D. T. Dobie & Company (K) Limited v Sajom International Co. Limited & another (Civil Appeal E277 of 2020) [2023] KEHC 21685 (KLR) (Civ) (6 April 2023) (Judgment)

Neutral citation: [2023] KEHC 21685 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E277 OF 2020

AA VISRAM, J

APRIL 6, 2023

BETWEEN

D. T. DOBIE & COMPANY (K) LIMITED ..... APPELLANT

AND

SAJOM INTERNATIONAL CO. LIMITED ..... 1ST RESPONDENT

JUBILEE INSURANCE CO. OF KENYA LTD ..... 2ND RESPONDENT

(Being a Cross-Appeal from part of the Judgment and Decree delivered on 2nd October, 2020 at The Chief Magistrate's Court at Nairobi, by the Honourable D. M. Kivuti (Mr.) in Chief Magistrates Civil Case No. 3610 of 2012)

JUDGMENT

Background:

1. The 1st respondent (plaintiff in the lower court) filed this suit in the lower court vide a plaint dated June 21, 2012. The 1st respondent alleged that on or about March 9, 2011, it purchased a motor vehicle registration number KBJ 287W ("the Vehicle") from the appellant. The 1st respondent's case was that the vehicle was at all times covered by a free comprehensive insurance policy that was to run for a period of one year from the date of purchase and delivery of the vehicle.

2. The litigation in the lower court was triggered following a series of events which began with the involvement of the vehicle in a road accident; and thereafter, the theft of the vehicle, each of which incidents resulted in insurance claims by the 1st respondent.

3. In relation to the first incident, the 1st respondent alleged that after the vehicle was involved in an accident, the 2nd respondent duly covered the cost of its repair pursuant to an insurance policy with it. At that time the 2nd respondent did not object to the 1st respondent's insurable interest.

4. However, when the second incident occurred on November 28, 2011, this time around the 2nd respondent refused to accept the claim on the basis that the 1st respondent had no insurable interest in the vehicle.

5. In response to this, the 1st respondent filed suit against the 2nd respondent claiming that the 2nd respondent had made representations to it that the vehicle was insured. This representation was based on its conduct; and accordingly, the 2nd respondent was estopped from denying the 1st respondent's insurance claim.

6. The 2nd respondent enjoined the appellant to the lower court proceeding by way of Third Party Notice claiming indemnification for liability.

7. The appellant opposed the suit in the lower court vide its Third Party Defence dated December 10, 2014 in which it denied that it had misled the 1st respondent on the existence of a free comprehensive insurance. It stated that it had never represented to the 1st respondent that the vehicle was insured for one year running from the date of delivery, as claimed by the 1st respondent.

8. The appellant stated that the sale of the motor vehicle to the 1st respondent was an outright sale; and that a third party did not retain any insurable interest in the motor vehicle after the sale.

9. The appellant stated that the 1st respondent had failed to remove and surrender to it, the insurance sticker which was attached to the vehicle after the sale and transfer of the vehicle.

10. The matter went for a full trial and on September 25, 2020 the lower court entered judgment in favour of the 1st respondent. The lower court found the 2nd respondent liable to pay the sum of Kshs. 1,693,600/- being the value of the vehicle, together with interest, and costs.

11. Aggrieved by the above judgment, the appellant has filed this appeal dated October 29, 2020 on the following grounds:

    a. The Learned Trial Magistrate erred in law and in fact in holding that the 2nd respondent had successfully attributed liability to the appellant.

    b. The Learned Trial Magistrate erred in law and in fact in finding that the appellant retained any insurable interest in the motor vehicle registration number KBJ 287W after the sale.

    c. The Learned Trial Magistrate erred in law and in fact in finding that the third party notice was competent as the 1st respondent did not surrender back the insurance sticker after the sale of the motor vehicle hence the 1st respondent would not in law have any benefits for indemnity on the basis of an insurance contract between the appellant and the 2nd respondent.

    d. The Learned Trial Magistrate erred in law and in fact in holding that the 2nd respondent was liable to the 1st respondent and further holding the appellant liable when there was evidence that the 1st respondent was not privy to the contract between the appellant and the 2nd respondent.

    e. The Learned Trial Magistrate erred in law and in fact in holding that the comprehensive insurance policy taken out by the third party prior to the sale of the motor vehicle registration number KBJ 287 W was taken for the benefit of the 1st respondent.

f. The Learned Trial Magistrate erred in law and in fact in failing to find and hold that the appellant's insurable interest under the policy with the 2nd respondent ceased and ended following the sale of the said motor vehicle to the 1st respondent.

g. The Learned Trial Magistrate erred in law and in fact in finding that the 1st respondent had proved their case against the 2nd respondent and that the 2nd respondent's insurance policy taken out by the appellant was surely issued for the benefit of the appellant.

h. The Learned Trial Magistrate erred in law and in fact and reached a verdict that is wholly against the weight of the law and evidence presented before the court.

12. The 1st respondent, in turn, appealed against the judgment of the lower court and filed their Memorandum of Cross Appeal dated November 10, 2020 based on the following grounds:

a. The Learned Magistrate erred in law and in fact in awarding interest from the date of the judgment instead of awarding from the date of filing suit as prayed for in the plaint.

b. The Learned Magistrate erred in law and in fact in failing to consider that this was a liquidated claim and interest should run from the date when the amount was due and or when the suit was filed.

c. The Learned Magistrate erred in law and in fact in failing to consider the evidence, relevant authorities and submissions by the appellant thus arriving at the wrong conclusion with respect to the above.

13. The parties agreed that this appeal be disposed of by way of written submissions. The appellant filed its written submission dated January 23, 2023. The 1st respondent filed its written submission dated January 31, 2023.

Appellant's Submissions:

14. The appellant submitted that it sold three vehicles to the 1st respondent on the basis of a promotion, where it sold the vehicles with one year free insurance coverage for those specific vehicles. The insurance company through whom the promotion was administered was Chartis Insurance, and not the 2nd respondent.

15. The applications for the insurance cover of those vehicles were done in the name of the 1st respondent, and comprehensive insurance policies were issued directly in its name.

16. In the case of the present vehicle, the appellant had taken out comprehensive insurance cover to insure its own interest in the vehicle between January 11, 2011 and December 31, 2011. This interest ceased upon sale and transfer of the vehicle to the 1st respondent.

17. The appellant submitted that the 1st respondent was duty bound to surrender the certificate of insurance to it but did not do so. There was no agreement between the parties that the policy taken out by the appellant would remain in place for the benefit of the 1st respondent.

18. The appellant clarified that it had abandoned grounds number one, two, four and eight since filing the Memorandum of Appeal. Accordingly, it submitted that the central issue before the court was whether the policy between the appellant and 2nd respondent continued in force after the sale and transfer of the vehicle to the 1st respondent.

19. The appellant argued that a buyer of an already insured subject cannot obtain insurance without a transfer or fresh insurance cover in relation to that subject. This was because the insurance contract is between the insurer and the insured, which in this case, was between the appellant and the 2nd respondent. Accordingly, after the appellant had sold the vehicle, it no longer had any interest to which the policy in its favor could continue to have force.

20. The appellant submitted that in the absence of an express stipulation in the policy, the moment the appellant parted with the vehicle, the policy relating to it lapsed. The appellant relied on the English authority of Peter v General Accident Fire and Life Assurance Corporation Ltd. [1938] 2 All ER 267 (CA) which is to the effect that insurers are not liable if the owner of the vehicle has sold it and handed the insurance policy to the buyer but the buyer has not taken out a policy of his own.

21. The appellant further relied on the English authority of Rodgerson v Scottish Automobile and General Insurance Company Ltd. [1931] ALL Ea Reprint 606 (HL), where it was held that if the insured parts with the ownership of the insured vehicle, the policy of insurance relating to the same lapses.

22. The appellant submitted that the lower court had erred because there was evidence that the 1st respondent was not privy to the contract between the appellant and the 2nd respondent. It contended that a policy of insurance is the result of a contract between an insured and an insurer against liability. The appellant and the 2nd respondent were the only rightful parties who were privy to the contract in question.

23. Finally, the appellant submitted that neither the general principles of law relating to contract, or common law, gives a third party a cause of action against the insurer.

The 1st Respondent's Submissions:

24. The 1st respondent submitted that it purchased the vehicle from the appellant together with comprehensive insurance cover. This was evidenced by the fact that after an accident occurred (which led the 1st respondent to lodge claim with the 2nd respondent), the 2nd respondent demanded payment for excess, which sum was duly paid, and the vehicle was repaired.

25. Further, the appellant had never informed it that it had cancelled the contract, or that the 1st respondent was required to return the insurance sticker to it. Rather, the appellant had represented to it that the contract would run for a period of one year after the sale.

26. Moreover, it submitted that the appellant and the 2nd respondent knew about the sale of the vehicle with an insurance sticker on it, and still did not stop the insurance cover.

27. On the issue of privity of contract, the 1st respondent submitted that the appellant represented to it that it did not need to be privy to the insurance contract to be protected by the insurance cover. By virtue of its previous conduct and representations, the appellant was estopped from denying its insurable interest in the vehicle.

28. The 1st respondent relied on the High Court decision in *Kenindia Assurance Co. Ltd v New Nyanza Wholesalers Ltd [2017]* eKLR where the court stated:

> "In order for a common law estoppel by representation to arise, the person to whom the representation is made must have changed his position in some way to his detriment. In doing so, he must have relied on the representation, although that need not have been the sole cause of his change of position."

29. Further to the above, based on the same authority, the 1st respondent submitted that between the balance of the doctrine of estoppel, and principle of privity of contract, the doctrine of estoppel had upset privity of contract. Accordingly, despite the absence of an express contract between the 1st and 2nd respondent, representations made by the appellant to the 1st respondent and the conduct by the parties referred to above, was sufficient to invoke the doctrine of estoppel.

30. In support of its cross appeal, the 1st respondent submitted that interest ought to have run from the date of filing suit; and that the amount awarded by the trial court was a liquidated sum. It relied on section 26 (1) of the *Civil Procedure Act*; and the High Court decisions in *Scanpex Communications System Ltd. v Amicable Travel Services Ltd. [2020]* eKLR and *Jane Wanjiku Wambi v Anthony Kikamba Hato & 3 others [2018]* eKLR in support of the above position.

Analysis and determination:

31. I have read the record in its entirety and considered the grounds of appeal raised by the appellant and the grounds raised in cross appeal. The issues that arise for determination are as follows:

    a. Was the 1st respondent covered by the 2nd respondent's insurance policy after the sale and purchase of the Vehicle?

    b. Are the parties entitled to the reliefs sought?

Was the 1st respondent covered by the 2nd respondent's insurance policy after the sale and purchase of the Vehicle?

32. As this is a first appeal, I have a duty to re-evaluate the evidence before me. This principle as set out in the Court of Appeal decision of Selle and Another Versus Associated Motor Boat Company Ltd & Others [1968] EA 123, where the court stated that:

> " 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 conclusion. Though it should always bear in mind that it has neither seen nor heard the witnesses and should make 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 in some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence on the case generally."

33. Looking at the record before me, there are two different versions of events. One version, broadly speaking, is that the appellant and 2nd respondent made representations to the 1st respondent that it could rely on the insurance cover in place at the time the 1st respondent bought the vehicle. The second version of events is that the 1st respondent simply bought a vehicle from the appellant in the ordinary manner, without any promotional offer. No such representation relating to any insurance policy was made or said; the 1st respondent was never a party to the contract for insurance cover; and the cover ceased to exist upon sale of the vehicle to the 1st respondent.

34. Looking at the record, I am persuaded that the second version of events is more probable than the first. I say this because I am unable to find sufficient evidence that the insurance policy between the appellant and 2nd respondent was intended to cover the purchaser after the sale of the Vehicle.

35. In his testimony, PW1, Mr. Kamau, admitted that "there is no paperwork to support this deal", the 'deal', being free comprehensive insurance cover of the vehicle. He further testified that ".... the receipt shows that the relationship was between the company and jubilee insurance". Yet Mr. Kamau was certain that the Vehicle was covered. His reason was based on the notion that by paying the excess fee, and in turn, the consequent repair his vehicle pursuant to the same, the parties had affirmed the contract, and were now estopped from denying the cover of insurance.

36. Looking at the judgment in the lower court, the Magistrate agreed with the above position. However, based on the record, I am not persuaded that this was a reasonable conclusion. The evidence shows that 1st respondent bought three vehicles from the appellant, which were in fact sold together with insurance, as part of 'a deal'. Ms. Nagpal, the Sales Manager for the appellant testified that:

> "there was a promotion on pick- ups that were new ...the price for new pick -ups were Kshs. 1,956,400/- each ...the insurance was in the name of the purchaser ... we had a deal with Chartis..."

37. Several key points emerge from the above testimony: the first is that the 'deal' related to new vehicles, which were being sold at the price of Kshs. 1,956,400/-; secondly, and more importantly, the insurance for those vehicles were made in the 1st respondent's name and not the appellant's.

38. Looking at the record, a further point emerges, only three vehicles were available under this 'deal'. Ms. Nagpal testified that "the plaintiff bought three new cars. The fourth was not available." Because a fourth vehicle was not available, the witness testified that, the 1st respondent opted to buy the appellant's "company car", which she stated "was used, and we sold the same to (the 1st respondent) for Kshs. 1.6 million. This was an old vehicle".

39. Based on the above testimony, I am persuaded that this fourth vehicle, was different. It was different from the other three vehicles in several obvious ways: it was not new; it was a used vehicle; it was sold at a different price from the other three vehicles; and the insurance for the vehicle was not effected in the name of the purchaser, rather, it was in the name of the company. To my mind, these facts alone, ought to have put the 1st respondent on notice that the terms of sale and purchase of that vehicle would not be identical to the other three.

40. Despite the above, Mr. Kamau, seemed content to ignore these differences. He testified (in relation to the fourth vehicle), that he never filled any requests or application forms for insurance in his name. Nor did he provide any details to any insurance company. At the same time, he could not explain why the insurance coverage for the other three vehicles had been effected directly in the 1st respondent's name, and not the appellant company name. The evidence does not add up.

41. I have considered the English authorities of Peter v General Accident Fire and Life Assurance Corporation Ltd. [1938] 2 All ER 267 (CA) and Rodgerson v Scottish automobile and general insurance company ltd. [1931] ALL Ea Reprint 606 (HL), which I note are persuasive.

42. The above authorities are in line with our own jurisprudence. In *Kenya Orient Insurance Ltd. versus Kelvin Macharia Karanja [2017]* eKLR, the court similarly reached the conclusion that an insurance policy does not extend beyond the time of sale of the insured property as the insurable interest is lost once the insured property is sold.

43. Accordingly, the lower court went wrong when it found that the purchaser was entitled to rely on the insurance sticker as proof of the cover. This is because, first of all, the sticker could not purport to

make the 1st respondent a party to the insurance contract; second, it could not bestow benefits on the 1st respondent arising from a contract that it was not party to.

44. The 1st respondent ought to have made further inquiries of its own to find out if the Vehicle was covered. Further, once it realized that the cover was not in its name, it ought to have taken out fresh cover in its own name. It did not do so, and could not inherit a policy that is not in its name as the law does not allow this. At best, the 1st respondent could benefit from a temporary cover for a period of not exceeding three months after the sale. Section 76 A of *Insurance Act* Cap 407 Laws of Kenya provides;

> "1. Upon change of ownership of a motor vehicle, an insurer should;
>
> a) Only issue a temporary cover for a period not exceeding three months pending the registration of the motor vehicle in the name of the new owner.
>
> b) Not renew the temporary cover or issue any annual policy in respect of the motor vehicle, unless the new owner provides proof of the registration of the motor vehicle in his name by the Registrar of motor vehicles."

45. Because the insurance cover was in a different name, by operation of law, it could not have lasted beyond the period of three months from the date of the sale. The 1st respondent's claim against the appellant was accordingly based on an illegality in the first place because even if its claim was proved (which was not) it would still have been outside the three months statutory period. The sale was in March 2011, while the incident giving rise to the claim occurred in November, 2011.

46. Estoppel cannot operate contrary to law. Further, I am satisfied that the payment and acceptance of excess was a mistake. I do not think it gave rise to a contract between the parties.

47. Based on reasons above, on a balance of probability, I am satisfied that the 1st respondent failed to prove that it was covered by the 2nd respondent's insurance policy after the sale and purchase of the vehicle.

Are the parties entitled to the reliefs sought?

48. The upshot is that the appeal is with merit and succeeds. Having found for the appellant in entirety, the 1st respondent's cross appeal is dismissed.

49. The orders of this court are as follows:

a. The appeal is allowed.

b. The judgment of the Honorable Trial Magistrate and all consequential orders dismissing the suit in the lower court are hereby set aside with costs to the appellant.

c. Judgment is entered in favour of the Third Party/ appellant as prayed for in the Third Party defence in the lower court.

DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 6TH DAY OF APRIL 2023

ALEEM VISRAM

JUDGE

In the presence of;

..... for the Appellant

..... for the Respondent