Mayfair Insurance Company Limited v System Re-Engineering Limited (Civil Appeal 1431 of 2023) [2024] KEHC 8875 (KLR) (Civ) (25 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8875 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 1431 OF 2023

JK NG'ARNG'AR, J

JULY 25, 2024

BETWEEN

MAYFAIR INSURANCE COMPANY LIMITED ..... APPELLANT

AND

SYSTEM RE-ENGINEERING LIMITED ..... RESPONDENT

(An appeal from the judgment and decree of the Chief Magistrate's Court at Nairobi (S. Muchungi, PM.) delivered on 24th November 2023 in CMCC No. E2917 of 2021)

JUDGMENT

1. The respondent is the owner of motor vehicle registration number KCQ XXXX. It averred at all times material to the suit, it was insured by the appellant. On 7th June 2020 at around 7:30 p.m., the said motor vehicle was involved in a road traffic accident along Gatundu road in Kileleshwa area Nairobi County. The said motor vehicle was at the time driven by the respondent's directors. The circumstances of the accident according to the respondent were that the suit vehicle was being driven at a speed of 40kph with the aid of headlights. The driver encountered an on-coming vehicle which immediately after passing it, heard a loud bang causing the airbags in the suit vehicle to detonate.

2. The driver thereafter stopped meters away and switched off the engine. On alighting the vehicle, the driver inspected the same and observed that there was oil spillage, a deflated front will and a shattered windscreen near the steering area. Furthermore, the vehicle had hit a curbstone. The accident was reported and a police abstract obtained. The respondent then notified Tonny Otieno, employee of the appellant company of the accident.

3. The vehicle was subsequently towed to St. Austin's garage by the appellant and assessed for repairs. The respondent averred that since the appellant never informed it of the process and what was ongoing, it lodged a complaint at the Insurance Regulatory Authority. It was then that the appellant issued a

demand letter demanding for storage charges irrespective of the fact that the vehicle remained under the appellant's custody for 8 months. The respondent contended that the appellant refused to accept liability for the repairs of the vehicle yet it had taken out a valid policy cover. It is for those reasons that the respondent filed a plaint dated 27th April 2021 seeking a declaration that the appellant be obliged to repair and release the suit vehicle, general damages for wrongful keeping and detention of the vehicle and costs of the suit in Nairobi CMCC No. E2917 of 2021.

4. In its judgment dated 24th November 2023, the trial court found that the appellant acted unfairly and unlawfully in repudiating the respondent's cover. Noting that the vehicle had been declared uneconomical to repair on being assessed, the trial court awarded the respondent compensation for the loss of its vehicle at Kshs. 1,160,000.00. It was further awarded costs of the suit together with interest thereon.

5. The appellant is dissatisfied with the said judgment. It filed its memorandum of appeal dated 19th December 2023 that raised seven grounds disputing the findings of the trial court. It lamented that the trial court awarded a remedy not prayed for by the respondent; that the learned magistrate erroneously shifted the burden of proof to the appellant; that the trial court ignored the appellant's expert's evidence that revealed disparities between the scene of the accident and the damage on the suit vehicle; that the reports presented by the appellant were never controverted; that the trial magistrate erred in finding that the appellant should have called for the respondent's input when selecting assessors and investigators while there is in fact no requirement to do so; that the trial court speculated the extent of damage when the suit vehicle was moved from one garage to another when no such thing was pleaded; and that the respondent's submissions were ignored. In view of the following, the appellant urged this court to allow the appeal by dismissing the respondent's suit. It further urged this court to make an order on what shall happen to the salvage of the respondent's motor vehicle and the payment of the accrued storage charges.

6. The appeal was heard on the basis of the parties rival written submissions. The appellant filed its written submissions dated 24th May 2024. It submitted that based on the assessment report and DW4's evidence, the accident, as narrated by the respondent, could not have resulted in the damage on the respondent's motor vehicle. As a result of those discrepancies, which were not explained to the satisfaction of the appellant, the appellant submitted that it was well within its rights, and so did so, to repudiate the policy as the respondent favored no rational explanation. That the concealment of material information breached the insurance principal of utmost good faith. It justified that it could only assess the damage of the motor vehicle once the vehicle had been towed out of the accident scene. For those reasons, it did not cause further damage to the motor vehicle. On the storage charges, it submitted that DW4 explained that once it was established that it was uneconomical to repair, there was no reason to leave it at St. Austin Garage. It is for that reason that it was moved to a yard whose charges were cheaper.

7. On the expert reports, the appellant submitted that firstly, the opinions were necessitated by the unsatisfactory explanation given by the respondent. Secondly, it was impractical and untenable to seek the respondent's opinion as it was a stranger to all agents the appellant had appointed. Thirdly, the respondent raised no issue with their appointments and cooperated with them all through. Had the respondent been dissatisfied, the appellant propositioned, it ought to have engaged its own independent contractors. For those reasons, the respondent's allegations were dismissed as an afterthought.

8. On its part, the respondent filed its written submissions dated 21st May, 2024. It argued that the trial court's findings were bereft of error having considered the evidence and submissions of the parties holistically. On the prayers granted, it argued that it was within the trial court's discretion to award a

remedy that met the ends of justice. That the burden of proof had been discharged by the respondent and as such, no such burden shifted to the appellant as alleged. For those reasons, it urged this court do dismiss the appeal with costs.

9. I have considered the record of appeal, examined the parties' respective written submissions as well as the impugned judgment and analyzed the law. This being a first appeal, I am reminded of my 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 magistrate are to stand or not and give reasons either way. [See *Abok James Odera t/a A.J Odera & Associates v. John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR].

10. According to the respondent's witness PW1 Aaron Kipkoech, director and software developer of the respondent's company, he was driving motor vehicle registration number KCQ XXXX on 7th June, 2020 at around 7:30 p.m., along Gatundu road in Kileleshwa when he encountered an oncoming vehicle. After passing the said vehicle, he heard a loud bang causing the airbags to deploy. Following that incident, PW1 drove for a few meters and switched off the running engine.

11. On alighting and inspecting the vehicle, PW1 noticed that there was oil spillage, the front wheel was deflated and the motor vehicle's windscreen had been smashed twice near the steering area. He further noted that the vehicle had hit the curbstone in the middle of the road at the junction between Gatundu Road and Olenguruone Road.

12. Following the accident, PW1 notified his friend and thereafter the police based at Kilimani Police Station. An abstract was obtained the following day. PW1 also notified Tonny Otieno, employee of the appellant company who advised him to take the vehicle to St. Austin's garage to wit PW1 complied. PW1 contended that thereafter, the appellant towed the suit vehicle to an unknown place without informing the respondent.

13. According to PW1, the appellant thereafter sent Parity Insurance Loss Assessors and a firm of investigators to conduct an assessment and investigation of the accident. During this process, at the accident scene, the respondent stated that he was by and large was not involved in the process in the company of his friend. That during the process, the officers spoke in kikuyu dialect, a language unknown to PW1 when taking measurements. He thus propositioned that the report procured was biased as to make the appellant avoid liability to repair the motor vehicle or compensate the respondent accordingly.

14. Dissatisfied with the turn of events, the respondent lodged a complaint with the Insurance Regulatory Authority. This galvanized the appellant to issue a demand letter seeking storage charges for the respondent's motor vehicle which they held in their custody unknown to the respondent. The respondent was at pains because the suit vehicle had been financed by a bank under a loan arrangement which it had dutifully paid.

15. The respondent sued the appellant for the reason that it had refused to accept liability and repair the suit vehicle and was holding the same in their unknown custody for over eight months. As a result of the hold up, the respondent had been condemned to use car hire services to run the daily operations of the company. PW1 was apprehensive that the suit vehicle had deteriorated and caused great prejudice and economic loss to the respondent. He added that in a meeting with the Insurance Regulatory Authority, he was only questioned as to the circumstances of the accident. Though he never employed the services of his own independent assessor, it urged this court to grant the reliefs as enumerated in its plaint.

16. On the part of the appellant, DW1 Paul Mararo Janja proprietor Marao Auto Assessors testified that on 26th June, 2020, they were instructed by the appellant to assess the suit vehicle parked at St. Austin

Garage. The vehicle was assessed to determine the cost of repairs which came to Kshs. 591,090.00 against the pre-accident value of Kshs. 1,160,000.00. DW1 added that since the motor vehicle had a heavy impact, the repairs exceeded 50%. The report, dated 26th June, 2020, was prepared and a subsequent one prepared on 27th November, 2020, indicating the circumstances of the accident.

17. During the process, they held a meeting together with the investigator, the insured and the insured's lawyer, at the accident scene. The assessor also prepared a technical report. DW1's position was the PW1 did not explain whether the motor vehicle hit the curbstone in the middle of the motor vehicle or the front. In their conclusions, DW1 found that the PW1 could not make a proper judgment of how the accident occurred and as such could possibly not have been the one driving the vehicle. DW1 finally stated that they are not in the business of contacting the insured in conducting their assessment.

18. DW2 Kennedy Okello employee at Parity Loss Assessors Insurance Claims Investigators testified that they were instructed by the appellant on 29th June, 2020 to investigate the subject accident. In the normal conduct of business, DW2 explained that they engage policy holders or their representatives to conduct a comprehensive report and visit the scene. The report that was ultimately prepared annexed with supporting documents.

19. According to DW2, major findings were inconsistent with the damage inflicted on the suit vehicle. That the vehicle had a large underside front part concentrated on the engine. That PW1's evidence was inconsistent with the damage on the vehicle. That damage occurred at the rear and not the front part. That the variance of the height of the curbstone and the vehicle was two inches and as such, there was a likelihood that there was no impact between the curbstone and the motor vehicle. That since the curbstone was chisel shaped, it could not have occasioned container shaped damage. He observed that there was underside damage totally unrelated to the accident that could have contingently been caused by other objects and not only the curbstone. There was also oil spillage. He continued that when asked for the tracking gadget report, the same was never furnished.

20. On 17th November, 2020, DW2 was informed by the appellant to visits the scene with the technical assessors and the insured one more time. The motor vehicle was brought to the scene to enable PW1 explain the circumstances leading up to the accident. Later they had a meeting with the Insurance Regulatory Authority. He testified that the damage of the tyre was unrelated to hitting the curbstone.

21. DW3 George Katama Kago assessor working at Integrated Motor Assessors testified that they were retained by the appellant to carry out a technical report to establish the circumstances of the accident and the damage occasioned. Their representative found that the exhaust pipe had two different impacts by stone and an object with protrusions. The damage was on the right hand side yet it should have been occasioned on the left hand side if the driver was avoiding a collision. There was impact on the engine cradle which had better clearance that the sump. The impact was underneath and vertical and could not have caused both impacts. He concluded that the narration of PW1 was not consistent with the damage to the vehicle.

22. After forwarding the report dated 11th September, 2020, DW3's team had a meeting with PW1, his representative, DW1, DW2 and the appellant's representative where PW1 explained the circumstances leading up to the accident. The accident scene was also measured and it was observed that the damaged cradle was three inches higher that the curb. As such, it was not possible that the vehicle hit the curb. It was also observed that the damaged exhaust pipe was away from the parent. There were two impacts on the engine cradle and PW1 could not explain the circumstances causing that damage. The conclusion was that the accident did not cause the damage.

23. DW4 Christopher Kahiu a claims analyst working for the appellant testified that as at the time of the accident, the appellant insured the respondent's suit vehicle under policy number 01/COMP/01/0700/20363/2018. He recalled that on 8th June, 2020, the respondent lodged a claim on grounds that a self-involving accident occurred along Gatundu Road on 7th June, 2020 and as a result, suffered damage on the subject vehicle.

24. In processing the claim, the appellant engaged an assessor to assess the damage and estimate the costs of repairs. He also recalled that the appellant engaged an investigator to ascertain the circumstances leading up to the accident. That the appellant procured the services of Mararo Auto-assessors Limited who prepared a report dated 20th June, 2020 estimating the costs of repairs at Kshs. 591,090.00. In their report dated 15th August, 2020, Parity Loss Assessors, a firm of insurance investigators, found that the damage on the suit vehicle was inconsistent with the scene of the accident and PW1's story. Consequently, they advised the appellant to commission a Technical Report into the matter.

25. In that regard, DW4 testified that Integrated Motor Assessors Limited were commissioned to prepare a Technical Report dated 11th September, 2020. According to the said report, Parity Loss Assessors detailed the inconsistencies as narrated by the PW1 as to conclude that the damage caused was not as a result of the said accident. For instance, it was established that the damage on the underside of the motor vehicle was not caused by the curbstone as alleged by PW1. This is because the suit vehicle had a ground clearance higher than the curbstone claimed to have damaged the underside of the vehicle.

26. In light of the above expert opinions, DW4 testified that the appellant had no choice but to repudiate the respondent's claim. The respondent was notified of the decision on 6th November, 2020 with reasons. The respondent thereafter appealed against that repudiated claim. In line with the institution of the appellate process, Integrated Motor Assessors were asked to attend to the scene and prepare a report a second time. They appeared together with Mararo Auto-assessors and similarly gave the same findings. For this reason, the respondent's appeal was rejected vide a letter dated 7th December, 2020. DW4 recalled that the respondent then lodged a report with the Insurance Regulatory Authority. However, that complaint was similarly rejected.

27. DW4 opined that the respondent was not candid and did not exercise utmost good faith in narrating his story. Furthermore, none of the reports had been subjected to challenge. Based on the principle of utmost good faith, it was DW4's conclusion that the appellant was in breach of that dogma. Furthermore, a motor vehicle insurance, he added, is a contract of indemnity. In the circumstances, an insured is entitled to recover only what has been lost in the crystallization of a risk and nothing more. He thus concluded that it would be unfair to compel the appellant to repair the motor vehicle when the respondent had failed to fulfil its end of the bargain. It is for those reasons, that he prayed that the suit be dismissed with costs.

28. It is not denied that the respondent took out a policy cover with the appellant under policy number 01/COMP/01/0700/20363/2018 in respect to motor vehicle registration number KCQ XXXX. It is also not denied that an accident occurred on 7th June, 2020 along Gatanga Road in Kileleshwa galvanizing a chain of events. This prompted a series of investigations conducted by DW1, DW2 and DW3's colleague.

29. The respondent contended that as a result of the accident, the suit vehicle suffered damage; a fact that was strongly refuted, controverted and denied by the appellant. In fact, the appellant repudiated the claim stating that the respondent's narration of events was inconsistent with the extent of damage found on the insured vehicle. In brief, the appellant's reasons were that the appearance of the scene did not tally with PW1's account. In particular, they questioned whether the suit vehicle was damaged by

the curbstone on the underside. This is because the suit vehicle had a ground clearance higher than the curbstone claimed to have damaged the underside of the vehicle. Did the respondent establish its case to the required standard of proof as held by the trial court?

30. I have reconsidered the evidence of PW1. I find that he consistently explained what happened when the accident occurred. At the risk of belaboring further, PW1 passed an oncoming vehicle when he heard a loud bang. He then drove the vehicle for a short distance before coming to a complete halt. It was here that he hit the curbstone and drove over it. The air bags deployed, the front wheel was deflated and the motor vehicle's windscreen had been smashed twice near the steering area. He thereafter immediately reported the matter at the police station and subsequently to his insurer's (the appellant) to instigate the process of recovery since it had a valid policy with the appellant.

31. As rightfully observed by the trial court, all the assessors and investigators extensively did was to discredit the aspect of whether the curbstone caused damage to the vehicle. In addition, none of the experts seemed to establish what caused the loud bang. However, what was apparent was that there were several effects of the accident to include oil spillage, the damage on the windscreen, the tyre flat and deployment of airbags. It is agreeable that oil spillage was found on the pavements.

32. I must also point out that contrary to the propositions advanced by the appellant, the fact that an expert report has not been refuted by another expert report is no blanket conclusion that the expert evidence was verifiable. A court must still interrogate the veracity or otherwise of the averments embedded therein to establish whether the evidence corroborates or not the allegor. Furthermore, I would not term the reports as too independent as to be weighty for the reason that when the report was prepared a second time, the appellant still retained the same professionals. Of course, they would not contradict their earlier findings and risk not being retained by the said party for future gigs. In my view, there was an element of biasness. I have no doubt in my mind that had there been reports by several professionals, a comprehensive report would have come out of the exercise.

33. This court also observed that the vehicle had been towed to another location unknown to the appellant. It is deplorable that an institution offering services to a wide variety of citizens would make a surreptitious effort to move a vehicle without the knowledge of the owner. Could it be that when the vehicle was moved from the garage to the unknown location, that further damage was caused extensively? That cannot be wished away. Certainty, the experts ought to have holistically taken into account all factors including the clandestine trip of the vehicle from the garage to an unknown location suffice to add the implantation of the vehicle to the accident scene months after the accident had occurred.

34. It is for these reasons that I find that indeed the trial court not only properly but also painstakingly comprehended the issues and well-founded its conclusions. The appellant acted unfairly and it is my considered view that it was attempting to avoid the claim when it was apparent that it was its obligation to do so. Since the prayers were untenable, the court was right to award the pre-accident value of the vehicle in the sum of Kshs. 1,160,000.00 since the vehicle is still in the custody of the appellant.

35. Before I pen off, the appellant also urged this court to address the parties on the storage charges. Firstly, I must state that the appellant failed to file a counterclaim in respect to this issue so as to formulate a basis as to whether it ought to have this prayer granted or not. However, this is a court of justice with liberty to make any orders as may meet the ends of justice. I however caution the appellant against acting in such conduct in violation of rules of procedure and practice. I find that since the appellant on its own volition transferred the vehicle without the respondent's input and furthermore failed to uphold proper care and diligence, it ought to be the one to meet those costs. I do so hold as much.

36. The upshot of the above is that the appeal herein lacks merit. It is hereby dismissed with costs to the respondent.

It is so ordered.

DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 25TH DAY OF JULY, 2024.

J.K. NG'ARNG'AR, HSC

JUDGE

In the presence of: -

M/s Njoroge Advocate for the Appellant

No appearance Advocate for the Respondent

Court Assistant – Peter Ong'idi

Further Order;

30 days stay granted.

J.K. NG'ARNG'AR, HSC

JUDGE