



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Appeal 155 of 2006

JAMES NJOGU MUOGI.....PLAINTIFF/APPELLANT

-AND-

GATEWAY INSURANCE CO. LTD.....DEFENDANT/RESPONDENT

*(An appeal from the Judgment of Principal Magistrate Miss. H. N. Ndung'u delivered on 14<sup>th</sup> September, 2006 in CMCC No. 1020 of 2003*

*at Mombasa Law Courts)*

JUDGMENT

The Plaintiff/Appellant, by amended plaint of 18<sup>th</sup> May, 2004 had sued the respondent herein, seeking special damages (Kshs. 256,650/=), general damages for breach of contract, and costs of the suit with interest.

The plaintiff's case was that he was the owner of the "suit motor vehicle", Reg. No. KAK 038, and he had an insurance cover for it with the respondent herein.

The said motor vehicle was involved in an accident on 19<sup>th</sup> March, 1993 causing injury to three persons who obtained a decree for payment of damages. It was the evidence of the appellant herein that the respondent failed to pay up the full decretal sum, as auctioneers attached the suit motor vehicle and sold it.

The evidence given for the respondent herein was that the respondent had, indeed, issued the appellant with a commercial motor vehicle insurance policy; and one of the conditions was that if the insured was involved in an accident, he was to pay an excess of Kshs. 10,000/=. The defendant tendered evidence that the plaintiff had failed to pay the excess as required, but **had paid** it in a staggered time-frame running to three years.

Evidence was also given for the respondent herein that it was a condition of the insurance policy that in the event of a dispute between the parties, the matter would go to arbitration (only where liability was admitted, and quantum alone remained outstanding). Evidence was tendered for the respondent herein that, as between the parties, there had been an earlier suit, HCCC No. 519 of 1993 and the liability which it established, was paid off by the respondent, and the matter settled on **27<sup>th</sup> June, 1996**. This settlement was arrived at after the appellant's motor vehicle was attached on **9<sup>th</sup> December, 1995** and it was sold by public auction. The valuation of the said motor vehicle was only done in **2004**, and the report does not state the value as at 1995. The valuation, given as Kshs. 50,000/=:, was as at 2004. It was the respondent's evidence that "it is not possible for an insurance company to pay a claim before [the] excess is settled".

The findings made by the learned Magistrate were as follows: the respondent had issued the appellant with a commercial vehicle policy; an accident involving the said motor vehicle took place on 19<sup>th</sup> March, 1993; the respondent was notified; the respondent called upon the appellant to pay the excess, according to the relevant policy condition (Kshs. 10,000/=); but the appellant did not pay the full amount of the excess; although the respondent ultimately paid the decretal sum in HCCC No. 519 of 1993, they were under no obligation to pay the claim, because the appellant did not pay the excess; the respondent had only paid the injured persons on humanitarian grounds, after execution warrants were issued against the appellant herein.

From the foregoing outline of facts, the trial Court proceeded to make its determination as follows:

***“After carefully weighing all the evidence, I am unable to find that the plaintiff has established the claim. He himself breached condition 2 of the policy in that he failed to pay the excess required, or rather, paid it in bits over a [three-year] period, and [even though] the insurance company subsequently [paid].....Kshs. 446,672 [in respect of] the judgment in HCCC [No.] 519 of 1993, this was purely on humanitarian grounds. He cannot turn around and sue the insurance company for an alleged breach of contract, whereas he was the person in breach of contract. And ....I also add that although the plaintiff claims special damages in the amount of Kshs. 256,650/=, the Court is not at all told how this amount is made out.....[The] plaintiff’s evidence on record does not....disclose how this amount is made up.....***

***“And on the claim for breach of contract, I find that the plaintiff is not entitled to any payment .....for his own actions.....constituted a breach of contract. The defendant had thereafter no obligation at all to pay and if [they] did pay as we are told they did.....on humanitarian grounds [then] their so doing is commendable”.***

The plaintiff’s case was dismissed, and he now appeals on grounds stated as follows:

- (a) that the learned Magistrate erred in law in dismissing the suit, as the evidence was overwhelmingly in favour of the plaintiff;***
- (b) that it was in error, as a matter of law, for the trial Court to come to the conclusion that failure to pay the excess on the policy, predisposed the suit to fail;***
- (c) that the learned Magistrate should have come to the conclusion that the plaintiff proved his case on a balance of probability;***
- (d) that the learned Magistrate should have held that the respondent herein had the duty to make payment, save that the respondent could debit the amount by the figure attributable to the excess.***

Learned counsel for the appellant submitted that the trial Magistrate had failed to appreciate the appellant’s evidence and had, consequently, come to the wrong conclusion: the appellant had reported the accident, in which two persons died; the appellant had been asked to pay the excess; the excess was paid, albeit by instalments; the respondent undertook to pay, but paid belatedly, only after the appellant’s motor vehicle had been attached and sold.

Counsel submitted that it was an erroneous conclusion on the part of the trial Court, to hold that the appellant was in breach of the insurance contract by not paying the excess. It was submitted that by the terms of the policy, if the excess was not paid, then the insurance company pays and later deducts that payment from any amount to be released under the policy.

Counsel further submitted that the respondent had not Sought from the Court a declaration that it was not bound to satisfy the decree.

Counsel brought to the Court’s attention the terms of the governing insurance policy; with regard to the payment of excess, para. 5 thus states:

***“If the expenditure incurred by the Company shall include the amount for which the insured is responsible hererunder such amount shall be repaid by the Insured to the Company forthwith”.***

On the terms of the foregoing provision in the policy, counsel urged that “even without payment of the excess the agreement was still binding”. It was submitted that, by the policy document, the respondent cannot fail to pay: “It was upon them to pay and [then] deduct what was due from the appellant”.

Counsel submitted that the evidence showed, that the appellant had acted on the basis of instructions by the respondent; but there was no time when he had been told the respondent would not pay the claim. Counsel thus stated the underlying principle in insurance contracts: “Insurance companies have a duty to [their] insured, and must act in the best interests of their insured, in accordance with the policy.”

Counsel asked that the judgment of the Court of first instance be set aside, and judgment entered for the appellant for: Kshs. 256,650/= (special damages); Kshs. 198,000/= (loss of use); Kshs. 300,000/= (damages for breach of contract); costs.

The basis of most of the suggested figures in damages is set out in the appellant’s written submissions of 10<sup>th</sup> August, 2006 before the trial Court. In that document of submissions, learned counsel, **Mr. Odiaga** had thus submitted : the defendant had paid the decretal sum after the suit motor vehicle had been attached and sold; this was evidence that the defendant was contractually obligated to pay, under the insurance policy; the payment was not a humanitarian gesture, nor a public relations exercise; the defendant could not fail to pay even if the appellant herein failed to pay the excess payment; the defendant should not have waited until the suit motor vehicle was attached and sold, before making the payment; the defendant, by delaying payment, was in breach of contract; special damages should be paid by the defendant.

The respondent, by written submissions, reiterated its submissions made before the trial Court: that the respondent had been entitled to repudiate the insurance contract, but it chose not to do so; that the appellant had been in breach of contract by not paying the

insurance excess; that “if at all the plaintiff’s goods were sold, it was not due to the defendant’s negligence or failure, as the plaintiff ought also to have salvaged his commodities”; the respondent “is not liable and responsible for the plaintiff’s predicament or loss”.

Upon reviewing the evidence before the trial Court and the findings of the learned Magistrate thereupon, and upon evaluating the submissions by learned counsel, I have come to the conclusion that the whole question turns on the requirement of law attached to the **insurance contract** between the appellant and the respondent. Entering into the contract was not a social engagement, but the basis for contingent **legal liabilities** which could come to pass, in the event of an accident. When such a motor accident took place on 19<sup>th</sup> March, 1993, the obligations of the insurance contract were immediately engaged, requiring the insurance company to pay up for the emerging liabilities. Rather than perform its duty under the insurance policy, the respondent herein engaged in unnecessary dilatoriness, occasioning considerable prejudice to the appellant.

I am not in agreement with the respondent’s case, that the fact that the appellant had not yet paid the excess amount was a failure that had the effect of annulling the insurance contract: that is a strained interpretation of para. 5 of the insurance policy, and I reject it.

The outcome of the suit should have been in favour of the appellant; and so I hereby allow the appeal, and make the following specific orders:

- (1) The respondent shall pay general damages to the appellant in the sum of Kshs. 250,000/=, the same to bear interest at Court rate as from the date hereof, until payment in full.**
- (2) The respondent shall pay to the appellant special damages in the sum of Kshs. 256,650, bearing interest at Court rate as from the date of the judgment of the Court of first instance, until payment in full.**
- (3) The respondent shall pay to the appellant, for loss of use of motor vehicle, Kshs. 198,000/= and the same shall bear interest at Court rate as from the date of the judgment of the Court of first instance, until payment in full.**
- (4) The respondent shall pay the appellant’s costs for the original trial, and the same shall bear interest at Court rate as from the date of filing suit, until payment in full.**
- (5) The respondent shall pay the appellant’s costs for the appeal, and the same shall bear interest at court rate, as from the date of lodging the appeal, until payment in full.**

**Decree accordingly.**

**DATED and DELIVERED at MOMBASA this 2<sup>nd</sup> day of July, 2010.**

**J. B. OJWANG**

**JUDGE**

Coram: *Ojwang, J.*

Court Clerk: *Ibrahim*

For the Appellant: *Mr. Oddiaga*

For the Respondent: