Kenya Orient Insurance Limited v Kiilu (Civil Appeal 415 of 2019)
[2023] KEHC 4065 (KLR) (Civ) (8 May 2023) (Judgment)

Neutral citation: [2023] KEHC 4065 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 415 OF 2019

AN ONGERI, J

MAY 8, 2023

BETWEEN

KENYA ORIENT INSURANCE LIMITED ..... APPELLANT

AND

JOSPHAT KYUALO KIILU ..... RESPONDENT

(Being an appeal against the judgment and decree of Hon. ORENGE (P.M) in Milimani CMCC no. 2639 of 2017 delivered on 19/6/2019)

JUDGMENT

1. This appeal arises from a declaratory suit filed by the respondent against the appellant seeking declaratory orders that the appellant was obliged to pay the respondent special damages of ksh.431,301/= in respect of the repair for the respondent's motor vehicle registration no. KBX 921Z.
2. The respondent had insured the said motor vehicle with the appellant and the said policy was in force when the motor vehicle was involved in an accident on 18/5/2015 and it was extensively damaged.
3. The appellant agreed to pay the respondent cash ksh.431,301/= in lieu of repair.
4. The appellant sent an assessor to establish whether the vehicle had been repaired and the assessor established that the cost of repair was altered from 431,301/= to 191,980/= and therefore the appellant was not under an obligation to indemnify the respondent.
5. The trial court entered judgment in favour of the respondent in the sum of ksh.431,000 plus costs and interest.
6. The appellant has appealed against the said judgment on the following grounds;

a. That the learned trial magistrate erred in law and in the manner that he analyzed the evidence that was led in the case and in failing to appreciate the nature of the dispute between the parties and the applicable insurance law principles

b. That the learned trial magistrate misapprehended the doctrine of indemnity in insurance law and practice

c. That the learned trial magistrate failed to analyze the applicability of the principle of indemnification as applied when a party accepts cash in lieu of repairs from an insurer.

d. That the learned trial magistrate erred in law and in fact in failing to consider the appellants submissions.

7. The parties filed written submissions in the appeal which I have duly considered. The appellant submitted that it was not disputing the insurance contract and that all it stated was that the respondent had chosen to be compensated by way of cash in lieu of repairs. It was its argument that the trial court did not address its mind to the doctrine of indemnity under insurance law or address his mind to the defence of unjust enrichment.

8. It was the appellants submission that it was notified on or about 18th May 2015 that the insured vehicle had been involved in an accident. The respondent opted to repair his car cash in lieu of basis. The appellant appointed an assessor who inspected the respondent's vehicle and ascertained that the cost of restoring the vehicle to its pre-accident condition. The assessment established that the respondent's vehicle had been under insured given that the insured value of the vehicle was Kshs. 3,000,000 while the actual pre-accident value was kshs. 4,400,000.

9. The appellant prepared a cash in lieu discharge voucher for Kshs. 431,301 and vide its letter dated 6th July 2017, it notified that the respondent that the vehicle will require re-inspection after repairs. The letter also notified the respondent that his vehicle had been under insured and as such he was to contribute towards the repairs of the vehicle in light of the insurance principle of pro-rata condition of average.

10. The appellant claimed that it sent an assessor to determine whether the vehicle had been restored to its pre accident condition. The assessor established that the vehicle had been repaired, save that the respondent had chosen to repair the damaged cabin instead of replacing the same in line with that initial assessment report as a result the cost of the repairs was altered from Kshs. 431,301 to Kshs. 191,980 and further upon applying the pro rata condition of average to the respondent's claim, it was clear that the costs of the repairs were below the policy excess and as such the appellant was not under any obligation to indemnify the respondent.

11. Finally the appellant submitted that the insurance contract was one of indemnity and the appellant could only pay for the loss suffered by the respondent the value of a cabin that he never bought which he admitted during cross examination.

12. This being the first appellate court my duty is to re-evaluate the evidence adduced before the trial court and to arrive at my own conclusion whether to support the finds of the trial court. In Selle v Associated Motor Boat Co. [1968] EA 123 in the following terms: -

> " An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.

> 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 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 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."

13. The issues for determination in this appeal are as follows;

    i. Whether there was a valid insurance policy subsisting between the appellant and the respondent at the time of the accident.

    ii. Whether the appellant is liable to pay special damages of ksh.431,301 as cash in lieu of repair in respect of damage to the respondent's motor vehicle.

    iii. Who pays the costs of this appeal.

14. On the issue as to whether there was a valid insurance contract subsisting between the appellant and the respondent, I find that it is not in dispute that the appellant had insured the respondent's motor vehicle and that the policy was subsisting when the respondent's motor vehicle was involved in an accident and it was extensively damaged.

15. In the case of Lucena v Craufurd, 127 Eng. Rep 630, 642 [1805] the court observed as follows:

> " The term 'insurance contract'....shall....be deemed to include any agreement or other transaction whereby one party, herein called the insurer, is obligated to confer benefit of pecuniary value upon another party, herein called the insured or the beneficiary, dependent upon the happening of a fortuitous event in which the insured or beneficiary has, or is expected to have at the time of such happening of such event. A fortuitous event is any occurrence or failure to occur which is, or is assumed by the parties to be, to a substantial extent beyond the control of either party. In a general sense insurance is a contract to pay a sum of money upon the happening of a particular event or contingency, or indemnity for loss in respect of a specified subject by specified perils; that is, an undertaking by one party to protect the other party from loss arising from named risks, for the consideration and upon the terms and under the conditions recited".

16. On the issue as to whether the appellant is liable to pay special damages of ksh.431,301 as cash in lieu of repair, I find that the appellant declined to make the said payment after sending an assessor who found that the repair costs were ksh.191,980 and not ksh.431,301.

17. I find that the contract of insurance is a contract of indemnity and the same can pay no more than the damage incurred.

18. In the case of Crisp v Security Nat'l Ins. Co, 369 S.W. 2d 326 [1963], the court stated that

> " Indemnity is the basis and foundation of insurance coverage not to exceed the amount of the policy, the objective being that the insured should neither reap economic gain or incur a loss is adequately insured.

> ...The measure of damage that should be applied in case of destruction of this kind of property is the actual worth or value of the articles to the owner for use in the condition in which they were at the time of the fire excluding any fanciful or sentimental considerations"

19. This aspect is emphasized in Castellain v Preston. Brett LJ declared that:

> " The very foundation.....of every rule which has been applied to insurance law is this, namely, that the contract of insurance contained in a marine or fire policy is a contract of indemnity, and of indemnity only, and that this contract means the assured, in case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified. That is the fundamental principle of insurance, and if ever a proposition is brought forward which is at variance with it.....that proposition must certainly be wrong."

20. The respondent admitted that the spare parts were not replaced since the same were repaired.

21. The appellant is only liable to pay for the actual loss sustained and no more.

22. I accordingly set aside the judgment and decree of the Trial court and I declare that the Respondent is not bound to pay the cash in lieu of repair in the sum of kshs .431,301.

23. The appeal herein partially succeeds and I substitute the sum of kshs. 431,301 with kshs.191,980/= which was the actual loss incurred.

24. Judgment be and is hereby entered in favour of the respondent against the appellant in the sum of kshs.191,980/= together with costs of this suit and interest from the date of filing the original suit until payment in full.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 8TH DAY OF MAY, 2023.

A. **N. ONGERI**

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of:

.....for the Appellant

.....for the Respondent