



**Mukuha v Kenya Orient Insurance Limited (Civil Appeal E023 of 2020)  
[2023] KEHC 23902 (KLR) (19 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 23902 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CIVIL APPEAL E023 OF 2020  
PM MULWA, J  
OCTOBER 19, 2023**

**BETWEEN**

**JOHN GITAU MUKUHA ..... APPELLANT**

**AND**

**KENYA ORIENT INSURANCE LIMITED ..... RESPONDENT**

**JUDGMENT**

1. This is an appeal lodged by the appellant herein, John Gitau Mukuha having been dissatisfied with the judgment in Thika CMCC No. 27 of 2019 which decision was delivered on November 10, 2020.
2. The circumstances leading up to the appeal are set out in the plaint dated January 5, 2019 where the appellant stated that he was comprehensively insured by the respondent under the terms of policy of insurance number NYR/0807/014858/2016 in respect of all comprehensive claims arising from the loss and/or damage to his motor vehicle registration number KCG 227V which policy was in force from June 9, 2017 to May 8, 2018.
3. That on the January 20, 2018, at Ngoliba off Thika Matuu road, the said motor vehicle was involved in an accident, as a consequence of which it was extensively damaged and upon assessment it was declared a write off.
4. The appellant sought for declaratory orders for breach of contract; compensation against the appellant in respect to the motor vehicle registration number KCG 227V plus special damages and costs of the suit plus interest thereon, arising out of the insurance policy agreement.
5. Upon service of summons, the respondent entered appearance and filed its statement of defence on February 6, 2019 to deny the appellant's claim. The loss and damage suffered by the plaintiff as pleaded in the plaint were also denied. In total, the defendant denied any obligation to compensate the appellant for any loss of his vehicle or at all or having breached any trust, fidelity or any statutory obligations or at all and the plaintiff was put to strict proof.



6. Upon conclusion of the case, in his judgment, the learned trial magistrate upon evaluating the evidence tendered found that the appellant did not strictly prove specific damages as to the pre-accident value of the vehicle. He further dismissed his claim on general damages.
7. The aforesaid decision has precipitated the appeal presently before this court. The memorandum of appeal dated December 1, 2020 raises the following grounds;
  - i. That the learned magistrate erred in law and fact in awarding the plaintiff the sum of Kshs. 1, 765,000/= as Special Damages as the said award is manifestly inadequate in the circumstances considering the damages sustained.
  - ii. That the learned magistrate erred in law and fact by not awarding Special Damages as evidenced by the requisite documents and proved.
  - iii. That the learned magistrate erred in law and fact in failing to consider the totality of evidence on record in making award on account of special damages.
  - iv. That the learned magistrate erred in law and fact in failing to award general damages despite the weight of evidence adduced.
  - v. That the learned magistrate erred in law and fact in failing to award interest on special damages from the date of breach of the contract.
8. At the hearing of the appeal, directions were taken that the appeal be canvassed by way of written submissions and the parties herein filed their rival submissions.
9. I have considered the rival submissions on record alongside the relevant authorities cited. As is the legal requirement for a court sitting on a first appeal, I have re-evaluated the evidence placed before the trial court and studied the judgment in question and the sole issue for determination is whether the appeal herein has merit. The court will address its mind as to whether the plaintiff proved his case on a balance of probabilities.
10. This being a first appeal, it is by way of a retrial and this court, as the first appellate court, has a duty to re-evaluate, re-analyze and re-consider the evidence afresh and draw its own conclusions on it. The court should however bear in mind that it did not see the witnesses as they testified and give due allowance for that. (see *Selle v Associated Motor Boat Co Ltd & others* [1968] EA 123).
11. I shall first deal with the question on whether the appellant proved special damages. Award of damages involves exercise of discretion by the trial court. In that regard, the law is settled that an appellate court will not readily interfere with exercise of that discretion unless it was wrong; was based on no evidence or the court considered irrelevant facts or failed to consider relevant factors which resulted into an injustice.
12. In *Mbogo & another v Shah* [1968] EA 93, the Court, (Sir Newbold, P.) stated at page 96:

A Court of Appeal should not interfere with the exercise of discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and as a result there has been misjustice.
13. The appellant averred that the policy was a comprehensive insurance cover for motor vehicle registration number KCG 227V. He sought a declaratory order that the respondent is under a contractual and statutory obligation to compensate/indemnify him for the loss incurred on January 20, 2018 when his vehicle was involved in an accident and that the sum insured as total loss was Kshs.



- 3, 700, 000 as per the policy number NYR/0807/014858/2016. He argued that the trial court was wrong in awarding the sum of kshs. 2, 000, 000 instead of the insured sum of Kshs. 3, 700, 000. The respondent maintained that the court rightly awarded the appellant kshs. 2, 000, 000 as the value of his damaged motor vehicle less the salvage value of kshs. 420, 000.
14. A claim for special damages is in the nature of restitution and, where proved, it is meant to restore the claimant to the position he would have been save for the action complained of.
  15. The law is settled that a claim for special damages must not only be specifically pleaded but must also be strictly proved with as much particularity as circumstances permit. (See *Capital Fish Limited v Kenya Power and Lighting Company Limited* [2016] eKLR).
  16. I have perused contents of the Plaintiff and the prayers sought by the appellant. In his evidence he has itemized his claim and prayed for a specific amount of Kshs. 3,700,000 being the pre accident value of the vehicle and a further sum of Kshs. 120,000 as storage charges, recovery and towing charges at kshs. 55, 000, assessment charges at Kshs. 10,000 and loss of business income for four months at Kshs. 400,000.
  17. In support of his claim, I note that the appellant produced a certificate of insurance and premium debit note/endorsement which shows the value of the vehicle as at May 10, 2018 as Kshs. 3,700,000.
  18. In my view, the debit note was a demand of payment. The appellant ought to have adduced evidence to confirm that the same was paid to the respondent. The respondent having denied ever entering into any contract with the appellant, the burden was on the appellant to prove not only the existence of such a contract but also the terms and conditions of the same and in particular the sum assured.
  19. Further, upon perusal of prayer 1 in the plaintiff, the declaratory orders that are sought are as per the policy of insurance number NYR/0807/014858/2016. The only way the appellant would have succeeded in his claim was by producing an insurance contract to prove to the court that the vehicle was indeed insured for Kshs. 3,700,000. The Certificate of Insurance that was tendered in evidence only proves that the appellant had an insurance cover with the respondent and nothing more.
  20. In the circumstances of this case, and in the absence of the said contract, the declaratory orders sought could not issue as the court could not have been in a position to tell what the terms and conditions of the policy were. The evidence of the plaintiff and the declaratory orders were based on that contract and his evidence is of no value without it. This court cannot issue declaratory orders in a vacuum. In view of the foregoing, I find that the learned magistrate analyzed the law and facts properly and I would have no reason to interfere with his finding.
  21. Turning now to the issue of general damages. The appellant argued that the trial court was wrong in not awarding him general damages for breach of contract. According to the respondent, it neither owed the appellant a duty of care nor was such duty, if any, breached.
  22. The law is that general damages are not awardable for breach of contract or breach of contractual obligations. In *Dharamshi v Karsan* [1974] EA 41, it was held that general damages are not awardable for breach of contract in addition to the quantified damages as it would amount to a duplication.
  23. Similarly, in *Securicor Courier (K) Ltd v Benson David Onyango & another* [2008] eKLR, the Court of Appeal reiterated that general damages are not awardable for breach of contract. (See also *Provincial Insurance Co. EA Ltd v Mordechai Mwangi Nandwa*, (KSM Civil Appeal No 179 of 1995).
  24. The above decisions affirm the position that what is suffered or is believed to have been suffered, the damage that is to be compensated by way of damages, can only be known by the party and it is claimed in specific terms which has to be proved.



25. Flowing from the above principles of law, the appellant was not entitled to damages for breach of contractual obligations, having raised a specific claim for special damages.
26. In view of the foregoing, I find that the learned magistrate correctly analyzed the law and facts properly and I would have no reason to interfere with his finding.
27. In the end, I find that the appeal has no merit and it is hereby dismissed. I make no order as to costs.

**JUDGMENT DELIVERED VIRTUALLY, SIGNED AND DATED AT KIAMBU**

**THIS 19<sup>TH</sup> DAY OF OCTOBER 2023**

.....

**P. MULWA**

**JUDGE**

**In the presence of:**

Duale – court assistant

Mr. Tumu - for the appellant

Ms. Sharon Caren - for the respondent

