Geminia Insurance Company Limited v Ngacha (Civil Appeal E1239 of 2023) [2024] KEHC 9851 (KLR) (Civ) (10 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9851 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E1239 OF 2023

REA OUGO, J

JULY 10, 2024

BETWEEN

GEMINIA INSURANCE COMPANY LIMITED ..... APPELLANT

AND

JOSEMARIA KARANI NGACHA ..... RESPONDENT

(Being an Appeal against the Judgment and Decree of the Honorable Principal Magistrate M.S Kimani delivered on the 24th day of October 2023 in the Milimani Chief Magistrate`s court at Nairobi in CMCC NO. E2183/2021.)

JUDGMENT

1. The respondent at the subordinate court filed a suit alleging that he insured his vehicle registration number KCE 077W Toyota station wagon as a chauffeur-driven public service vehicle with the appellant. The respondent averred that he paid the insurance premium and was issued policy number HRD/KSI/2017/004033. According to the terms of the policy cover, the insurance protected the respondent's motor vehicle from total loss among other risks, for which the defendant would pay Kshs 1,000,000/- in case of loss.

2. On or about May 10, 2018, the respondent's vehicle was stolen by a thief who pretended to be buying the vehicle and sped off with it. The plaintiff reported the matter to Akila police post and additionally informed the defendant of this loss but the defendant unlawfully and adamantly refused to make good payment of the value of the car.

3. The appellant in his defence admitted that he had insured the respondent's vehicle KCE 077W. It was averred that although the policy covered the plaintiff against total loss, it did not extend to loss arising from negligent contractual transactions between the plaintiff and third parties. The defendant denies the allegation of theft by stating that the plaintiff voluntarily, carelessly, and negligently gave the keys

of the vehicle and its logbook to the buyer at an agreed price of Kshs 920,000/- which was released to the plaintiff vide a cheque. The defendant contended that it wasn't liable as at the time of the loss, the terms and policy conditions had ceased to apply immediately after the plaintiff released the vehicle, logbook, and keys to the buyer.

4. The trial court in her judgment concluded that the facts and circumstances of the case outrightly demonstrated a case of theft rather than a contract for the sale of goods. The court further held that the respondent was not careless and did not breach his duty of care. He was therefore entitled to be indemnified. The respondent was awarded Kshs 1,000,000/- which was the sum insured.

5. The appellant dissatisfied with the decision of the court decided to appeal the matter on the following grounds:

    1. That the learned magistrate erred in both law and fact in failing to give effect to the terms of the policy document in relation to the claim before the court.

    2. That the learned magistrate erred in both law and fact in failing to consider what amounts to loss under the policy of insurance `the contract` and therefore arrived at wrong conclusions

    3. That the learned magistrate erred in both law and fact in arriving at a finding that the respondent had an insurable interest as at the time he lodged a claim with the appellant.

    4. That the learned trial magistrate erred in law and in fact by holding that the incident of May 10, 2018 was a theft of motor vehicle KCE 0777W and therefore the Respondent claim was payable under the policy of insurance.

Submissions

6. The appellant seeks to have the appeal allowed, the judgment and decree of the subordinate court be set aside and be substituted with a dismissal of the Respondent's suit in the trial court with costs and that the appellant do have costs of the appeal.

7. The appellant's submissions on ground no. 1 of the appeal were that the respondent had reached a mutual agreement with the buyer on the sale price. The payment would be made through a banker's cheque. The respondent entrusted the vehicle's key and the logbook to the buyer who vanished with the vehicle and the cheque turned out fraudulent. The appellant implored the court to hold that the insurance contract did not cover the loss in the circumstances presented in this suit as this was a loss through an agreement.

8. On the second ground of appeal, it was the appellant's submission that the respondent had manifest control over the imminent loss and therefore no incidence of accidental loss. The appellant relied on the *Halsbury laws of England (2003 reissue)* definition of loss which provides that, to constitute a loss under an all-risk policy, there must be something accidental and fortuitous which can be described as casualty. The appellant relied on the case of *Doa Doa Tented Camps and Lodges Limited v Jubilee insurance Company of Kenya Limited* [2021] eKLR and the case of *Lucena v Craufurd* 127 Eng.Rep 630,642 [1805]. The appellant's concluded by submitting that the respondent being defrauded was not an accidental loss within the meaning of the policy.

9. The appellant`s submission on grounds 1 and 4 was that the loss was out of an agreement which the policy contract excluded the duty to indemnify if the loss was due to an agreement. Reliance was made on the Black's law dictionary definition of an agreement in an effort to further the appellant's case. The

Appellant relied on the case of *Amuga and Company Advocates v Kisumu Concrete Products Limited* [2021] eKLR as well as the case of *Athwal v Black Top Cabs Ltd* 2012 BCCA 107 (B.C C.A). It was the submission of the appellant that the court should give effect to the parties' Policy Contract in whole and therefore proceed to allow the appeal and dismiss the respondent's suit before the subordinate court with costs.

10. The respondent in his submissions, in addressing the issue of whether the loss was accidental, stated that the fact of being engaged in extensive conversation with the buyer does not make the respondent responsible for the loss if the person posing as a buyer turns out to be a fraudster who steals your car and leaves you with a fake banker's cheque. The respondent emphasized and placed reliance on the trial court's decision where the court stated that no one in the society or community we live in is unsusceptible to fraudsters. The respondent went further to aver that he had confidence in the antitheft devices installed in his vehicle when he left to verify the cheque. The respondent relied on the case of *Webster v General Accident Fire and Limited* [1953] 1 Q.B. 520 which states that it is immaterial that the owner willingly parted with the lost item and held that loss could take place even though the insured voluntarily parted with possession of the chattel insured. Further reliance was done on the case of *Dobson v General Accident Fire and life Assurance Corporation* [1989] 3 All ER 927.

11. The respondent submitted that the issue of whether the loss was a liability arising from the agreement and therefore exempted from indemnification by first differentiating between a loss and a liability. The respondent relied on the *Black's law dictionary* definition of both loss and liability. He submitted the exception under the insurance policy covered liability from agreements and not loss from agreements. It was therefore his submission that no liability arose from the alleged agreement and instead what arose was a loss that the respondent suffered and for which the appellant was under contractual liability to compensate the respondent. The respondent proceeded to submit there was total loss of the vehicle because according to the *Black`s Law Dictionary* definition of total loss, the vehicle had been placed beyond the insured`s control and beyond the insured`s power of recovery and therefore entitled to indemnification.

12. The respondent submitted that the appellant had expanded their reasons for denying the claim beyond the original reason given for rejecting the claim and beyond the arguments made in their pleadings at trial. The respondent asserted that the appellant had stealthily and cunningly raised new arguments which are; that the loss was not accidental and that the policy did not cover loss arising from an agreement. The respondent relied on the case of *Madara and 2 others v Chite & another* (Civil Appeal 111 of 2022) [2023] KEHC 24270 (KLR) which stated that parties are not allowed to depart from pleadings mainly because this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation. Other cases relied on were, *Jackson Kaio Kivuva v Penina Wanjiru Muchene* [2019] eKLR as well as the case of *Malawi Railways Ltd v Nyasulu* [1998] MWSC 3.

13. The respondent concluded their submission by contending that there is need for certainty in handling of insurance claims whereby if an insurer denies a claim for a specific reason which has been communicated in writing, they should not be allowed to fish for any other reason to deny the claim in the course of litigation. This certainty can only be achieved if the appellant's claim is denied and reminded of the letter dated 5 July 2018. The respondent was of the view that the appellant should not go fishing for technical reasons in the course of litigation. The respondent urged the court to dismiss the appeal with costs to the respondent.

Analysis And Determination

14. This being the first appeal, the Court must reconsider and reevaluate the evidence and draw its conclusion. However, the Court must make due allowance for the fact that it has neither seen nor heard the witnesses. These principles were set out in *Selle and another v Associated Motor Boat Company Ltd.& Others* [1968] EA 123:

> An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should made due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif v Ali Mohamed Sholan* [1955], 22 EACA 270).

15. Josemaria Karahi Ngacha (PW1) adopted his witness statement. He testified that he was covered for the loss of the motor vehicle. He testified that he advertised for the sale, got a prospective buyer, and met at Nairobi South Hospital. He testified that they did not have a draft agreement. The buyer proposed to pay using a banker's cheque and Pw1 testified that he had no reason to doubt the banker's cheque. Pw1 accepted the cheque and gave the buyer the ignition key, logbook, and the vehicle. Thereafter, he went to DTB bank where he was informed that the cheque was incapable of being cashed. He reported the theft at Akila police station. The vehicle also had an immobilizer that would stop the car within 500 meters. On cross-examination, he testified that he did not know if the vehicle could be immobilized.

16. Richard Mariga Gitare (DW1) testified he is a licensed private investigator. The vehicle was not stolen but was sold by the owner. Pw1 realized that he had been conned after he was informed that he had gotten a fake cheque. Pw1 willingly sold the vehicle to the buyer and released the keys and logbook after receiving a fake cheque.

17. David Nyaundu (DW2) testified that he works at the appellant company as the claims officer. They insured the respondent for loss or damage to the vehicle. The respondent was given a comprehensive cover. He testified that the loss was foreseeable and the policy covers unforeseeable losses. The respondent had a duty of care to take reasonable steps to prevent the loss. The respondent failed to carry out any due diligence to ascertain who the buyer was. The respondent breached the contract as he failed to report the loss immediately as per the policy.

Analysis And Determination

18. The main issue in this appeal is whether there was a valid contract between the insured and 'the buyer'. A valid contract must have the elements of an offer, acceptance, and consideration. Harris JA in *Garvey v Richards* [2011] JMCA 16 ought to ordinarily reflect the following principles:

> "It is a well-settled rule that an agreement is not binding as a contract unless it shows an intention by the parties to create a legal relationship. Generally, three basic rules underpin the formation of a contract, namely, an agreement, an intention to enter into contractual relationships and consideration. For a contract to be valid and enforceable an essential terms governing the relationship of the parties must be incorporated therein. The subject matter

must be certain. There must be positive evidence that a contractual obligation, born out of an oral or written agreement is in existence."

19. In this case, the respondent made an advertisement for the sale of his vehicle. He met with the intended buyer and they negotiated the price. The respondent received a banker's cheque drawn in his favor. He did not wait for the cheque to be honored. The cheque received by the respondent was not of value. It was not in dispute that the respondent received a fake cheque. According to the policy document, the contract provided for general exceptions as follows:

> " We (the insurance) will not be liable in respect of...any liability which attaches by virtue of an agreement but which would not have attached in the absence of such agreement."

20. From the above provision, I find that there was no contract because of lack of consideration. The exception in the insurance policy cannot apply to the appellant. The insurance policy had conditions which were to be met by the insured. The respondent was also required to take all reasonable steps to prevent accidents, injuries, loss or damage. The respondent had an obligation to take reasonable measures to avoid causing loss.

21. I find that the respondent did not do so. He handed the key and the logbook to the fraudster without first confirming whether the cheque was valid. The respondent ought to have secured the funds from the buyer before parting with the possession and title/logbook to the vehicle. His actions breached his duty of care and, in essence, violated the terms of the insurance policy. The trial court's conclusion that no one is immune to fraudsters did not absolve the respondent of his contractual obligations.

22. In conclusion, I set aside the award by the subordinate court and find that the respondent did not prove his case at the lower court as it is evident that he breached the conditions of the contract. The appellant shall have the costs of this appeal.

DATED, SIGNED AND DELIVERED ONLINE AT BUNGOMA THIS 10TH DAY OF JULY 2024

R.E. OUGO

JUDGE

In the presence of:

Mrs Ngala For the Appellant

Mr. Rasugu For the Respondent

Wilkister /Diana C/A