Kenya Orient Insurance Limited v Ngwimbi (Civil Appeal 25 of 2022) [2023] KEHC 19720 (KLR) (3 July 2023) (Judgment)

Neutral citation: [2023] KEHC 19720 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL 25 OF 2022

DKN MAGARE, J

JULY 3, 2023

BETWEEN

KENYA ORIENT INSURANCE LIMITED ..... APPELLANT

AND

SAMMY KIOKO NGWIMBI ..... RESPONDENT

JUDGMENT

1. This is an appeal arising from the judgment of Maureen Nabibya in Mombasa CMCC 1648/2017 in the appeal the appellant filed three grounds of appeal as follows: -

    a. The Magistrate erred in law and in fact in entering judgment for the respondent after holding that the respondents had not proved key aspects of his case.

    b. The Magistrate erred for entering judgment for things that had neither been pleaded, proved nor prayed for.

    c. The Magistrate erred in failing to dismiss the Respondents suit with costs for want of proof.

The pleadings

2. The Respondent was said to be an owner of motor vehicle registration No. KCB 695Y Toyota Hilux Pick- up which the Appellant insured under certificate of policy No. B7804941 running from 23/2/16 to 22/2/17. The said vehicle was involved in an accident on 25/7/16. The same was reported at Mariakani. He procured an expert who estimated the cost to be 900,00/= for repair. The cost of repair outstripped the value of the vehicle.

3. The Appellant underestimated the cost of repair to be 484 583. The vehicle has not been repaired. The impasse has resulted to losses of 80,000 per month and repayment of loan of 51,000 per month. He therefore prayed for the total costs of repairs at a fair market value of 1,008,500 and loss of income from 30/6/16 and general damages for breach of contract.

4. In the plaint, he did not particularize the1,008,500 the same was particularized in the witness statement. This is a case where the doctrine of Uberimal fidei reigns supreme. In that doctrine the insurer assumes the risk of the insured incase of happening of an event. That event restores the Respondent to the position he was had the insured event not occurred. It does not create a proof for him nor does encourage moral hazards. In the case of British American Insurance Co. Limited & another v Isaac Njenga Ngugi [2019] eKLR: -

> " 15. It is not contested that the insurance contract is premised on "uberrimae fides", the principle of good faith and full disclosure, that the contract of insurance requires that the assured knows everything about the risk he wants to insure and he must disclose to the insurer every fact material to the risk. The Court of Appeal in Co-operative Insurance Company Ltd v David Wachira Wambugu [2010] 1 KLR 254 put it this way
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> > "... 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, 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. There is an obligation there to disclose what you know, and the concealment of a material circumstance known to you, 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. 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."

5. Indeed, in order to avoid moral hazards, the insurers introduced policy excess. This is a portion, usually less than 10 % which the insurer bears in case an accident occurs and its usually the first 10% meaning that damages cos ting less than 10% of the value of the vehicle or such percentage as parties agreed in excess are not repairable. Is a portion borne by the Respondent it also means that it's the insurer who

adjusts losses to take care of vagaries that occur before the loss that is insured. That is to say if there are losses occurring due to wear and tear prior uninsured accidents, drunken driving losses intention losses and such like then they are removed from the losses that are payable.

6. The operative document is usually the policy of the insurance. It provides the roles of each of the parties and how the losses are to be dealt with.

7. In the Respondent's documents, is enclosed several quotations, the Respondent opted to repair the vehicle in a garage of his choice and therefore he was to be given money in lieu of repairs amounting to a sum of 525,333. There was a dispute whether the Respondent was willing to move the vehicle to be repaired at Jaffrey Motors. There appears to be an upward inflation in that on 21/11/16 the costs of repairs were adjusted to 593,083 to give a 20% mark up required in garages.

8. The Appellant in his defence, they sated that the cost of repairs are determined by professionals. That explained what changed the cost of repairs from 525, 333 to 593,083.

9. The Respondent insisted on being paid the entire cost of repairs and loss of income for 16 months. The parties filed comprehensive submissions and then this appeal was certified ready for hearing.

10. The court in its judgment found the Appellant liable and made the following orders: -

    a. The court decide to grant prayers the court feels would be just.

    b. The vehicle to be assessed within 7 days by an independent assessor at the cost of the Appellant.

    c. The Appellant to commenced repair not less either 30 days from the date of assessment or if he can't repair within 30 days to replace the same car and give the sum assured within 30 days.

    d. Each party to bear its costs.

Duty of the first Appellate court

11. The duty of the first Appellate Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of Selle and another Vs Associated Motor Board Company and Others [1968] EA 123, where the law looks in their usual gusto, held by as follows;-

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

12. The Court is to bear in mind that it has not seen the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

13. In Fidelity & Commercial Bank Ltd V Kenya Grange Vehicle Industries Ltd (2017) eKLR, the Court of Appeal, Ouko, Kiage and Murgor JJA held as doth:-

> " Courts adopt the objective theory of contract interpretation and profess to have overriding view sometimes called Four Corners of an Instrument, which insists that a document's meaning should be derived from the document itself, without reference to anything outside of the document, extrinsic reversed..."

14. The trial court and this court will construct documents in a similar manner as there are no witnesses required to know the content of a document. Therefore, where the findings of the trial Court are consistent with the evidence generally, this Court should not interfere with the same.

15. In the case of Peters vs Sunday Post Limited [1985] EA 424 where in the court therein rendered itself as follows:-

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

16. In the case of in Nyambati Nyaswabu Erick Vs Toyota Kenya Ltd & 2 Others (2019) eKLR, Justice D.S Majanja on 21st February, 2019 held as doth:

> " General damages are damages at large and the Court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method approach should be that comparable injuries would as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly the same."

17. It is thus settled that the state of the Kenya economy and the people generally and the welfare of the insured and injury public must be at the back of the mind of the trial Court.

18. The foregoing was settled in the cases of Butter Vs Butter Civil Appeal No. 43 of 1983 (1984) KLR where the Court of Appealed held as follows as paragraph 8.

> " In awarding damages, a Court should consider the general picture of all prevailing circumstance and effect of the injuries of the claimant but some degree of .....is to be sought in the awards, so regard would be paid to recent awards in comparable cases in local Courts. The fall of value of monies generally, the levelling up and down of the facts of exchange between currencies...should be taken into consideration."

19. Finally, in deciding whether to disturb quantum given by the Lower Court, the Court should be aware of its limits. Being exercise of discretion the exercise should be done Judiciously conclusively are circumstances to ensure that the award is not too high or too low as to be an erroneous estimate of damages.

20. The duty of the Appellate Court as regards damages is that of discretion. The Court of Appeal for East Africa in Shah Vs Mbogo & Another Version Shah (1968) EA 93, held as doth;-

> " The (appellate Court) .. should not interfere with the exercise of discretion of a (trial court)..unless satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision or unless it is manifested from the cause as a whole that the Judge was clearly wrong in the exercise of this discretion and that as a result these has been an injustice."

21. The High Court, pronounced itself succulently on these principles in Kemfro Africa Ltd Vs Meru Express Servcie Vs. A.M Lubia & Another 1957 KLR 27 as follows: -

> " The principles to be observed by an appellate Court in deciding whether it is justified in distributing the quantum of damages awarded by the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in

assessing the damages, took into account an irrelevant facts or left out of account a relevant one or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of damages.

22. The foregoing statement had been ably elucidated by Sir Kenneth 'Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Counsel, that is Nance vs British Columbia Electric Co Ltd, in the decision of Henry Hilanga vs Manyoka 1961, 705, 713 at paragraph c, where the Learned Judge ably pronounced himself as doth regarding disturbing quantum of damages:-

> " The principles which apply under this head are not in doubt. Whether the assessment of damages be by the Judge or Jury, the Appellate Court is not justified in substituting a figure of its own for that awarded simply because it would have awarded a different figure if it had tried the case at the first instance..."

23. Therefore, for me to interfere with the award it is not enough to show that the award is high or had I handled the case in the subordinate court, I would have awarded a different figure.

24. So my duty as the appellate court is threefold regarding quantum of damages: -

    a. To ascertain whether the Court applied irrelevant factors or left out relevant factors.

    b. To ascertain whether the award is too high as to amount to an erroneously assessment of damages.

    c. The award is simply not justified from evidence.

25. The foregoing statement had been ably elucidated by Sir Kenneth O'Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Council, that is, Nance vs British Columbia Electric Co Ltd, in the decision of Henry Hilanga vs Manyoka 1961, 705, 713 at paragraph c, where the Learned Judge ably pronounced himself as doth regarding disturbing quantum of damages:-

> " The principles which apply under this head are not in doubt. Whether the assessment of damages be by the Judge or Jury, the Appellate Court is not justified in substituting a figure of its own for that awarded simply because it would have awarded a different figure if it had tried the case at the first instance..."

26. For the appellate court, to interfere with the award it is not enough to show that the award is high or had I handled the case in the subordinate court, I would have awarded a different figure.

Analysis

27. I must admit I had considerable difficulties understanding the tenure of the judgment. It appears to be of the nature of an inchoate structural interdict. In matters of this nature the court must firmly and strongly make a decision one away or another to avoid parties holding the court at ransom interpreting things it should not interpret.

28. Parties making the claim must as a corollary understand that insurers money is not their money. It belongs to the insuring public. It is debate that has been had for generations regarding aware of damages and for which its generally agreed that damages awarded must be such that they do not increase premium's unduly or leave the insured with nominal compensation.

29. The policy of insurance gave the choice under Sn1 to the insurance of how they settle the claim. Authority to repair was up to the authorized repair limit and consequential loss was excluded. With this in mind, the court had no authority to prefabricate between the decision that ought to have happened.

30. From the evidence on record, the Appellant never refused to repair but it had its authorized garages. The Respondent did not have authority to pick its own garage and this is so when the garage being picked has indicated that the cost is more than double the cost in the garage chosen.

31. This has unnecessarily left the dispute to fester for five years because of the grandstanding. As pleaded, the Respondent has not proved its case. He is not entitled to choose where his vehicle is being repaired and at what cost. For almost 5 years have passed and we do not know the state of the vehicle from the evidence an amount of 593,083 was assessed by the Appellant to be payable.

32. According to the Appellant, that amount was sufficient. Had the Respondent surrendered the vehicle we could have known by now whether the amount is truly enough. This is also crucial in that there's a 20% markup in the cost given by the garages. I therefore find that the Respondent suit was a suit without purpose.

33. Regarding the issue of damages, they are not due. In the case of David Bagine Vs Martin Bundi [1997] eKLR, the court of Appeal had this to say: -

> " 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:
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> "....special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in Bonham Carter vs. Hyde Park Hotel Limited [1948] 64 TLR 177 thus:
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> Respondents 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" We also refer to the cases of Ouma vs. Nairobi City Council [1976] KLR 297 at page 304 and Kenya Bus Services vs. Mayende (1991) 2 KAR 232 at page 235. The evidence before the learned judge on the question of loss of user was just "thrown at him". The respondent had stated that his profit margin was Kshs. 5,000/= to Kshs. 9,000/ = per day from the sale of potatoes. Although the learned judge said that there was not a single receipt to show or prove those figures, the learned judge nevertheless proceeded to the damages under the heading of "loss of user" as general damages ..."

34. A loss of this nature especially a loss of this nature especially a loss of user is for the use of the vehicle for a short period pending repair. The Appellant had not refused to do the repairs but impasse had been caused by the Respondent's obstinacy that is either his way or the high way. That needs to stop and stop now.

35. Consequently, the orders given by the learned magistrate are untenable in law as the court is not entitled to ignore the orders sought and create its own orders. I make the folding findings: -

    a. The upshot of the foregoing is that though the Respondent's suit lacks merit in its entirety. The appeal is thus allowed with costs of Ksh. 80,000

b. The Appellant had offered to settle the claimant for s sum of Ksh. 593,083/=. The said amount of Ksh. 593,083/= less costs of the Appeal of Ksh. 80,000/= making net of Ksh. 513, 083/=, shall be paid to the Respondent on or before 28/08/2023.

c. Should the Appellant pay the said amount of Ksh. 513, 083/=, to the plaintiff or his advocates on or before 31/8/23 it shall not attract interest. If the amount or part there is not paid on or before 31/8/2023, it shall attract interest from 1/9/23 at court rates.

d. I am not minded to disturb the order of costs given by the court below given the relations between the parties and given that it is a discretionary order.

e. A copy of this judgment be served upon the trial court.

f. For avoidance of doubt, the rest of the claims of the plaint are dismissed in limine.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 3RD DAY OF JULY, 2023. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:

Miss Julu for The Appellant

Mr Ngonze for the Respondent

Court Assistant - Brian