United Way Kenya Limited v Cannon Assurance Company Limited (Civil Appeal E138 of 2021) [2023] KEHC 17283 (KLR) (Commercial and Tax) (12 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17283 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL APPEAL E138 OF 2021

DAS MAJANJA, J

MAY 12, 2023

BETWEEN

UNITED WAY KENYA LIMITED .... APPELLANT

AND

CANNON ASSURANCE COMPANY LIMITED .... RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. E. Wanjala, SPM dated 30th April 2020 at the Nairobi Magistrates Court at Milimani in CMCC No. 267 of 2019)

JUDGMENT

Introduction and Background

1. What is before the court for determination is an appeal filed by the appellant challenging the decision of the subordinate court dated April 30, 2020 where the trial court dismissed the Appellant's suit.

2. The facts that gave rise to the said suit and now this appeal are fairly straightforward and can be gleaned from the parties' pleadings before the trial court. At the material time, the appellant was the owner of a motor vehicle K*R **5J ("the motor vehicle") whereas the Respondent was a registered and licensed insurance company that was providing a comprehensive insurance cover for the motor vehicle under policy number 01/07/05848/12 ("the policy").

3. Sometime in March 2013, the appellant, through its Managing Director reported to the police that the motor vehicle had been stolen while he was in the process of selling it. That two men purporting to be potential buyers asked to view and inspect the motor vehicle only for them to storm out with it and that the motor vehicle has never been recovered to date.

4. The appellant notified the respondent about the theft and demanded compensation for the stolen motor vehicle which demand the Respondent declined to honour on the grounds, inter alia, that the

Appellant had been negligent and had breached the terms of the policy by not taking due care of the motor vehicle, that it advertised the sale of the motor vehicle thereby altering the insured risk as the motor vehicle was insured for personal use and by putting it in the market, the risk covered changed, that the appellant failed to install an anti-theft device despite it being a requirement under the policy, that the loss was foreseen as the Appellant allowed the motor vehicle to be driven away by people unknown to him, that there was no consideration at the point of the loss and that there was manifest bad faith on the part of the appellant.

5. The appellant therefore filed suit seeking Kshs. 5,700,000.00 being the comprehensively insured amount for the motor vehicle and car hire charges at Kshs. 3,000.00 per day from March 3, 2013until date of payment.

6. The matter was also referred to mediation. The only issue agreed was that there was an insurance policy in place and that loss had occurred. The parties failed to agree on the issue of liability. Due to the value of the subject matter, the suit was transferred to the subordinate court for hearing and determination.

7. In due course, the respondent filed its Statement of Defence and reiterated the grounds upon which it had declined to compensate theappellant.

8. The matter was set down for hearing where both parties called one witness each; the appellant called its Managing Director, Charles Wachira Ngundo (PW 1) whereas the respondent called its Claims Officer, Evans Otieno Onsego (DW 1).

9. After considering the parties' evidence and submissions, the trial court rendered its judgment on April 30, 2020. The court accepted for determination the following issues raised by theappellant. first, whether the appellant had insured the motor vehicle with the respondent. Second, whether the motor vehicle was stolen. Third, whether the appellant breached the terms of the policy and last, whether the respondent was liable to compensate the appellant for the loss of the motor vehicle.

10. Since the first two issues were settled by mediation, the trial court thus held that the respondent had insured the appellant's motor vehicle and that the said motor vehicle was stolen and that the loss had occurred. On whether the appellant breached the terms of the policy, the trial court agreed with the respondent that the appellant did not exercise due care in dealing with the strangers who accessed the motor vehicle so as to avert the theft, hence the trial court found that the appellant indeed breached the general duty of care to avoid the loss. The trial court was further persuaded by the respondent that by the appellant advertising the motor vehicle for sale, the risk changed and the motor vehicle was exposed to resultant theft since the strangers who stole the motor vehicle responded to the advertisement for sale. However, the trial court found that as admitted by the respondent at the hearing, the appellanthad installed an anti-theft device on the motor vehicle at the time of the theft. In the circumstances, the learned magistrate held that theappellant had breached the terms of the policy and found that the respondent could not be held liable to compensate the appellant for the loss.

11. Following dismissal of the suit, therespondent filed this appeal based on the Memorandum of Appeal dated June 8, 2021. The appeal was canvassed by way of written submissions. Since the submissions more or else reiterate the parties' positions I have already summarized above, I do not find it necessary to summarize the same but I will make relevant references in my determination below.

Analysis and Determination

12. As this is the first appeal, this court is enjoined by the provisions of section 78 of the *Civil Procedure Act* to evaluate and examine the trial court's record and the evidence presented before it in order to arrive at

its own conclusion. This principle of law was well settled in the case of *Selle v Associated Motor Boat Co. Ltd* (1968) EA 123 where the Court of Appeal outlined the duties of a first appellate court as follows:

> [An appellate court] is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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...

13. Even though the Appellant has raised 7 grounds in its Memorandum of Appeal, it has condensed them into three issues for determination. First, whether the Appellant was negligent and breached the terms of the policy. Second, whether the advertisement of the motor vehicle for sale constituted change of use of the said motor vehicle under the policy and last, whether the Appellant was entitled to compensation for the theft of the motor vehicle under the policy.

14. As to whether the appellant was negligent and in breach of the policy, the appellant submits and faults the trial court for finding that it was in breach of Clause 16(c) of the policy which provides:

> 16.
>
> (c) Transfer of ownership/cancellation of policy
>
> This being a personal contract, it is not transferrable to other parties. Thus in the event of sale of the vehicle(s) or Cancellation of the Policy, certificate of insurance in duplicate MUST be returned to us immediately to facilitate cancellation.

15. The appellant further submits that the above clause is in respect to the cancellation of the policy in the event of sale of the motor vehicle. That the motor vehicle had not been sold and therefore, clause 16(c) was inapplicable and irrelevant to the circumstances of this case. It further submits that the trial court misapplied the use of the motor vehicle and made an error in its interpretation of Condition 3 of the policy which provides that:

> 3. Communication of changes
>
> You will inform us immediately of any important changes affecting the vehicle(s) covered under this and/or its/their use.

16. The appellant contends that the motor vehicle was his private car and has never been utilised for public purposes and that the class of the policy was “Private Car-Comprehensive” and there were no limitations attached thereto. It therefore contends that the allegation that the risk changed from being private to public is misleading.

17. The respondent opposes the appeal. it submits that although the appellant upgraded its policy on the motor vehicle on March 7, 2013, the premiums on the same were only paid on March 26, 2013several days after the purported theft occurred but that the motor vehicle had been advertised for sale in February, 2013. It states that at the time of upgrading the cover, the motor vehicle was already on sale which fact the appellant never disclosed to the respondent when applying for the upgrade. Further, that when the appellant paid the premiums for the upgraded policy on March 26, 2013, the motor vehicle had already been ‘stolen’ but the same was never disclosed and that this raises the question of how the Appellant was paying premiums for a vehicle that was no longer in its possession having been already stolen.

18. Having considered the record alongside theappellant's arguments, I disagree with the appellant that the trial court concluded that the risk of motor vehicle changed from being private to public. What the trial court stated was that "...by the plaintiff advertising the suit vehicle for sale despite the vehicle having been a private vehicle it exposed the vehicle to the public hence the risk changed..." The trial court never stated that the use of the car changed from private to public purposes or usage. It also never stated that theappellant was in breach of Clause 16(c) of the policy above, rather, it was just quoting the respondent's averments and position.

19. I also note that therespondent appears to be questioning the validity of the policy when it had already admitted during mediation and before the trial court that the policy was fully in place and that a loss occurred. The respondent cannot now state that the appellant was not covered by it at the time of the theft or that the policy was obtained by way of mischief when it had admitted otherwise.

20. The trial court held that theappellant breached the policy as PW 1 was negligent in the manner in which he let the strangers access the motor vehicle and that by advertising the motor vehicle the risk changed as the motor vehicle was now exposed to the public and the risk involved was higher. Did these actions breach the policy to the extent that the appellant could not be compensated for the loss of the motor vehicle? Condition 1 of the Policy provided that the respondent could only make payment if the appellant "...meets all the terms, conditions and endorsements of this policy". One of the conditions under the policy was that the appellant was to "take all other reasonable steps to prevent accidents, injuries loss or damage". The appellant was also supposed to inform the respondent of "....any important changes affecting the vehicle(s) covered under this and/or its/their use".

21. The next question is whether the appellant took all reasonable steps to prevent the loss of the motor vehicle and whether it was necessary to inform the respondent that the motor vehicle was up for sale. Going by the statement provided by PW 1 to the police and to the trial court, I find that the trial court did not err when it came to the conclusion that PW 1 was negligent in the manner in which he casually let strangers take the motor vehicle for a test drive. This is indicative that the appellant did not take reasonable steps to prevent the loss of the motor vehicle and was thus in breach of the policy. I also find that it was necessary for theappellant to inform the respondent that the motor vehicle was up for sale as the decision to sell was an important change to the motor vehicle that the insurer ought to have known. I hold that failure to communicate this change was also in breach of the policy. This finding is against the nature of contracts of insurance which are based on disclosure by the insured. The Court of Appeal in *Co-Operative Insurance Company Ltd v David Wachira Wambugu* [2010] 1 KLR 254 expounded on this point by stating as follows:

> The learned Judge was right in saying that a contract of insurance is one of uberrimae fidei. The insurer is entitled to be put in possession of all material information possessed by the insured. In policies of insurance, whether marine insurance or life insurance, there is an understanding that the contract is uberrimae fidei, <u>if you know any circumstances at all that may influence the underwriter's opinion as to the risk he is incurring, and consequently as to whether he will take it, you will state what you know</u>. There is an obligation there to disclose what you know, and the concealment of a material circumstance known to you, <u>whether you thought it material or not, avoids the policy...Contracts of insurance are contracts of utmost good faith and this gives rise to a legal obligation upon the insured, prior to the contract being made, to disclose to the insurer all material facts and circumstances known to the insured which affect the risk being run</u>. Insurance is a contract of speculation and the special facts upon which the contingent chance is to be computed lie most commonly in the knowledge of the assured only; the underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge

> to mislead the underwriter into a belief that the circumstance does not exist. The keeping back such circumstance is a fraud, and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention, yet still the underwriter is deceived and the policy is void; because the risqué run is really different from the risqué understood and intended to be run at the time of the agreement. The policy would be equally void against the underwriter if he concealed. The governing principle is applicable to all contracts and dealings. Good faith forbids either party, by concealing what he privately knows, to draw the other into a bargain from his ignorance of the fact and his believing the contrary. [Emphasis mine]

22. For these reasons, I cannot fault the subordinate court for finding that the appellant was negligent and thus in breach of the policy. As stated, therespondent could only pay up a claim if all the conditions of the policy were fulfilled and thus, the trial court did not err in finding that respondent could not be held liable to compensate the appellant for the loss of the motor vehicle once there was breach of the policy.

Disposition

23. I find that the appeal lacks merit. It is dismissed with costs to the Respondent. The costs are assessed at Kshs. 60,000.00.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF MAY 2023.

D. S. MAJANJA

JUDGE

Mr Kotonya instructed by Gachie Mwanza and Company Advocates for the Appellant

Mr Makumi instructed by J. Makumi and Company Advocates for the Respondent