



**Yusuf v Xplico Insurance Co Ltd (Civil Appeal E062 of 2021)
[2023] KEHC 888 (KLR) (9 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 888 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E062 OF 2021
TW CHERERE, J
FEBRUARY 9, 2023**

BETWEEN

ABDALLA MWENDA YUSUF APPLICANT

AND

XPLICO INSURANCE CO LTD RESPONDENT

*(Being an appeal from the judgement and decree Maua CMCC
NO. 34 OF 2019 by HON. M.C Nyigei (SRM) on 20th April, 2021)*

JUDGMENT

1. The Appellant herein filed this suit in the lower court seeking for compensation for the value of the motor vehicle KBW 072N, loss of user at Kshs 2,000/- per day from 21st August,2016, damages for breach of contract, costs and interests of the suit.
2. The matter was heard to its logical conclusion where upon determination of the matter, the court dismissed the suit with costs to the Defendants on the ground that the plaintiff had not proved his case against the Defendant, that the claim failed as he had not shown that there was a valid insurance policy at the time of the accident and that his vehicle which was insured by the Defendant was sold to satisfy the decretal amounts in Maua CMCC No 21B, 22 and 23 of 2015.
3. Appellant being greatly aggrieved by the judgement of the Honourable Senior Magistrate Hon MC Nyigei delivered on the 20th April,2021 appeals to this Honourable court and sets forth the following grounds: -

The learned trial magistrate erred in law and in fact in dismissing the suit in its entirety.

1. The learned trial magistrate erred in finding that the suit arose from sale of motor vehicle to satisfy the judgement.



2. The learned trial magistrate's erred in law and fact in concluding that there was no evidence tendered to indicate that the subject motor vehicle had been proclaimed, attached and advertised for sale and sold.
3. That the learned Magistrate erred in law and in fact in finding that the plaintiff had not proved his case on a balance of probability.
4. That the learned magistrate erred in law and in fact in failing to consider the evidence, both oral and documentary tendered by the plaintiff.
5. That the magistrate erred in law and in fact by failing to consider the plaintiff's submissions in their entirety.
6. That the judgement of the court is against the weight of evidence on record.
7. That the learned trial magistrate erred in law by failing to take into account matters he ought to have taken into account while making a determination in a breach of contract claim.

Determination

4. This being a first appeal, the role of this court is to re-evaluate and subject the evidence to afresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. The court also takes note of the fact that it did not have the benefit of seeing or hearing the witnesses testify and therefore has to make an allowance for the same. (See *Selle v Associated Motor Boat Co.* [1986] EA 123, *Peters v Sunday Post Ltd* [1958] EA 424 and *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR).
5. I have considered the appeal in the light of the trial court record, the submission and authorities cited by the parties.
6. Appellant's case is that sometime in December, 2013, he purchased motor vehicle registration No KBW 072N from Sealand Motors Mombasa at a price of KES. 830,000/= and the vehicle was meant to operate as a Taxi within Maua and its environs and thus he took out PSV Third Party policy; Policy No 086/00155/13/12/060 with Xplico Insurance Company having paid all the premiums demanded.
7. Appellant stated that on the 25th December, 2013, the motor vehicle herein was involved in Road Traffic Accident, where the authorized driver of the motor vehicle accidentally knocked down three pedestrians. The pedestrians then filed civil suits against Appellant as the insured owner of the accident motor vehicle and his driver in Maua CMCC No's 21B, 22 & 23 of 2015 and the court on determination of the suits found the driver liable for the accident and Appellant liable vicariously for his driver's actions and the court awarded the parties damages as follows: CMCC No22/15 KES. 1,582,700/-, CMCC No 21B/15 KES.89, 250/- and CMCC No 23/15 KES.97, 800 plus costs and interests in each.
8. He stated that having paid the excess fees demanded by the Defendant when the cases above were filed, and having had a counsel instructed by the Defendant to defend the above mentioned claims; he sat back expecting the defendant to pay the Decretal amount ordered in the above cases and unfortunately, the defendant paid only paid KES. 200,000/- as a result of which the subject motor vehicle was sold.
9. Appellant contended that as a result of the sale, he lost earnings of KES. 2,000/- per day from 21st August, 2016.



10. Maurice Mugambi a taxi driver at Antubwetwe where Appellant used to work stated that he earns KES..600/- for 4 trips daily and one trip on . He confirmed that Appellant’s vehicle KBW 072L was attached and sold off.
11. On 01st December, 2020, Respondent closed its case without calling any witness. The trial court in a judgment dated 20th April, 2021 found Appellant’s case not proved and dismissed it.

Determination

12. The burden of proof in a civil case is on a balance of probability; this court makes reference to the case of *Miller v Minister of Pensions* (1947) 2 ALL ER 37 where Lord Denning discussing that burden of proof had this to say;

‘That degree is well settled. It must carry a reasonable degree of probability, but not high as required in a criminal case. If evidence is such that the tribunal can say ‘We think it more probable than not’, the burden is discharged, but, if the probabilities are equal, it is not.’

Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties’ explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.’

13. The *Evidence Act*, Cap 80 is clear on the aspect of the burden of proof. In this case, Appellant had a duty to prove that the vehicle he had insured with the Respondents was attached and sold due to the negligence of Respondent to settle decretal sums in three suits filed against him.

14. Sections 107 and 108 of the *Evidence Act* provide as follows: -

Section 107.

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

Section 108

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

15. The issue for determination is whether Appellant proved its case on a balance of probability.
16. Appellant tenders a PSV Third Party policy; Policy No 086/00155/13/12/060 with the name Xplico Insurance Company on it and he said it was issued by the Respondent. As stated earlier in this judgment, Respondent did not tender any evidence.
17. Appellants did not tender any evidence. That averments in pleadings are not evidence was appreciated in *Francis Otile v. Uganda Motors* Kampala HCCS No 210 of 1989 where it was held that the court cannot be guided by pleading since pleadings are not evidence and nor can they be a substitute therefor. Before that the then East African Court of Appeal held in *Mohammed & Another v. Haidara* [1972] EA 166 that the contents of a plaint are only allegations, not evidence. According to *Edward Muriga Through Stanley Muriga v Nathaniel D. Schulter* Civil Appeal No 23 of 1997, where a defendant does not adduce evidence the plaintiff’s evidence is to be believed as allegations by the defence is not



evidence. In *CMC Aviation Ltd. v Cruisair Ltd. (No 1)* [1978] KLR 103; [1976-80] 1 KLR 835, Madan, J (as he then was) expressed himself as hereunder:

“Pleadings contain the averments of the parties concerned. Until they are proved or disproved, or there is an admission of them or any of them, by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. Evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation. Until their truth has been established or otherwise, they remain un-proven. Averments in no way satisfy, for example, the definition of “evidence” as anything that makes clear or obvious; ground for knowledge, indication or testimony; that which makes truth evident, or renders evident to the mind that it is truth.”

18. The consequences of a party failing to adduce evidence was considered in the case of *Motex Knitwear Limited v. Gopitex Knitwear Mills Limited* Nairobi (Milimani) HCCC No 834 of 2002, Lesiit, J (as she then was) citing the case of *Autar Singh Bahra and Another v. Raju Govindji*, HCCC No 548 of 1998 appreciated that:

“Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st plaintiff’s case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail.”

19. Again in the case of *Trust Bank Limited v. Paramount Universal Bank Limited & 2 Others* [2009] eKLR Lesiit, J (as she then was) citing the same decision stated that it is trite that where a party fails to call evidence in support of its case, that party’s pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings.
20. From the foregoing, I find that there was no defence to counter Appellant’s defence that his motor vehicle was duly insured by the Respondent and the trial magistrate’s finding on that point was erroneous.
21. The most important issue is whether Appellant’s motor vehicle was attached and sold in satisfaction of judgment which Respondent failed to settle. As rightly observed by the trial court, no material was placed before the court to demonstrate that indeed Appellant’s motor vehicle had been attached and sold.
22. Having failed to prove the sale of his motor vehicle, the trial magistrate correctly arrived at the correct decision that Appellant could neither recover its value or damages for loss of its use from the Respondent.
23. From the foregoing, I find that the trial magistrate’s finding was well founded and I have no reason to interfere with it,
24. Consequently, I find that this appeal has no merit and it is dismissed. I make no order for costs since Respondent did not defend the appeal

DATED IN MERU THIS 09TH DAY OF FEBRUARY, 2023.

WAMAE. TW. CHERERE

JUDGE

Appearances



Court Assistant - Morris Kinoti

For Appellant/Applicant - Ms. Kiyuki for Kithome L. Mutinda & Co Advocates

For Respondent - N/A for Ahmednassir, Abdikadir & Co Advocates

