



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL APPEAL NO. 82 OF 2000
INSURANCE COMPANY OF EAST AFRICA
LTD.....APPELLANT

VERSUS

NDAMBUKI KISAU.....RESPONDENT

J U D G E M E N T

This is an appeal against the judgement of the Principal Magistrate Machakos in PMCRC 970/99 which was delivered on 8.8.2000. Judgement was entered for the respondent (plaintiff) against the appellant (defendant) for Kshs.403,500/=. The claim arose out of a material damage to the respondent's motor vehicle KAB 216K which had been involved in a road traffic accident and had been insured by the appellants.

The respondent was the plaintiff in the lower court. It was the respondent's case that on 26.4.1999 he insured his motor vehicle KAD 216K, amongst other vehicles, against 3rd party risks with ICEA Ltd through Jovimu Brokers. He was issued with a certificate of insurance which was produced in that court as exhibit No. 2, C 179886. The policy commenced on 26.4.1999 and was due to expire on 25.4.2000. He was issued with a policy document produced as exhibit no.3. He paid Jovimu Brokers the sum of Kshs.66,30/= on 25.9.1999 as per (exhibit no. 1) a receipt from Jovimu to cover all the respondent's vehicles insured including the subject motor vehicle. The subject motor vehicle was involved in an accident on 17.7.1999 as evidenced by the abstract (Exhibit no. 4) and the respondent lodged a claim with the appellant Insurance Company. The respondent took the motor vehicle to motor vehicle assessor and damage to the vehicle was assessed at kshs.668,145/85. The vehicle was declared a write off and salvage was valued at kshs.120,000/=. The pre-accident value of the vehicle was put at Kshs.450,000.00.

The appellant who was the defendant in the lower court agreed to have done business with Jovimu Brokers whereby Jovimu would be issued with certificates of insurance on credit for 60 days. Jovimu obtained a cover for the respondent which was issued on 26.4.1999, the respondent failed to pay the premiums as evidenced by the letter from Jovimu brokers to the appellant dated 12.8.1999 in which the brokers instructed the appellants not to honour the claim by the respondent as no premiums had been paid by the respondent (Dex1).

The policy was cancelled on 13.9.1999 but on 21.9.1999 the brokers attempted to pay the premium by cheque but the cheque was dishonored. The bank statement DEX 4 was evidence of the dishonor. Though a policy document was issued the respondent never filed the proposal form and it is the appellant's contention that no insurance contract was entered into by the parties. The magistrate after hearing the case found in favour of the respondent and the appellants were aggrieved by that judgement and it prompted this appeal. The appellant relied on five grounds of appeal which I will consider in the judgement.

The first and 2nd grounds were argued together the gist being whether there was a valid contract of

insurance between the respondent and appellant upon which the appellant could be called upon to compensate the respondent.

The respondent approached Jovimu Brokers for an insurance cover. Respondent was issued with an insurance certificate of insurance on 26.4.1999 and a policy document was also issued. The respondent paid his premiums to Jovimu Brokers on 20.9.1999 and yet the accident upon which the claim is made occurred on 17.7.1999. The Insurance brokers issued a cheque in respect of the premiums on 21.9.1999 but the same was dishonored as evidence by the bank statement DEX 4. By the time claim by the respondent arose on 17.7.1999 no premiums had been paid to the appellants. The certificate had been issued over 2 ½ months earlier. Under section 156(2) of the insurance Act, a broker will normally be given 60 days credit period within which to pay the premium to the insurance company. The 60 days credit period had expired on 25.6.1999 3 weeks before the accident. In insurance contracts, premiums provide the consideration required for conclusion of a contract. There was no consideration that had passed in this contract and so the purported contract had not been concluded. The respondent had failed to perform his part of the contract. Did the appellants notify the respondent of the cancellation of the policy. The appellants claim to have cancelled the policy by their letter to the respondents dated 12.8.1999 (DEX no. 1). In that letter Jovimu Brokers were informing the appellants to stop processing the respondent's claim as premium was not paid up. At page 34 of record of appeal at clause 10 is a provision on cancellation of an insurance contract by an insurer. The policy is cancelled by the company sending a 7 days notice by registered letter to the insured at his last known address.

In this case it is clear from the letter of 13.8.2001 addressed by the appellants to Jovimu that the respondent had never filled the proposal form and there were no details about him and they addressed the letter to Jovimu brokers as their address was indicated as the respondents last known address. Page 39 of record of appeal notice which is the schedule to the policy document, shows the address of the respondent as box 53951 Nairobi which is the same address at page 41 and 52 of the record of appeal which is the address appearing on letter heads of Jovimu brokers. Though this was the brokers address, it was the last known address of the respondent and a proper notice of cancellation of the policy was given by the appellants as required by the proposed terms of the contract.

Even after the policy was cancelled by letter dated 13.8.1999 the brokers issued a cheque dated 21.9.1999 which they accepted and banked. Unfortunately the cheque was dishonored. The question is why would the appellants accept the cheque while the credit period had expired and cancellation made. Under section 156(5) of the insurance Act the parties can agree to extent the 60 days credit period. I believe this is what the appellants were trying to do but on the cheque being dishonored the appellants disclaimed liability which was properly done as there was no substituting contract for want of consideration.

The lower court found that Jovimu brokers were the agents of the appellants whereas the appellants deny it. It is the insured who approached the brokers for a policy and the brokers issued the certificate on behalf of the appellants immediately. It is the appellants view that if the respondents were unhappy with the brokers they could have cancelled the policy and moved on to another. On the other hand the respondents are of the view that issue of agency is irrelevant since the principle who are the appellants were disclosed and once that happens the agent drops out of the picture and that the respondent had paid the premium and it is the brokers who failed to forward it to the appellants (principal.) As earlier noted no premium was paid to the appellants either by brokers or the respondent. In agency contracts, once the principle is disclosed, the agent drops out of the picture. In this case however the brokers never dropped out of the scene. The respondents had used the brokers address. It is the broker who received money from respondents and continued to communicate with the appellant. It is the brokers who informed the appellants to cancel the policy for non payment of premiums and later asked them to accept payment and later issued a cheque to appellants that was dishonored by bank. So whose agent was Jovimu brokers? In support of the contention that Jovimu brokers were agents of the insured (respondents) the appellant relied on the case of *ANGLO AFRICAN MERCHANTS LTD VERSUS BAILEM* 1969 ALL ER 421 where at page 428 the judge restated what the law is in regard to whose agent the broker is. At paragraph D he stated as follows "in all matters relating to the placing of insurance, the insurance broker is the agent of the insured and the assured only. I do not think that that proposition of law has ever been in doubt amongst lawyers."

Extracts from Halbury's law of England v25 at paragraph 397, the law relating to brokers is also stated which is that if one wishes to obtain insurance of a non marine character he employs an insurance broker as distinct from going to the insurers directly or their agents. It further states that the broker is the insured's agent and the ordinary law of agency governs their relationship. From the extract and authority cited there is no doubt whose agent the broker is. The agent on the other hand transacts business for the insurance company. Paragraph 710 of Halburys laws of England Vol. I confirms this. Whatever the witness from the appellants company told the court about the arrangement the brokers had with the appellants, the brokers remained the agents of the insured. It is the brokers who failed to remit the insurance premiums to the appellants even after the appellants seemed to have waived their notice of cancellation of policy and the appellants could not be blamed for failing to honour the terms of contract. The respondents could not sue the insurance company alone. They should have sought indemnity from their agent – the brokers and should have therefore enjoined them to the suit.

The trial magistrate found that the salvage belonged to the appellant because Jovimu had directed them to take the vehicle to associated motors. As earlier noted Jovimu brokers were the agents of the insured and the directions they gave were on behalf of the insured. Further the policy document at paragraph 6 on page 33 of the appeal provides that in the event of a motor vehicle being declared a total loss the insurance company will indemnify the insured less the salvage value. It further provides that the insured will not abandon any property to the company except at the company's discretion and there must be a consent as to the surrender of such property to the company before the settlement. This means that the salvage was the respondents property unless the parties agreed that the insurance company could remain with the salvage. There was no such agreement. The trial magistrate in making his award should have made the award less the salvage of Kshs.120,000/=. This is because in insurance business, the insured in being indemnified, should only be put back in the shoes that he was in before the loss. It was an error for the court to find that the salvage belonged to the appellants.

In the policy document, there is a clause, paragraph 3 (page 3) which provides that if the insurer makes a settlement, the company is entitled to recover the sum indicated in the excess clause which was 5% of the insured estimate of the vehicle value stated in the policy. At page 433 of General principles of Insurance by Hardy & Ivamy, it is indicated that excess clauses are meant to relieve insurers of minor accident claims. In this case the respondents concede that excess should have been paid by the respondent but that the issue was not raised in the lower court and cannot be raised at this stage. I do find that the magistrate should have considered the issue of payment of excess by respondent.

It had been pleaded at paragraph 7 of the plaint filed in the lower court, that the respondent had fully met all the conditions of the policy before the certificate of insurance was met.

This court has found that conditions of the policy were not met as regards the appellants and the respondents should have enjoined the brokers as a party to the suit who were partially to blame for respondents failure to meet the conditions of the policy of insurance. The sum of this is that the appeal is allowed, judgement of the lower court is set aside with costs to the appellants and appellants will also have costs of this appeal. Dated, read and delivered at Machakos this 14th day of June 2004.

R. WENDOH

JUDGE