Britam General Assurance Company (K) Limited v Makau t/a Wharton Consultants (Civil Appeal E649 of 2021) [2024] KEHC 9944 (KLR) (Civ) (24 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9944 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E649 OF 2021

BM MUSYOKI, J

JULY 24, 2024

BETWEEN

BRITAM GENERAL ASSURANCE COMPANY (K) LIMITED ..... APPELLANT

AND

PAUL MUMIA MAKAU T/A WHARTON CONSULTANTS ..... RESPONDENT

(Being an appeal from judgement and decree of Honourable Keyne G. Odhiambo RM/ Adjudicator in Milimani Small Claim Courts claim number 602 of 202 dated 23-09-20211)

JUDGMENT

1. This is an appeal from judgment of Adjudicator in Nairobi Small Claims Court commercial case number 602 of 2021. In the said claim, the respondent and sued the respondent claiming the following;
    a. Kshs 92,874.00 being interest surcharged on the respondent for delay in payment of loan.
    b. Loss of use of motor vehicle for four months at Kshs 600,000.00.
    c. Costs of the claim.
    d. Interest at court rates.
2. The respondent had comprehensively insured his motor vehicle registration number KBZ 544E with the appellant. On 7-04-2018 when the insurance cover was in force, the respondent's motor vehicle was involved in an accident and declared a write off. The appellant was therefore and it is not disputed, under legal and contractual obligation to compensate the respondent for the loss of the motor vehicle. On 3-05-2018, the appellant issued the respondent with a discharge voucher for Kshs 3,050,000.00 which the respondent signed but the appellant failed to pay the amount until 12-11-2018. The

respondent claimed that the delay caused him to suffer damages as shown his pleadings and blamed the appellant for the loss. The Adjudicator entered judgment for the respondent as prayed.

3. The appellant has preferred this appeal and raised the following grounds;

    1. The learned magistrate erred in law and fact in finding that the Respondent had proved its case on a balance of probabilities.

    2. That the learned magistrate erred in law and fact in failing to consider and find that once a vehicle has been declared a write off, the only compensation is the pre-accident value of the motor vehicle, less the salvage value as assessed and other reasonable consequential expences that are subject to proof.

    3. That the learned magistrate erred in law and fact in failing to consider and find that where a vehicle has been declared a write-off, a claim for loss of user amounts to double compensation as the respondent was already compensated for the loss of his motor vehicle after the accident.

    4. That the learned magistrate erred in law and fact in failing to consider and find that the appellant fully compensated the respondent for the loss of his motor vehicle in the accident to the tune of Kshs 3,050,000.00.

4. Section 38(1) of the Small Claims Courts Act provides that;

> A person aggrieved by the decision or order of the Court may appeal against that decision or order to the High Court on matters of law.'

5. From the above provision, this court does not possess jurisdiction to entertain any appeal from the small claims court based on issues of facts. I note that all the above grounds of appeal talk of the magistrate having erred in law and facts. I will not make any consideration of issues which touch on facts. Having gone through the grounds of appeal and the submissions of the parties, I have concluded that the only issue of law in this appeal is whether a claim for loss of use is maintainable after an owner of a motor vehicle has been compensated in terms of replacement of a motor vehicle which has been declared a write off.

6. The appellant claims that the Adjudicator was wrong in failing to consider that once payment of the value of the motor vehicle was done, the respondent was not entitled to bring any other claim as doing so would have amounted to double compensation. On the other hand, the respondent argues that where an insurer fails to pay compensation within the period prescribed in law or within a reasonable time, the insured has a right to claim any loss or damage the insurer suffers or incurs thereafter. That is the only issue I have jurisdiction to determine in this appeal. The rest are issues of fact for which I do not have jurisdiction.

7. The respondent has referred me to Section 203 (1) of *Insurance Act* which states that;

> Where the claimant has submitted all the relevant documents, every insurer shall, in respect of the claims arising out of policies of insurance issued by it;

    a. Admit or deny liability;

    b. Determine the amount due;

    c. Establish the identity of the claimants; and

    d. Pay the claim within ninety days of the date of the reporting of the claim or where the determination of liability is by a court, within ninety days of such determination.

8. Provided that if, for any reason, the insurer is unable to pay the claim within the period specified in this subsection, the insurer shall apply to the Commissioner for extension of time, and the Commissioner may grant extension for a period not exceeding thirty days'.

9. I entirely agree with the respondent that this Section makes it mandatory for an insurer to pay the claim within ninety days. The only window for non-compliance within the period is that the insurer may under the proviso apply to the Commissioner for extension of the period for not more than thirty days. In this case the appellant has not shown that it made an application for extension.

10. It is not in dispute that the appellant issued a discharge voucher to the respondent on 3-05-2018. This in my view, is enough proof that the payment to the respondent was due and the appellant had an obligation to pay as the issuance of the discharge voucher marked compliance with Section 203(1) of the *Insurance Act* save for the last step which is payment. In my considered view, upon expiry of the period given by the law without the insurer paying the established amount, a fresh cause of action arises and if the insurer suffers loss or damage thereafter, the same is recoverable.

11. In Samuel Kariuki Nyangoti v Johaan Distelberger [2017] eKLR while awarding damages for loss of use in addition to compensation for the value of the motor vehicle, the Court of Appeal cited page 328 paragraph 863 of Halsbury's Laws of England – Fourth Edition re-issue thus;

> The measure is the value of chattel, to the owner as going concern at the time and place of the loss so that he might be in a position to purchase a replacement. Loss of user profit for a period until a replacement could be obtained may also be awarded, together with costs arising from the disturbance of any current engagement, the costs of adapting, transporting and insuring any replacement and wasted wages and standing charges, interest may be awarded on the sum.'

12. The appellant has argued that compensation for the loss of the motor vehicle should bring any claim by an insured to an end. This is in my view miscomprehension of the law. This suggestion would mean that an insurer may take as long as they want to settle a genuine claim since the insured will not have a recourse for any more damages he may suffer for unjustifiable delay. If this was the intention of the legislature, it would not have imposed penalties for failure to pay as it did in Section 203(3) of the same Act and even more serious consequences of possible winding up of the insurer under Section 203(5) of the Act.

13. To justify its position, the appellant has cited three cases; Ann Waithera Njenga vs Cube Movers Limited [2021 eKLR, Raymond Muindi Simon v Takaful Insurance of Africa [2019] eKLR and Permuga Auto Spares & Another v Margaret Korir Tagi [2015] eKLR. However, having read the cited judgments, I hold the view that the cited authorities are not supportive of the appellant's position in this appeal.

14. In the Ann Waithera case, the court did not address itself to the issue of delay in payment of the compensation. In any event, the case involved a third party claim whereas the current claim is recovery of damages incurred as a breach of contract of insurance and the respondent's rights derived from the discharge voucher as well as the Section 203 of the *Insurance Act* Chapter 487 of the Laws of Kenya.

15. In the Raymond case, the claim was special damages particularized as such. In the current case, the respondent was claiming loss of user as general damages which are awardable as held by the Court of

Appeal in case of Samuel Kariuki Nyangoti v Johaan Distelberger (supra) where the Court of Appeal stated;

> " 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 a balance of probabilities and the principle of restitutio in integrum is applied in such cases."

16. The same goes for Permuga authority where the court held that;

> " The trial magistrate in his judgment termed it as a general damage. It was clearly pleaded as a special damage and therefore subject to prove.....
>
> I agree that when the court is awarding damages for loss of user, the court ought to consider that a commercial vehicle cannot be kept on the road when it does not make profits, the special damage must however be subject to proof."

17. In view of the foregoing, I do not see any error the adjudicator made in deciding the issue in favour of the respondent. Having held earlier that the issue discussed above was the only issue of law in this appeal, I find no merit in this appeal and the same is dismissed with costs to the respondent.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JULY 2024.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.