Hersi v Toyota Kenya Limited & another (Civil Suit 235 of 2016)
[2023] KEHC 19247 (KLR) (Civ) (22 June 2023) (Judgment)

Neutral citation: [2023] KEHC 19247 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL SUIT 235 OF 2016

CW MEOLI, J

JUNE 22, 2023

BETWEEN

FADUMO MOHAMUD HERSI ..... PLAINTIFF

AND

TOYOTA KENYA LIMITED ..... 1ST DEFENDANT

UAP INSURANCE CO. LTD ..... 2ND DEFENDANT

JUDGMENT

1. Fadumo Mohamud Hersi, (hereafter the Plaintiff) by the plaint dated 01.09.2016 sued Toyota Kenya Limited (hereafter the 1st Defendant) and UAP Insurance Co. Ltd (hereafter the 2nd Defendant) seeking a new vehicle of the same quality and standard as the subject motor vehicle; Kes 21,375,000/- (read Twenty-One Million Three Hundred and Seventy-Five Thousand only) on account of loss of user that continued to accrue at the rate of Kes 25,000/- per week from August 6, 2016 until payment in full.

2. It was averred that over the years the Plaintiff purchased several vehicles from the 1st Defendant and that on December 18, 2012 the Plaintiff purchased motor vehicle registration no. KBT 991Z (hereafter subject motor vehicle) and the purchase price was paid in full. Further that as a promotional benefit for the purchase of the subject motor vehicle the 1st Defendant obtained from the 2nd Defendant a comprehensive insurance cover for the period between December 19, 2012 and December 18, 2013 as per Policy No. 024/880/108524/2012 in respect of the subject motor vehicle. That on or about 05.05.2013 while the said insurance cover was in force, the subject motor vehicle was involved in a road traffic accident, was extensively damaged and declared a write off. obligating the defendants and or any of them to provide the Plaintiff with a new motor vehicle under the contract of insurance or other representations.

3. It was further averred that in breach of their legal duties and or obligation under the contract of insurance and or other promises, the Defendants refused, failed and or neglected to procure for the Plaintiff a new motor vehicle and the Plaintiff has thereby suffered loss and damage. As a result of the Defendants' actions and or omissions, the Plaintiff suffered loss of use of the subject motor vehicle at the rate of Kenya Shillings Twenty-Five Thousand (Kes 25,000/-) per day for five days per week since 05.05.2013 and continues to suffer the said loss.

4. On October 13, 2016 the 1st Defendant filed a statement of defence denying the key averments in the plaint and by its counterclaim sought orders compelling the Plaintiff to collect the vehicle from the 1st Defendant's premises and or workshop; to pay the storage charges accrued at the rate of Kes 1,000.00 per day from August 31, 2016 till the collection date; costs of suit and counterclaim and interest.

5. The gist of the 1st Defendant's averments was that on May 7, 2013 the Plaintiff delivered the subject motor vehicle for repair at the 1st defendant's workshop along Kampala Road Nairobi, and upon completion of repairs on August 31, 2013 and the replacement of the subject motor vehicle's chassis, the Plaintiff was invited to collect the vehicle but without proper cause and or reason has failed, refused and or neglected to collect the subject motor vehicle from the 1st Defendant's workshop. It was further averred that the 1st Defendant repairs and services many vehicles in its daily operations which all need to be stationed at the 1st Defendant's premises or workshop. That the presence of the subject motor vehicle in the 1st Defendant's premises since August 31, 2013 has become a liability to the 1st Defendant by taking up valuable space for and incurring storage charges of Kes 1,000 per day.

6. The 2nd Defendant filed its statement of defence on November 1, 2016 denying the key averments in the plaint asserting that the subject motor vehicle was satisfactorily repaired by the 1st Defendant and authorized for release to the Plaintiff.

7. The Plaintiff thereafter filed a reply to defence to both and 1st and 2nd Defendant's respective statements of defence and a defence to the 1st Defendant's counterclaim by joining issues with the averments in the statements of defence and denying the key averments in the 1st Defendant's counterclaim.

8. During the trial, Plaintiff testified as PW1. She identified herself as a business lady who resides at Eastleigh and proceeded to adopt her witness statement dated September 1, 2016 as her evidence- in -chief. She produced the documents in the list of documents of even date as PExh. 1 - 14. Under cross-examination, she reiterated that after the accident she returned the vehicle to the 1st Defendant but both Defendants have declined to replace it with a new car or cash in lieu of repairs.

9. She denied having instructed the 1st Defendant to repair the vehicle and confirmed that the policy obligated 2nd Defendant to either compensate her or repair the subject motor vehicle. However, insisting on a new vehicle or payment in lieu of repairs. It was her evidence further that the subject motor vehicle was involved in an accident in Maua and sustained damage to the front cabin, engine, brakes, screen, and chassis. That the 2nd Defendant, after examining the vehicle, took it to the 1st Defendant but the former failed to inform her that the vehicle was ready for collection from the latter's yard.

10. On re-examination she reiterated that the vehicle was damaged extensively and subsequently written off meanwhile she has not been paid by the 2nd Defendant. She concluded by stating that there was no agreement to repair the subject motor vehicle.

11. On behalf of the 1st Defendant, Joel Kinaro testified as DW1. He identified himself as a workshop manager, before adopting his witness statement dated 02.11.2020 as his evidence -in -chief and produced the documents in the list of documents filed on 13.10.2016 as DExh.1-14. During cross-

examination he stated that the subject motor vehicle was assessed after the accident under instructions of the 2nd Defendant. That assessors detailed the damage to the vehicle and made a finding that the same could be repaired even though the chassis needed replacement.

12. He further stated that the new chassis was imported and repairs to the vehicle concluded on August 31, 2013. That several calls were made to the Plaintiff to collect the subject motor vehicle while issuing requisite documents to enable the Plaintiff to generate a new logbook. He confirmed that the vehicle was badly damaged, requiring replacement of the chassis. He further stated that the vehicle required a new chassis number and that the Plaintiff, despite being notified, left the vehicle in the 1st Defendant's yard. On re-examination he stated that the subject motor vehicle was brought to their garage by the 2nd Defendant and repair instructions issued at their behest and that the responsibility lay with the Plaintiff to collect the vehicle.

13. Despite being given the opportunity, the 2nd Defendant did not call any evidence.

14. At the close of the trial parties filed submissions. Counsel for the Plaintiff began by restating the respective parties' pleadings and evidence. He reiterated the Plaintiff's evidence on the acquisition of the vehicle, and insurance cover and subsequent accident and repairs. On whether the vehicle was repaired to the required standard, counsel submitted that it is undisputed that the vehicle was extensively damaged rendering it a complete write off. Although the motor vehicles chassis was replaced the source of the new chassis was unknown as it arrived in the country more than two months after the vehicle had purportedly been fully repaired.

15. While calling to aid the decision in *Thomson Kerongo v Kenya Orient Insurance Co. Ltd* [2015] eKLR he contended that the anomalies to the motor vehicle details on account of the replacement of its chassis would ultimately cause the Plaintiff great inconvenience subjecting her to both criminal and civil culpability. In conclusion, it was submitted that the balance of convenience tilts in favour of Plaintiff. The decisions in *Chris Ndolo Mutuku v Associated Motors Limited & another* [2020] eKLR and *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another* [2001] eKLR were cited in support of the foregoing. The court was urged to allow the suit as prayed.

16. On the part of the 1st Defendant, counsel responding to the first two issues raised by the Plaintiff argued that the Plaintiff did not tender any evidence to support the allegation that the 1st Defendant procured a comprehensive insurance cover on behalf of the Plaintiff from the 2nd Defendant. That the Plaintiff further failed to prove that the subject motor vehicle was a write- off as result of the accident. It was further submitted that the 2nd Defendant procured an expert motor vehicle assessor who assessed damage to the motor vehicle, the repair required and estimated costs before advising the 2nd Defendant. The latter thereafter instructed the 1st Defendant to proceed with repairs as per the assessment report.

17. On whether the Plaintiff has a cause of action against the 1st Defendant and is entitled to relief sought in the plaint, counsel argued that the 1st Defendant was not a party to the insurance contract/policy between the Plaintiff and the 2nd Defendant hence no obligation existed on the 1st Defendant in favour of the Plaintiff. The decisions in *Kipkebe Limited v Peterson Ondieki Tai* [2016] eKLR, *M'bita Ntiro v Mbae Mwirichia & another* [2018] eKLR and *Afroplast Industries Limited v Sanlam Insurance Co. Ltd & another* [2021] eKLR were called to aid.

18. Regarding the counterclaim, it was summarily contended that the 1st Defendant completed repairs to the subject motor vehicle on 03.08.2013 and a release letter issued on October 3, 2013. That it was the Plaintiff who refused to collect the subject motor vehicle inconveniencing the 1st Defendant and incurring storage charges of Kes 1,000/- per day now standing at a sum of Kes. 2,166,000/- which the 1st Defendant claims. In conclusion, it was submitted that Plaintiff's claim as against the 1st Defendant

is unmerited therefore the Plaintiff's suit ought to be dismissed with costs and the counterclaim being allowed as prayed.

19. The 2nd Defendant opted and or failed not to file submissions on the matter.

20. The court has considered the pleadings, evidence as well as the submissions of the respective parties. The question for determination is whether on a balance of probability the parties with adverse respective claims have established the same, and if so, what reliefs ought to be granted.

21. The court proposes to contemporaneously deal with the merits of the two adverse claims before it. In that regard, the respective parties' pleadings before court are pertinent. The Court of Appeal in *Wareham t/a A.F. Wareham & 2 others v Kenya Post Office Savings Bank* [2004] 2 KLR 91, addressed itself as follows as concerns the foregoing:-

> "We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of order XIV of the *Civil Procedure Rules*. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail."

22. The applicable law as to the burden of proof is found in section 107, 108 and 109 of the *Evidence Act*. In *Karugi & another v Kabiya & 3 others* (1987) KLR 347 the Court of Appeal stated that:

> "[T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof....The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim."

23. Earlier herein the gist of the parties' respective pleadings was elaborately captured. The undisputed facts are that on or around December 18, 2012 the Plaintiff purchased motor vehicle KBT 991Z from the 1st Defendant and settled the purchase price in full. It is further not disputed that the subject motor vehicle was covered under comprehensive insurance for the period between December 19, 2012 and 18.12.2013 as per Policy No. 024/880/108524/2012 issued by the 2nd Defendant. Further there is no dispute that during the currency of the said insurance cover, the subject motor vehicle was involved in a traffic accident on or about 05.05.2013 and was damaged as a result.

24. What this court has been called upon to determine is firstly whether the Plaintiff is entitled to a new motor vehicle of the same quality and standard and whether she is entitled to Kes 21,375,000/- in loss of user at a rate of 25,000/- from 06.08.2016 until payment in full. The dispute arises from an agreement of sale between the Plaintiff and 1st Defendant on one hand and a contract of insurance with the 2nd Defendant, on the other, in respect of the vehicle.

25. What role does the court play in adjudicating over a dispute between contracting parties? In the oft-cited decision of *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another* [2001] eKLR, it was stated that;-

....."A court of law cannot re-write a contract between the parties whereas its role is limited to interpretation of the same. This is because contracting parties are free to specify the terms and conditions of their agreement, and that when parties do contract, the court does not have the right or ability to substitute its judgment for that of the parties."

26. The Plaintiff has ably described the respective parties in her plaint and the capacity to which they have been sued. The 1st Defendant is described as "a multinational corporation which is the largest automobile manufacturer in the world.....and is the 13th largest company in the world by revenue" whereas the 2nd Defendant is described as "a limited liability company duly registered as such under the *Companies Act* aforesaid and licensed to carry on the business of insurance under the *Insurance Act*".

27. From the description, the relationship between the Plaintiff and the 1st Defendant is premised on the sale agreement regarding the subject motor vehicle while the relationship between the Plaintiff and the 2nd Defendant is based on a contract of insurance.

28. Neither the agreement between the Plaintiff and the 1st Defendant nor with the 2nd Defendant was produced to assist the court ascertain the terms of engagement. It appears from the evidence of PW1 and DW1, however, that repairs to the subject motor vehicle were undertaken by the 1st Defendant at the behest and or instructions of the 2nd Defendant. See PExh.1 – Job Card, DExh.2 – Services Quotation, DExh.3 – Assessment Report and DExh.4 – Invoice to 2nd Defendant.

29. The 1st Defendant was not sued as an insurance company and no claim of indemnity could lie against it. There was no evidence to support the claim for a replacement vehicle or payment in lieu made by the Plaintiff against the 1st Defendant. It appears that the Plaintiff's grievance was based on the policy of insurance No. 024/880/108524/2012 and the 2nd Defendant's failure to fulfill its obligation therein.

30. The Court of Appeal in *Kenindia Assurance Co. Ltd v Monica Moraa* [2016] eKLR describing the nature of an insurance contract cited with approval the decision of the Supreme Court of India in *United India Insurance Company v Kantika Colour Lab and others* Civil Appeal No. 6337 of 2001 where the court stated as follows:-

> "Contracts of Insurance are generally in the nature of contracts of indemnity. Except in the case of contracts of Life Insurance, personal accident and sickness or contracts of contingency insurance, all other contracts of insurance entitle the assured for the reimbursement of actual loss that is proved to have been suffered by him. The happening of the event against which insurance cover has been taken does not by itself entitle the assured to claim the amount stipulated in the policy. It is only upon proof of the actual loss, that the assured can claim reimbursement of the loss to the extent it is established, not exceeding the amount stipulated in the contract of Insurance which signifies the outer limit of the insurance company's liability. The amount mentioned in the policy does not signify that the insurance company guarantees payment of the said amount regardless of the actual loss suffered by the insured. The law on the subject in this country is no different from that prevalent in England; which has been summed up in *Halsbury's Laws of England* - 4th Edition" [Emphasis Added]

31. Thus, for the Plaintiff's cause to succeed on a balance of probabilities she ought to have demonstrated the existence of a contract of insurance, accruing rights thereunder and proof of alleged total loss of the subject motor vehicle. The policy of insurance is the document creating the legal relationship between the respective parties and upon which the claim of either breach of contract or indemnity is founded. The policy document sets out the rights and obligations of the respective parties.

32. At the hearing PW1 adduced into evidence a bundle of documents attached to her a list of documents dated 01.09.2016, among which was a copy of the insurance policy. However, she did not produce the policy of insurance despite the same having been listed. Section 2 of the *Insurance Act* describes 'Policy' as:-

> "(a) in relation to ordinary life assurance business or industrial life assurance business, includes an instrument evidencing a contract to pay an annuity upon human life; (b) in relation to bond investment business, includes a bond, certificate, receipt or other instrument evidencing the contract with insurer; and (c) in relation to other classes of business, includes an instrument under which there is for the time being an existing liability already accrued or under which any liability may accrue;" [Emphasis Added]

33. The certificate of insurance which formed part of the claim supporting documents in the aforesaid Plaintiff's list of documents was identified and marked as PExh.5. Section 7 of the *Insurance (Motor Vehicles Third Party Risks) Act* describes a 'Certificate of Insurance' as:

> "A certificate of insurance shall be issued by the insurer to the person by whom a policy of insurance is effected"

34. The certificate of insurance derives its existence and force from the policy of insurance and in the absence of the latter, no binding legal relationship can be asserted. All that the Plaintiff produced at the trial was the claim form - PExh.3 and Certificate of Insurance PExh.5 as proof of the contract of insurance between herself and 2nd Defendant. However, none of these documents contains the contract terms, the respective rights, and obligations of the parties, and more importantly, the 2nd Defendant's obligations towards the Plaintiff as sought to be enforced by the suit.

35. Thus, it is impossible to tell what accruing rights the Plaintiff was entitled to under the alleged policy of insurance concerning the alleged damage sustained to the subject motor vehicle. Moreover, no motor vehicle assessment report was produced by the Plaintiff in proof of alleged damage thereto. The 1st Defendant produced its own assessment report as DExh.3. It captured the quantification of costs of repairs at Kshs 1,243,588/- with the pre-accident value of the subject motor vehicle being Kes 2,750,000/-. The vehicle was not declared a total loss in that report.

36. John Birds and Norma J. Hird, Birds' in their book *Modern Insurance Law*, 5th Ed. Sweet & Maxwell at pg. 266 while equally discussing the foregoing issue as pertains to total and partial loss in insurance terms observed that;-

> "Property may be totally or partially lost, in other words it may be totally destroyed or lost, or it may only be damaged. The measure of recovery may well differ according to this distinction. Total loss need not necessarily mean in this context, complete destruction, although it is obviously included. A total loss includes cases where "the subject matter is destroyed or so damaged as to cease to be a thing of the kind insured".....The same will apply to the car that is a genuine "write off". It may be in practice that cars are written off because it is regarded as uneconomic to repair them, even though they may not be so damaged as to cease to be cars, because they could be repaired comparatively easily. Whether in law these would be would strictly be regarded as totally lost must be open to doubt, even though in practice they may be so treated." [Emphasis Added]

37. Therefore the question whether a vehicle is a write-off is an objective test based on economics of costs, and the mere fact that PW1 alleges that the subject motor vehicle was a write-off was to no avail. In any event, despite the Plaintiff's evidence, it does not follow therefore that she would have been automatically entitled to a new vehicle as prayed which value as to sum insured or the pre-accident value, which was equally never pleaded.

38. On a balance of probabilities, there was no proof that the 1st and 2nd Defendant was under specific obligation to compensate the Plaintiff for the loss and damage to the subject motor vehicle and or there was breach of the insurance policy the 2nd Defendant in any event. Despite all the foregoing, the subject motor vehicle was repaired by the 1st Defendant at the behest of the 2nd Defendant. Illustrative of the fact that there existed a contract of indemnity as between the Plaintiff and the 2nd Defendant.

39. The Plaintiff's is a special damage claim. The Court of Appeal in *David Bageine v Martin Bundi* [1997] eKLR stated: -

> " It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of *Mariam Maghema Ali v Jackson M. Nyambu t/a Sisera store*, Civil Appeal No. 5 of 1990 (unreported) and *Idi Ayub Sahbani v City Council of Nairobi* (1982-88) IKAR 681 at page 684:
>
> "... special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in *Bonham Carter v Hyde Part Hotel Limited* [1948] 64 TLR 177 thus;
>
> "Plaintiffs must understand that if they bring actions for damages, it is for them to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, 'this is what I have lost, I ask you to give me these damages, 'They have to prove it."

40. Further in *Nkuene Dairy Farmers Co-op Society Ltd & another v Ngacha Ndeiya* [2010] eKLR stated that:

> " In our view special damages in a material damage claim need not be shown to have actually been incurred. The claimant is only required to show the extent of the damage and what it would cost to restore the damaged item to as near as possible the condition it was in before the damage complained of... . In *Ratcliffe v Evans* [1892]2QB 524 Bowen L.J. said:
>
> "The character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry."

See also *Ouma v Nairobi City Council* (1976) KLR 304 and Hahn v Singh [1985] KLR 716.

41. With respect to the claim for "a new vehicle of the same quality and standard as the subject motor vehicle" the Plaintiff did not specifically plead or prove with particularity the said claim and the Plaintiff's claim for loss of user though obtusely pleaded was not supported by evidence. The Plaintiff's claim must fail in toto.

42. Moving on to the 1st Defendant's counterclaim against the Plaintiff, the 1st Defendant claims storage charges accrued at the rate of Kes 1,000.00 per day from 31.08.2016 till the collection date. It was DW1's evidence that upon repairs it was the responsibility of the Plaintiff to collect the vehicle. That several calls were made to the Plaintiff to collect the subject motor vehicle pursuant to issuance of the release letter DExh.6 from the 2nd Defendant authorizing the release of the subject motor vehicle after a re-inspection was conducted in confirmation that repairs were satisfactory. PW1 through her evidence stated that the 2nd Defendant did not inform her that the subject motor vehicle was ready for collection.

43. Although the vehicle has lain in the Defendant's yard since the date of D.Exh. 6, and no written notification and or demand addressed to the Plaintiff calling for collection, on pain of incurring storage charges at the rate of Kes 1,000.00 per day from 31.08.2016 till the collection date was produced by the 1st Defendant, it appears plausible that the 1st Defendant could in all probability have called upon the Plaintiff to collect the vehicle. Absent that, it seems that the Plaintiff who was naturally expected to collect the vehicle deliberately refused to take the vehicle in maintaining her claim to a new vehicle. As earlier found, the Plaintiff's claim against the 1st Defendant was misconceived from inception, and as a minimum, the Plaintiff ought to have relieved the 1st Defendant, (and by extension herself of the possible accruing liability), of the burden of storing the vehicle as soon as the counterclaim was filed.

44. The court therefore finds that the 1st Defendant has proved its counterclaim against the Plaintiff. And while the specific charges of Kes.1000/- per day as claimed were not justified or shown to have been formally communicated to the Plaintiff by the 1st Defendant, the said Defendant is entitled to be compensated for the storage of the vehicle in its yard for almost ten years. The court awards a nominal global sum of kes.200,000/- (Two Hundred Thousand) to the 1st Defendant in that regard.

45. In the end the Plaintiff's suit is dismissed with costs to the 1st Defendant while the 1st Defendant's counterclaim is allowed, and judgment entered for the 1st Defendant against the Plaintiff in the sum of kes.200,000/- (Two Hundred Thousand) with costs and interest from the date of filing of the counterclaim.

46. The Court further directs that, subject to payment of the sum awarded to the 1st Defendant herein, the Plaintiff shall collect her vehicle from the 1st Defendant's yard within 14 days of today's date, in default of which further storage charges shall continue to accrue at the rate of Kes. 700/- (Seven Hundred) daily until collection, with interest at court rates. For the avoidance of doubt, this does not derogate from any other lawful remedy available to the 1st Defendant in the event of non-compliance by the Plaintiff.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 22ND DAY OF JUNE 2023.

C.MEOLI

JUDGE

In the presence of:

For the Plaintiff: N/A

For the Defendants: N/A

C/A: Carol