Directline Assuarance Company Limited v Okwanyson & another (Civil Appeal E133 of 2023) [2024] KEHC 5285 (KLR) (17 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5285 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E133 OF 2023

RE ABURILI, J

MAY 17, 2024

BETWEEN

DIRECTLINE ASSUARANCE COMPANY LIMITED ..... APPELLANT

AND

ELIJAH OMOLLO OKWANYSON ..... 1ST RESPONDENT

NILAM ENTERPRISES ..... 2ND RESPONDENT

(An appeal arising out of the Judgement of the Honourable D. Ogoti in the Chief Magistrate's Court at Kisumu delivered on the 6th July 2023 in Kisumu CMCC No. 561 of 2018)

JUDGMENT

Introduction

1. Vide a plaint dated 21.11.2023, the 1st respondent Elijaha Omollo Okwanyson sued both the appellant and 2nd respondent seeking specific performance of a contract as well as loss and damages that included loss of daily income at Kshs 50,000, failure to service loan for motor vehicle registration no KCM 495J coupled with the interest and penalties on the aforementioned loan.

2. It was the 1st respondent's case that he entered into a contract for a comprehensive insurance cover for his motor vehicle registration number KCM 495J with the appellant and that on the 23.4.2018, the said motor vehicle was involved in an accident. The 1st respondent testified that he informed the appellant who gave him a list of garages to choose from by the appellant and that he chose the 2nd respondent to do the repair works. He further testified that he was then informed by the appellant to pay an excess fee of Kshs 135,000 and complete paying premiums for the year which he did. It was the 1st respondent's testimony that following instructions from the appellant's assessor, the appellant opted to have the suit motor vehicle repaired rather than replaced as suggested by the 1st respondent.

3. It later emerged from the 1st respondent's case that the 2nd respondent repaired the suit vehicle using a nose cut which had a different chassis number to that of the suit vehicle and further that the 2nd respondent did not follow the right procedures with the relevant authorities in having the different nose-cut registered. As a result, the repaired suit vehicle was deemed not to be usable on the roads by the relevant authorities.

4. In support of its case, the appellant called two witnesses, DW1 Judith Wambua a Senior Claims Officer and DW2 Thomas Mireri Onduso, the appellant's internal motor assessor. DW1 reiterated the 1st respondent's testimony and further stated that the appellant told the 2nd respondent to repair the suit vehicle. It was her testimony that at the end of the repairs, the appellant was to sign a satisfactory note which it did. It was her testimony that the appellant authorised the nose cut of the vehicle and that the resultant scrap was collected on its behalf. She testified that the 2nd respondent informed them that he did not import the nose cut but purchased it.

5. DW2 testified that he inspected the repaired suit vehicle and found a problem with the chassis number and advised both the appellant and repairer not to release the vehicle till the issue was sorted. He further testified that it was the mandate of the repairer to seek authority of the Directorate of Criminal Investigations, DCI, so that the vehicle could be used on the roads. In cross-examination, DW2 reiterated that it was an industry practice for the owner of the garage to seek authority of the DCI. He further testified that the appellant wrote the letter to the 2nd respondent to effect the repairs on the damaged suit motor vehicle. He further testified that the 1st respondent was not directed to any specific garage but that he chose the garage of his choice.

6. DW3 Nilesh Patel testified on behalf of the 2nd respondent. It was his testimony that he was the director of the 2nd respondent. It was his testimony that the appellant took the suit vehicle to their garage for repairs and after the 2nd respondent's quotation on the costs of repair and works to be done, the 2nd respondent received the appellant's authority to effect the repairs including the nose cut vide a letter dated 18.6.2018 from the appellant's claim's department which was produced as Exh 7.

7. It was DW3's testimony that the chassis number was completely damaged during the accident and that the importation documents of the nose cut contained a chassis number which the assessors were aware of. He testified that there were only two options, to write off the vehicle or do the nose cut. According to him, the owner of the vehicle and the insurance are the ones who were to ensure that those changes ere effected. He further testified that the repairs that he carried out were done under the express instructions of the appellant and not the 1st respondent.

8. In cross-examination, DW3 reiterated that the instructions to repair the vehicle came from the appellant and that they had been repairing vehicles for the appellant to date. He further testified that the 1st respondent was never informed that the vehicle had a new chassis number. He further testified that he went to the DCI office concerning the change of chassis number but was directed to the NTSA.

9. In his judgement, the trial magistrate found that the 1st respondent was entitled to damages for loss of user having produced records of his daily income and expenses. The trial magistrate further found that the appellant was liable to shoulder damages for the loss of user as the contract for repair was between itself and the 2nd respondent to the exclusion of the 1st respondent.

10. Aggrieved by the said judgment, the appellant filed a memorandum of appeal dated 27th October 2023 raising the following grounds of appeal:

    a. The learned magistrate erred in law and fact in holding that appellant was 100% liable contrary to evidence on record and in particular testimony by plaintiff on cross-examination.

b. The learned magistrate erred in law and fact by making a determination to the effect that 1st defendant was liable to pay for loss of use despite the same being contrary to/and an exclusion to the policy provided to the 1st respondent and a direct exclusion to the contract thereto.

c. The learned magistrate erred in law and fact by making a determination to the effect that appellant was liable to pay damages in loss of use despite the appellant not being in charge of correcting the chassis number hence absolving the 2nd respondent who changed the chassis number contrary to instructions.

d. The learned magistrate erred in law and fact by awarding damages in loss of use, which are special damages despite the same not being proved.

e. The learned magistrate misapprehended the nature of contract between parties that there was a contract between the 1st and 2nd defendant to the exclusion of the plaintiff.

f. The learned magistrate erred in law and in fact in holding the 1st respondent was a stranger to the contract between the appellant and 2nd respondent.

11. The parties filed written submissions to canvass the appeal but Counsel for the 2nd respondent stated that he would not file any submissions.

The Appellant's Submissions

12. On behalf of the appellant, it was submitted that following the 1st respondent's admission in cross-examination that he chose the 2nd respondent company showed that the agreement between the parties was between the respondents and further that the 1st respondent blamed the 2nd respondent for not furnishing him with the right documents to clear with NTSA and thus the trial court erred in holding the appellant soley liable.

13. The appellant further submitted that the contract for repair between itself and the 2nd respondent could not be enforced against any party without including the 2nd respondent and thus the trial court erred in holding the appellant liable.

14. It was further submitted that the notebook produced by the 1st respondent as proof record of monies earned per month cannot amount to proof of special damages and as such, the trial court erred in awarding the said damages. Reliance was placed on the case of *Richard Okuku Oloo v South Nyanza Sugar Co. Ltd* [2013] eKLR where it was held inter alia that:

> "a claim for special damages must be specifically pleaded and proved with a degree of certainty and particularity but that the degree and certainty must necessarily depend on the circumstances and nature of the act complained."

15. The appellant submitted that the principal remedy under common law for breach of contract was an award of damages with the purpose being to compensate the injured party for the loss suffered rather than to punish the breaching party in very limited circumstances.

16. It was further submitted that awarding both general and specific damages as was done by the trial court amounted to double compensation and that the award stated by the plaintiff was extravagant, baseless and did not meet the threshold of strict proof of specific damages.

The 1st Respondent's Submissions

17. The 1st respondent's counsel submitted that he concurred with the trial court's holding that a contract only affects the parties to it and thus despite the fact that it was held that the 1st respondent had selected the 2nd respondent as the garage where repairs would be carried out, he was not a party to the contract for repairs entered into between the appellant and the 2nd respondent. It was further submitted that it was clear that there was an agency relationship between the appellant and the 2nd respondent.

18. The 1st respondent further submitted that the actions of the 2nd respondent in changing the identity of the suit motor vehicle fell within the scope of its authority to repair the suit vehicle and therefore the authorizing party could be deemed to be the principal and therefore bound by the acts of the 2nd respondent.

19. The 1st respondent submitted that he did not raise an issue of consequential loss before the trial court but rather one of special damages in respect of the Kshs 10,000 loss of daily income as evidenced by his daily records produced as exhibits.

20. It was further submitted that the instant appeal ought to have been directed against the 2nd respondent as most of the grounds raised therein relate to the trial court's failure to hold the 2nd respondent liable.

Analysis and Determination

21. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own independent conclusions. This, I have done as above bearing in mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. In *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, the court stated as follows:

> "This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

22. In that regard, an appellate court will only interfere with the judgment of the lower court, if the said decision is founded on wrong legal principles. That was the holding of the Court of Appeal in *Mkube v Nyamuro* [1983] LLR at 403, where Kneller JA & Hancox Ag JJA held that-

> "A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion."

23. Having considered the Appellant's Grounds of Appeal and the parties' Written Submissions as well as the evidence adduced by the parties, I find the issues for determination to be:

    i. Whether or not the finding of the appellant to be100% liable was fair and reasonable in the circumstances of this case.

    ii. Whether or not the 1st respondent was entitled to the award of loss of use.

    iii. what orders should this court make?

Liability

24. On liability, In *Khambi and Another v Mahithi and Another* [1968] EA 70, it was held that:

> "It is well settled that where a trial Judge has apportioned liability according to the fault of the parties his apportionment should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous, and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge."

25. In *Isabella Wanjiru Karangu v Washington Malele* Civil Appeal No. 50 of 1981 [1983] KLR 142 and Mahendra M Malde v George M Angira Civil Appeal No. 12 of 1981, it was held that apportionment of blame represents an exercise of a discretion with which the appellate court will interfere only when it is clearly wrong, or based on no evidence or on the application of a wrong principle.

26. It is established law that he who alleges must proof. The term burden of proof draws from the Latin Phrase *Onus Probandi* and when we talk of burden we sometimes talk of onus.

27. Burden of Proof is used to mean an obligation to adduce evidence of a fact. According to *Phipson on the Law of Evidence*, the term 'burden of proof' has two distinct meanings:

    1. Obligation on a party to convince the tribunal on a fact; here we are talking of the obligation of a party to persuade a tribunal to come into one's way of thinking. The persuasion would be to get the tribunal to believe whatever proposition the party is making. That proposition of fact has to be a fact in issue. One that will be critical to the party with the obligation. The penalty that one suffers if they fail to proof their burden of proof is that they will fail, they will not get whatever judgment they require and if the plaintiff they will not sustain a conviction or claim and if defendant no relief. There will be a burden to persuade on each fact and maybe the matter that you failed to persuade on is not critical to the whole matter so you can still win.

    2. The obligation to adduce sufficient evidence of a particular fact. The reason that one seeks to adduce sufficient evidence of a fact is to justify a finding of a particular matter. This is the evidential burden of proof. The person that will have the legal burden of proof will almost always have the burden of adducing evidence.

28. Section 107 of *Evidence Act* defines Burden of Proof as– of essence the burden of proof is proving the matter in court. subsection (2) Refers to the legal burden of proof.

29. Section 109 of the *Evidence Act* exemplifies the Rule in Section 107 on proof of a particular fact. It is to the effect that the burden of proof as to any particular fact lies on the person who wishes to rely on its existence. Thus, whoever has the obligation to convince the court is the person said to bear the burden of proof. In the premises, if one does not discharge the burden of proof then one will not succeed in as far as that fact is concerned.

30. The question therefore is whether the trial court was right to hold the appellant 100% liable for the loss allegedly suffered by the 1st respondent.

31. The evidence before the trial court was clear that the appellant entered into an agreement with the 2nd respondent for repair of the 1st respondent's motor vehicle. This was the testimony of DW1 and DW2 that the appellant authorised the 2nd respondent to carry out the repairs on the suit vehicle. DW3 similarly testified on this and further stated that prior to commencing the repair works, he sought

authorization from the appellant and even did a quotation on what the repair works entailed and that subsequently, the same was authorised by the appellant through a letter by its claims manager.

32. DW3 testified that he attempted to get clearance from the DCI regarding the chassis number issue but was redirected to the NTSA after which it seems he abandoned this pursuit and opted to lay this burden on the appellant and the 1st respondent.

33. From the above evidence of DW3, it is acknowledged that indeed, in the course of the repairs of the subject motor vehicle, the 2nd respondent had to ensure that the new chassis number was cleared with the relevant authorities before the repairs could be deemed to be complete as the 1st respondent could not use the vehicle on the road with a different chassis number from the one that it had prior to the accident. DW2 also testified that it was industry practice for the repairer of the vehicle in such instances to seek such clearance from relevant authorities.

34. I have considered the evidence tendered before the trial court and note that the appellant herein entered into a contract with the 2nd respondent for repair of the suit vehicle. This was after turning down the 1st respondent's idea of getting him a new car and after requiring the 1st respondent to make an excess payment of premium on the comprehensive cover and further complete his premium payments. This simply means that matters to do with the restoration of the suit vehicle back to the position that it was prior to the accident fell on the appellant and the 2nd respondent. Accordingly, issues to do with liability on any loss suffered by their misdeeds would have to be determined between themselves to the exclusion of the 1st respondent.

35. It therefore follows that the argument by the 2nd respondent that the appellant authorised all the repair work and thus was aware of the import and installation of the nose cut does not in my view absolve the 2nd respondent from liability as the agent of the appellant. This is not to say that the 1st respondent is enforcing the contract between the appellant and the second respondent, a contract that he was not party to, but that that as earlier herein stated, the 2nd respondent testified that he attempted to get clearance from the DCI but was redirected to the NTSA, which paints a picture of one who simply absconded his duties and instead passed the buck to the appellant and the 1st respondent. The effect of this finding is that the appellant can compensate the 1st respondent for the loss and claim part of it from the 2nd respondent, not that the 1st respondent will be required to pursue the 2nd defendant.

36. On its part, the appellant having received all the necessary premium payments from the 1st respondent in addition to the excess insurance cover payments, the appellant had no option but to ensure that the suit vehicle was restored to a working condition prior to its surrender to the 1st respondent in light of DW2's testimony that the suit vehicle was not ready to be released back on the roads.

37. In the circumstances of this case, it is my finding and holding that both the appellant and 2nd respondent were equally, jointly liable to blame as it was their joint duty to ensure that the suit vehicle was restored back onto the road. I thus apportion liability equally between the appellant and the 2nd respondent.

As to whether or not the 1st respondent was entitled to the award for loss of use

38. The 1st respondent pleaded that as a result of the failure of the appellant and the 2nd respondent to release the suit vehicle to him, he suffered loss and damages that included loss of daily income at Kshs 10,000. Contrary to the assertions and submissions by the appellant, the 1st respondent did not plead consequential loss The 1st respondent adduced evidence in the form of daily records that showed that he used to make Kshs 10,000 daily.

39. In *Samuel Kariuki Nyangoti v Johaan Distelberger* (2017) eKLR, where the appellant had claimed loss of user of his matatu which had been involved in an accident, the Court of Appeal stated:

> "(16) The damages claimed by the appellant were in the nature of pecuniary loss which the law does not presume to be the direct, natural or probable consequence of the accident since it is subject of ascertainment by court through evidence and the application of the law relating to the measure of damages. In personal injury cases, the loss of business profits and loss of future earning capacity are usually in the nature of general damages. The loss of use of a profit making chattel such as a lorry or matatu through an accident is similarly a claim in general damages. The standard of proof in such claims is on balance of probabilities and the principle of restitutio in integrum is applied in such cases." (emphasis)

40. The Court of Appeal also cited with approval the decision by Apaloo, J. (as he then was) in *Wambua v Patel & Another* [1986] KLR 336, where the court had found the plaintiff had not kept proper records of what he earned but stated:

> " Nevertheless, I am satisfied that he was in the cattle trade and earned his livelihood from that business. A wrong doer must take his victim as he finds him. The defendants ought not to be heard to say the plaintiff should be denied his earnings because he did not develop more sophisticated business method" .... But a victim does not lose his remedy in damages because the quantification is difficult."

41. In the earlier case of *Team for Kenya National Sports Complex & 2 others v Chabari M'Ingaruni* (Civil Appeal No. 293 of 1998), a claim for loss of use of a vehicle, a matatu, which had apparently been written off in an accident, was allowed for a period of six months although no supporting documentary proof by way of books of accounts had been produced upon the court being satisfied that the vehicle was used as a means of earning income for the deceased plaintiff.

42. Further in *Peter Njuguna Joseph & Another v Anna Moraa* (Civil Appeal No. 23 of 1991), the Court of Appeal assessed the loss of user of an immobilized matatu by estimates of the net income and period under which it should have been repaired even though not a single document was produced. (see also Jebrock Sugarcane Growers Co. Limited v. Jackson Chege Busia, (Civil Appeal No. 10 of 1991).

43. The above decisions are clear that loss of user or profit is in the nature of general damages and is proved on a balance of probabilities. The decisions also relate to commercial vehicles which were damaged and as a result, the owners claimed loss of user. The decisions further agree that the owner of a damaged vehicle is entitled to compensation and courts have been liberal when quantifying damages for loss of user.

44. Taking all the above into consideration, I am satisfied that the 1st respondent proved loss of user on a balance of probabilities. The records of daily earnings produced were not controverted by either the appellant or 1st respondent.

45. Accordingly, I find no reason to interfere with the same as granted by the trial court save that guided by the Court of Appeal decision in Peter Njuguna Joseph & Another supra, the damages for loss of user shall be calculated from the date of the accident up to the date that the trial court rendered its judgement, on the 6th July 2023.

46. In the end, I find that this appeal is partially successful regarding apportionment of liability equally and jointly between the appellant and 2nd respondent for the loss suffered by the 1st respondent. The appeal against damages for loss of user is also allowed partially.

47. Consequently, the finding on liability is set aside and substituted with an order finding that both the appellant and the 2nd respondent were equally jointly liable for the loss suffered by the 1st respondent.

48. I further set aside the judgment of the trial court on the period that the damages for loss of user is recoverable and substitute that order with an order that the said damages for loss of user shall be recoverable in the sum of Kshs 10,000 daily from the date of the accident until 6th July, 2023 when judgment in the lower court was delivered. For avoidance of doubt, the liability of the 2nd respondent is only limited to the claim for loss of user and not specific performance of the contract of insurance between the appellant and the 1st respondent.

49. On the prayers for failure to service loan for the suit motor vehicle and the accruing interest and penalties on the said loan, I observe that albeit the trial magistrate granted the 1st respondent orders as prayed in the plaint, there was no evidence adduced to establish this claim and therefore the claim is rejected and the omnibus award set aside.

50. The order for specific performance of the contract of insurance by the appellant and the 1st respondent as granted is sustained as the motor vehicle was declared by the DCI not to be unusable on the road as PSV owing to the nose cut that introduced a foreign body being a different chassis number which was illegal. For avoidance of doubt, this contract vide policy No. 08510355 is only enforceable between the appellant and the 1st respondent.

51. The lower court file to be returned to the lower court to vary the decree to accord with this judgment and in addition, the decree will specify and quantify what entails specific performance of the insurance contract. Any quantum of damages involved in the claim for specific performance of the insurance contract shall attract further court fees to be paid before execution of the decree.

52. Each party to bear their own costs of the appeal.

53. This file is closed.

54. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 17TH DAY OF MAY, 2024

R.E. ABURILI

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR