Irungu v Britam General Insurance Company Limited (Civil Appeal E295 of 2023) [2024] KEHC 13925 (KLR) (Civ) (8 November 2024) (Judgment)

Neutral citation: [2024] KEHC 13925 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E295 OF 2023

BM MUSYOKI, J

NOVEMBER 8, 2024

BETWEEN

DUNCAN MACHARIA IRUNGU .... APPELLANT

AND

BRITAM GENERAL INSURANCE COMPANY LIMITED .... RESPONDENT

(Being an appeal from judgment and decree of Honourable Ruguru N (SPM) in Chief Magistrate's Court at Milimani Commercial Courts civil case number 6486 of 2016 dated 17-03-2023)

JUDGMENT

1. By a plaint dated 22-09-2016 the appellant filed the suit the subject of this appeal in the lower court against the respondent claiming special damages for Kshs 500.00, general damages, costs of the suit, interest at court rates and any other relief that the court may deem fit to grant. The gist of the appellant's claim was that the appellant had comprehensively insured his motor vehicle registration number KBR ###Z with the respondent and in the night of 29th and 30th of July 2015 when the insurance cover was in force, the motor vehicle was involved in an accident. The appellant claimed that the respondent had breached the contract of insurance by failing to compensate him for the damages suffered as a result of the accident. On 1-11-2017, the appellant filed an amended plaint in which he prayed for the following orders;

   a. Special damages of Kshs 3,800,500/=.

   b. Loss of use of the said motor vehicle.

   c. General damages.

   d. Cost of the suit.

e. Interest at court rates.

f. Any other relief that the court may deem fit to grant.

2. The respondent filed a defence on 13-0-2016 in which as expected it denied liability and core to this appeal, stated that the liability to compensate the appellant did not attach as the appellant had withheld material facts on the circumstances in which the accident occurred. The respondent claimed that the appellant had breached a fundamental principle of insurance to wit utmost good faith.

3. The matter was heard by Honourable O.N. Makau (SRM) but judgment was written by Honourable Ruguru N. Principal Magistrate in which she dismissed the appellant's suit with costs. If I understand the judgement of the honourable magistrate which I have carefully read, her reasons for dismissing the appellants suit were;

   a. The appellant did not prove existence of the insurance contract between the parties, the terms and conditions of the contract and whether there was breach.

   b. The special damages were not proved.

   c. The claim for loss of user was not properly pleaded and proved.

4. Aggrieved by the decision, the appellant has preferred this appeal citing the following grounds;

   1. The learned trial magistrate erred in law and fact in failing to find that the appellant had proved his case against the respondent on a balance of probability and indeed there was uncontroverted evidence that an accident did occur involving the appellant's motor vehicle and there existed a valid insurance policy issued by the respondent at the time of the said accident.

   2. The learned trial magistrate misdirected herself in finding that the appellant failed to prove the existence of the insurance contract between the appellant and the respondent produced the insurance policy document.

   3. The learned trial magistrate erred in law and in fact in failing to appreciate the fact that the respondent acted in bad faith in failing to involve the appellant in the investigations as per the procedure governing insurance claims.

   4. The learned trial magistrate erred in law and in fact in failing to find that the respondent did not act in good faith by denying the appellant fair hearing while carrying out investigations as per procedure governing insurance claims.

   5. The learned trial magistrate erred in both law and in fact in failing to find that the appellant had on a balance of probability proved that the respondent's actions in refusing to honour the terms of the policy resulted into a breach of the insurance contract between the parties.

   6. The learned trial magistrate misdirected herself by failing to appreciate the fact that the appellant had on a balance of probabilities proved loss in the form of special damages as well as loss of user.

   7. The learned trial magistrate erred in law and in fact in her evaluation of the evidence produced hence arriving at a wrong decision.

   8. The learned trial magistrate erred in law and in fact by failing to appreciate that the respondent is bound by her own pleadings and therefore cannot unilaterally amend the terms of the insurance policy.

9. The earned magistrate erred in law and fact by failing to consider the appellant's submissions.

10. The learned trial magistrate erred in law and fact by failing to determine the case on the basis the law and the evidence on record.

5. The appeal was disposed of by way of written submissions. The appellant's submissions are dated 20-08-2024 while the respondent's are dated 1-10-2024. In his submissions, the appellant combined all the grounds of appeal and argued them together and therefrom framed five issues which he lists as; whether an accident occurred, whether the appellant was insured at the time of the accident, whether the accident was reported to the respondent, whether the respondent is liable to pay compensation and conclusion. In my own view, out of the issues framed by the appellant only the fourth one is relevant to this appeal. The other three as it shall be clear in this judgment are not in dispute.

6. The respondent claims in its submissions that the amended plaint on which this appeal is hinged in improperly on record as it was filed out of time. It also maintains that the respondent was entitled to avoid liability because the appellant breached the principle of utmost good faith and further that the appellant did not prove the damages as pleaded.

7. Before I got to the merits of the appeal, I wish to dispose of the preliminary issue raised by the respondent in respect of the amended plaint. The respondent has claimed that the amended plaint is improperly on record because the same was filed out of time in violation to the court order issued on 31-08-2017. According to the record, the appellant was by consent granted leave to file an amended plaint within seven days. It is clear that the amened plaint was filed on 1-11-2017 which was clearly out of the time. The proceedings show that the matter proceeded without the respondent raising the issue of late filing. The consent order had also granted the respondent leave to file its amended defence within seven days if need be. The respondent never filed the amended defence. Actually on 26-04-2018, the respondent told the court that it intended to amend its defence which does not appear to have been done. All through the trial in the lower court, the respondent did not raise that issue. The respondent has not shown the prejudice it suffered by the late filing both in the trial and in this appeal. The matter proceeded with assumption that the amended plaint was properly on record. In my opinion, it is not proper for the respondent to raise this issue for the first time in this appeal. The objection appears to me to be an afterthought which does not affect the substance of the issues in the matter. The respondent sufficiently defended itself based on the amended plaint and even at this stage, no prejudice has been claimed or disclosed and I am in the circumstances reluctant to declare the amended plaint irregular or improperly on record. I will proceed to dispose the appeal on its merit based on the amended plaint which was the basis of the proceedings before the trial court whose judgment is being appealed.

8. This being a first appeal, this court has a duty to revisit the evidence produced in the lower court and re-examine and re-analyse it as if it were conducting a re-trial. I must however caution myself that I did not take the evidence of the witnesses and did not have the advantage of observing the demeanour of the witnesses and therefore give due allowance for that. The parties are agreeable that the record of appeal is complete and none of them complained that the evidence taken by the trial court was not reflective of their testimonies. I will start by reproducing the abridged testimonies of the witnesses as hereinbelow.

9. The appellant called three witnesses. The first witness was one PC Euticus Mutai from Kasarani police station. He told the court that their police station issued an abstract on 3-08-2015 to the appellant in respect of the accident which occurred on 29-07-2015. The accident involved motor vehicle registration number KBR ###Z along Nairobi-Thika road at clayworks. He stated that he was certain that the abstract was issued by the station. He produced it as plaintiff's exhibit 4.

10. In cross-examination, the said officer stated that the accident was a non-injury. He added that the occurrence book indicated that the owner of the vehicle sustained slight injuries and was rushed to Neema Hospital. He stated further that, contents of paragraph 9 of the abstract differed with the contents of the occurrence book. The occurrence book did not indicate damages to the vehicle and that if there were any damages on the vehicle, they were possibly on the front and sides of the vehicle.

11. PW2 was one Kennedy Etabale who said that he was a motor vehicle assessor. He produced an assessment report for the motor vehicle and added that the appellant had requested them to carry out assessment of his damaged motor vehicle. He stated that the vehicle had been damaged on the front and other parts were vandalized. He added that according to the assessment report, the damages would have cost Kshs 613,548.00. He produced the report dated 17-06-2020 as exhibit 8. He said that the date of assessment was on 8-08-2019 which date is shown on the last page of the report.

12. When he was cross examined by Mr. Mahugu for the respondent, the witness stated that the 2nd page of the report showed the damaged parts which were on the left and right sides. He added that the bonnet was damaged, front bumper was dented, shock absorber was bend and suspenders were broken.

13. The appellant testified as the third witness. He adopted his witness statement dated 29-09-2016 as his evidence in chief and produced documents in his list of documents dated 22-09-2016 as his exhibits 1 to 11 and others in his list dated 2-12-2021 as his exhibit 14 and 15. He insisted that the accident occurred and his vehicle was damaged. According to the appellant, he was on the material day driving along Nairobi-Thika Road when he suffered a tyre burst as a result of which he lost control and the vehicle hit the guard rail of the highway, fell into the drainage trench and skid around 20 metres in the trench. He was injured and an ambulance arrived which rushed him to Neema hospital where he was treated overnight and discharged the following day. He stated that he went to the police on 31-07-2015 after the police called him. At Kasarani police station, he was informed that the accident had been booked in occurrence book as entry number 2/30/07/2015. He paid for towing charges and called his insurance agent and informed him of the accident following which he filled claim forms upon presentation of the police abstract. He later received a letter dated 13-09-2015 from the respondent informing him that the liability did not attach for reasons that he had withheld material facts regarding the actual cause of the accident and that the damages on the vehicle were inconsistent with the nature of the accident.

14. The appellant added that he held a meeting with the respondent's officials on 25-09-2015 but they refused to give him opportunity to be heard as they only asked him questions on matters that were already in the police records. According to the appellant, the respondent visited the scene of the accident and the garage where the vehicle had been taken two months after the accident occurred and thereafter, the respondent wrote to his insurance agent and informed him that they had sought a second opinion and they had concluded that the damages on the vehicle were inconsistent with the accident and that they were proceeding to close their file. The respondent further wrote to the garage asking them to release the vehicle to him.

15. In cross-examination, the appellant admitted that the police abstract showed that the accident was a non-injury one and insisted that the damages in his report were the ones suffered upon the accident. He complained that the respondent did not give him reasons for failure to compensate him. In re-examination, he stated that he had no control over how the police filled the police abstract. He also said that he did not look at the occurrence book.

16. The respondent called only two witnesses the first one being Wachira Kamweti an insurance investigator. He stated that he investigated the accident in question and prepared his report dated 2-09-2017 which he produced as defence exhibit. According to him, the report showed that the damages on the motor vehicle were not consistent with the facts of the accident.

17. He was cross-examined by Ms Ongegu for the appellant and stated that the copy he was shown was not signed but he insisted that the hard copy was signed. He admitted that there were no photographs of the vehicle in the report although it referred to some. He reiterated that the appellant was inconsistent. He was not able to get an eye witness but confirmed that the police visited the scene. According to him, he was expecting to see prints of a guard rail on the vehicle but not scratches. He also confirmed that some repairs were done on the scene.

18. The respondent also called Peter Ngola Makau a legal associate with the respondent. This witness adopted his statement dated 14-07-2022. He told the court that the respondent declined to compensate the appellant due to inconsistencies. He stated that the respondent had taken insurance cover with the respondent for motor vehicle registration number KBR ###Z which was in force as at the date of the accident. He confirmed that the appellant filled a claim form after which they commenced investigations by instructing Factline Insurance Investigators. He added that the investigations by the firm found out that the appellant was withholding some crucial mechanical fails which was contrary to the principle of *uberimae fidei* and as a result the respondent declined to compensate the appellant.

19. In cross-examination, he stated that he did not have the photographs of the motor vehicle. He stated that he was not a mechanical works expert. He also confirmed that the respondent had instructed the garage to release the motor vehicle to the appellant. He didn't know whether the appellant picked the vehicle or the storage charges were ever paid.

20. Having gone through the record of appeal and the parties' submissions, and based on the above reproduced evidence, I have formed an opinion that settling of the following issues will determine the fate of this appeal;

    a. Whether the appellant breached the principle of utmost good faith justifying the respondent in avoiding liability.

    b. Whether the appellant proved damages as pleaded and if so whether the same are allowable.

21. My above position is informed by the fact that the relationship between the parties is not in dispute. It is a common ground that the appellant had taken up insurance cover for the motor vehicle which was in force at the time of the alleged accident. The occurrence of the accident is not principally in dispute. What is in dispute is whether the circumstances surrounding the occurrence of the accident were as narrated by the appellant.

22. With the above position in mind, it is also not denied that the accident was reported to the police and police abstract issued to that effect. In view of this, it is clear to me that the trial magistrate's finding that the appellant had not proved that there existed an insurance contract between the parties was wrong. The contract, though denied in the defence was going by the evidence from the parties, not in dispute. The policy document was part of the documents filed by the respondent in its list of documents dated 9-03-2020 but it was not produced by any of the witnesses. That notwithstanding, it was clear from the evidence of the respondent's witnesses that the contract of insurance existed. If indeed it did not exist, what business would the respondent have had in commissioning the investigations on the circumstances surrounding the accident? The appellant had also produced a certificate of insurance and correspondence between the appellant and the respondent. The totality of this would obviously mean that on a balance of probabilities, the contract existed. It is therefore my finding that the trial court erred when it held that there was no proof of the insurance contract between the parties.

23. At the center of the dispute in this matter is the principle of utmost good faith which provides that the parties must disclose all material facts in relation and in respect of the relationship between the parties. This principle cuts across before, during and after the contract of insurance is signed. I have no

doubt that disclosure of the circumstances surrounding an accident is material to the performance and discharge of the parties' responsibilities relating to the contract. The Court of Appeal in *Co-operative Insurance Company Lt v David Wachira Wambugu* (2010) 1KLR 254 made the principle explicit by stating that;

> '..a contract of insurance is one of uberrimae fidei. The insurer is entitled to be put in possession of all information possessed by the insured.......There is an obligation there to disclose what you know, and concealment of a material circumstance known to you, whether you thought it material or not, avoids the policy.'

24. The circumstances surrounding the accident is central in insurer's decision on whether the same are covered under the policy. It is also clear in my mind that an insurer is entitled to enquire into and investigate the circumstances and facts surrounding an occurrence of an accident. An insurer is not expected to depend solely on the version or history given by the insured. It was therefore within the contractual rights of the respondent in this matter to retain the services of an investigator to make the inquiry and investigate the circumstances surrounding the accident in question.

25. I note that the claim form produced by the appellant as his exhibit 2 does not have the part where the circumstances of the accident is explained. I also note that the respondent had filed a complete form but the same was not produced as an exhibit in the case and I will therefore not give consideration to it. I however believe that, what the appellant told the court is what he told the respondent as far as the facts of the accident is concerned. In order to consider whether the appellant withheld material information, the court can only resort to the contents of the investigation report which was the only exhibit produced by the respondent and which was the basis for the respondent to avoid liability.

26. In the mid of testimony of DW1, the advocate for the appellant objected to production of the investigation report for reasons that it was not signed. According to the appellant, the same was not a proper report unless it was signed. The trial court ruled that it had noted the sentiments and will clear with the issue prudently and that the counsel for the appellant should tackle the same in cross examination. The court does not appear to have addressed itself to the report and the objection of the appellant in its judgment.

27. There were other challenges to the report such as the same making reference to photographs which were not attached or produced in court. DW1 stated that the photographs had been forwarded to the respondent but when DW2 took the witness stand, he stated that they also did not have the photographs. I also note that the makers of the reports are indicated as S. Wachira and Joseph Kinyoho. None of them signed the report. The witness who testified to this report was one Wachira Kamweti. It is not clear whether the witness was the same S. Wachira who was shown to have co-authored the report. Although the witness stated that he did the investigations, the discrepancies in the report coupled with lack of signature which is the sign of owning the documents, in my opinion renders the report inadmissible in evidence. In *Mugo Mungai & 4 Others v Official Receiver & Provisional Liquidator (Capital Finance Limited and Pioneer) & 2 Others* (2019) eKLR, Justice W.A Okwany was faced with similar situation and she proceeded to hold that;

> 'In conclusion, I find that an unsigned document has no probative value as the contents' genuineness cannot be proved. It is worth noting that documents do not prove themselves, a witness must be examined to prove the documents. The evidence of the contents of the documents is hearsay evidence unless the author thereof is known or identifies himself as owning the document.'

28. He who alleges must prove. By virtue of Section 107 of the *Evidence Act*, the burden of proving that the appellant was withheld material information was on the respondent. Honourable Justice Richard Mwongo when called upon to make a decision under similar circumstances in *British American Insurance Co. Limited & Another v Isaac Njenga Ngugi* (2019) eKLR held as follows;

> " 'On this there are authorities to the effect that where the declination is by the insurer, he is bound to prove the basis of the repudiation. In *J.V.N. Jaiswa, Law of Insurance, Eastern Book Company* (2008), the learned writer at p. 495 states:
>
> > 'If a claim is being repudiated by the Insurance Company on the ground that the insured had suppressed the material facts, the burden shall lie on the Insurance Company, who pleads suppression, to prove'.
>
> Likewise in *Stebbing v Liverpool and London Globe Insurance Company Ltd* (1916-17) All ER 248, the court held that;
>
> > '..the burden of proof is on the insurer to show that there was a misrepresentation or non-disclosure of material facts'".

29. Since I have held that the report was not admissible in evidence, it is my finding that the respondent did not on a balance of probabilities prove that the appellant withheld material information in respect of the circumstances surrounding the accident. I am alive to the fact that the trial court did not give any weight to this report and made no finding on the same but since this is an issue in this appeal, I had a duty to make reference and make a decision on the same.

30. I now turn to the issue of proof of special damages. The amended plaint asked for Kshs 3,800,500.00. In support of the claim the appellant produced exhibits 1 to 11 which were in his list of documents dated 22-09-2016; exhibits 12 and 13 contained in his supplementary list of documents dated 25-04-2018 and exhibit 14 and 15 which were in another supplementary list of documents dated 2-12-2021. Exhibit 13 is a valuation report by Regent Automobile Valuers and Assessors Ltd dated 23-05-2013 which shows the value of the motor vehicle was at the time Kshs 3,800,000.00. That would mean that the appellant was pleading compensation to the tune of the value of the vehicle as at the date of the valuation report.

31. The accident was on 29-07-2015 and obviously, there must have been some level of depreciation of the vehicle and as such the value of the vehicle could not have been the same when the accident occurred. In addition to this, such compensation would only be awarded if the vehicle was declared a write-off which is not the case in this matter. Further, where an insured is entitled to compensation for a total loss, there is always a value of the salvage which would be debited from what is payable to the insured unless the insurer took ownership of the salvage. Again, this is not the case in this matter. I therefore find no justification for the claim for the value of the motor vehicle at Kshs 3,800,500.00. That claim is not tenable and I decline to award it.

32. The appellant also claimed loss of use. He did not particularize what constituted the loss of use neither did he ask for a specific figure for the claim. The magistrate observed that this prayer is considered a special damage which must be specifically pleaded and strictly proved. However judicial authorities have settled that damages for loss of user are in nature of general damages which should be proved

on a balance of probabilities. In *Nyaga v Attorney General* (2023) KEHC 26484 (KLR) Honourable Justice L. Njuguna cited with approval Jackson Mwalili v Peterson Mateli (2020) eKLR as follows;

> " Loss of use (loss of user) falls under general damages as stated by the court in the case of *Jackson Mwalili v Peterson Mateli* (2020) eKLR thus;
>
> > '.... loss of user of profit is in the nature of general damages and is proved on a balance of probabilities. The decisions also relate to commercial vehicles which were damaged and as a result, the owners claimed loss of user. The decisions further agree that the owner of a damaged vehicle is entitled to compensation and courts have been liberal when quantifying damages for loss of user'".

33. It should be noted that for one to be entitled to damages for loss of user, he must provide evidence to justify the same. The appellant did not lead evidence to prove or even make attempt to prove what he used the motor vehicle for and what inconveniences he suffered due to its grounding. He threw the prayer to the court and sat back for the court to make assessment. Cases belong to the parties and the court can only award that which is rightly and successfully pursued by the parties. I would say that the appellant did not pursue this claim as it would have been expected of him. The same has no basis on which the court could allow it. In *David Bagine v Martin Bundi* (1997) eKLR, the Court of Appeal made reference to its own decision in Mariam Maghema Ali v Jackson M. Nyambu t/a Sisera Store, civil appeal number 5 of 1990 (unreported) and *Idi Ayub sahbani v City Council of Nairobi* (1982-88) 1KAR 681 at page 684 thus;

> 'It is trite law that the plaintiff must understand that if they bring actions for damages it is for them to prove damage. It is not enough to note 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."

34. I am now left with the prayer for general damages. On the same, the trial court held that; 'finally on the issue of general damages, I would have made an award of Kshs 480,000.00 if the plaintiff had proved breach of contract as that was the figure assessed for the parts that were damaged as a result of the accident.' The appellant produced an assessment report dated 2-12-2021 as exhibit 14. The said report was done 8-08-2019, more than four years after the accident and three years after this suit was filed. The report indicates that the vehicle was assessed at Westkam Garage to which was the same garage it had been taken after the accident. It would seem that the vehicle was not picked by the appellant from the garage even after the respondent instructed the garage to release it to him by its letter dated 12-10-2015.

35. I have looked at the appellant's assessment report which states that the vehicle had also been vandalised. I agree with the finding of the magistrate that the appellant should have mitigated his damages as early as 12-10-2015 when he was informed that the respondent would not be paying for the loss. At least the assessment or valuation should have been done immediately the respondent asked the yard to release the vehicle to the appellant. In these circumstances, the respondent cannot be held liable for the vandalism which occurred at the yard or elsewhere after the respondent attempted to avoid responsibility. Of course, the respondent did not help matters by failing to commission an assessment after the accident which, in the insurance industry, its responsibility. Instead, the appellant chose to do investigations only and gave a wide berth to the assessment despite having taken the vehicle to the garage.

36. I do agree with the honourable magistrate that general damages for breach of contract would be payable to the appellant. However, faced with the situation like the current one, it becomes difficult for this court to state with a degree of certainty how the assessor identified which parts were missing as a result

of accident and which were lost to vandalism. It must be taken therefore that the parts damaged as a result of the accident are those pleaded in the amended plaint.

37. Parties are bound by their pleadings and this court will not allow the appellant to introduce evidence which differs with his pleadings. According to the amended plaint, the following parts were damaged as a result of the accident;

a. Windscreen.

b. Bonnet.

c. Suspension.

d. Airbags.

e. Side mirror.

f. Tyres.

g. Side skits.

h. Gear.

i. Bumper.

38. Comparing the above list of pleaded parts with their value given by the assessor in exhibit 14, I get the following loss;

1. Windscreen- Kshs 60,000.00

2. Bonnet- Kshs Nil

3. LHS wheel arc moulding, 2 front tyres, front
   shock absorbers and LH front lower arm which
   I consider to be parts of suspension system- Kshs 129,000.00

4. Airbags- Kshs 50,000.00

5. Side mirror- Kshs 42,000.00

6. Tyres- Kshs 28,000.00

7. Side skits- Kshs Nil

8. Gear- Kshs Nil

9. Bumper- Kshs Nil

   Total Kshs 309,000.00

39. It is my finding that since there is no wrong without a remedy, the appellant was entitled to damages but this court cannot go outside the principles and operation of the law to award more than what has been proved or demonstrated. In addition to the above sum of Kshs 309,000.00, I am minded to add the labour and related charges recommended in the assessment report produced as exhibit 14 which total to Kshs 58,200.00 which I proceed to award.

40. It is clear from the above analysis that both parties did not prepare and plead their cases in a manner that would have assisted the court to make a better determination. However, in the interest of substantive

justice, I believe that I have done the best I could to make cases out of each side within the boundaries of the law and my mandate as an appellate court.

41. The upshot is that this appeal succeeds partly and the judgment of the trial court in Milimani Commercial Courts Chief Magistrate's civil case number 6486 of 2016 is set aside and substituted for judgment for the appellant against the respondent as follows;

    a. Kshs 367,200.00.

    b. Costs of the suit in the lower court and on this appeal commensurate to the award above.

    c. Interest on 'a' above at court rates from the date of filing of the lower court suit until payment in full.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 8TH DAY OF NOVEMBER 2024.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Judgment delivered in presence of:

Mr. Onsende holding brief for Mr. Ongegu for the appellant; and

Mr. Chengeche for the respondent