *A.W. Kimani instructed by A.W. Kimani & Co Advocates for respondent/director*