



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

CIVIL APPEAL NO.39 OF 2018

GRACE ANYONA MBINDA.....APPELLANT

- V E R S U S -

THE JUBILEE INSURANCE COMPANY LIMITED.....RESPONDENT

(Being an Appeal from the Judgment and decree of Hon. S.M. Mokuu (CM) in KERICHO CMCC. No.314 of 2013 delivered on 18/9/2018)

JUDGMENT

1. The Appellant who was the Plaintiff in CMCC No.314 of 2013 instituted the suit through a Plaint dated 28/8/2013 seeking Special Damages of Kshs.1,200,000/= and also loss of income of Kshs.200,000 per month in respect of loss of business opportunity between August, 2012 and the date of Judgment.
2. The Appellant stated in her Plaint that she was the owner of Motor Vehicle Reg. No. KBJ 431K Mitsubishi Lorry which was comprehensively insured by the Respondent under Policy Number P/NRB/2040/2011/72473 in the sum of Kshs.1,200,000/=.
3. Further, that the Appellant's Motor Vehicle was involved in an accident along Kericho-Kisumu Road on or about 18/8/2012 while the said Policy was in force but the Respondent had not indemnity.
4. The Appellant was seeking Kshs.1,200,000 in respect of loss of the Motor Vehicle and loss of user at the rate of kshs.200,000/= per month from August, 2012 up to the date of entry of Judgment.
5. The Respondent filed a defence on 12/9/2013 denying the Plaintiff's claim. The Respondent admitted the existence of the contract between them but said it was not bound to settle the claim because the accident was not reported and the Appellant had not paid excess fee.
6. The Appellant and her driver gave evidence before the Trial Court. The driver said the Motor Vehicle was involved in an accident along Kericho road at Kaitui while he was transporting construction materials and the motor vehicle was damaged beyond repair.
7. The Appellant reported the matter to Kericho Police Station and the vehicle was towed to Kericho. She said she notified the Agents of the Respondent who recorded her statement and the Motor Vehicle was towed to Sagoo Motors Kericho. The Appellant produced a note book where she was recording what the vehicle was making per day. She was claiming Kshs.200,000/= per month.
8. The Respondent did not deny existence of the contract. Their defence was that the Appellant did not obtain a Police Abstract or fill the claim form and therefore the Insurance could not take any steps.
9. The Respondent further stated in their evidence before court that if the Report would have been made, the matter would have been investigated and the Motor Vehicle assessed and the Appellant would have paid excess and since this procedure was not followed, the Appellant would not be compensated. The Respondents denied that they instructed Sagoo Motors to tow the Vehicle to their garage.
10. The Trial Court found that the Appellant demonstrated that she had a valid policy and that she reported the accident within a reasonable time. She was awarded Kshs.1,200,000/= less the legal excess. She was also awarded costs.
11. The Trial Court declined to award the loss of user of Kshs.200,000/= per month from the date of the accident until Judgment and the Appellant has now appealed to this court on the following grounds:-

(i) THAT the Court having found that the Respondent was liable for breach of Insurance Contract should have ordered the

Respondent to pay loss of user as the vehicle was being used for business.

(ii) THAT the Trial Court failed to consider the Appellant's authorities in respect of loss of user and arrived at an erroneous decision.

(iii) THAT the claim for loss of user/or loss of business opportunity was pleaded and proved and the same should be awarded.

12. The parties filed written submissions in this appeal which I have duly considered. The Appellant submitted that the contract of Insurance was not denied and further that the Trial Court having found that the Respondent was liable to indemnify the Appellant should have awarded loss of user at the rate of Kshs.200,000/= per month.

13. The Respondent opposed the appeal and submitted that loss of user was not covered under the policy since the policy covered loss of Motor Vehicle and not loss of user.

14. The issues for determination in this appeal are as follows:-

(i) Whether the Appellant proved loss of user.

(ii) Whether the Respondent is liable to pay loss of user of the Motor Vehicle.

(iii) Who pays the costs of this appeal?

15. On the issue of proof of loss of user, these are special damages, which the law requires that they must be specifically pleaded and proved.

16. The court of Appeal in **Civil Appeal no. 283 of 1996, (David Bagine versus Martin Bundi)** stated that damages which are claimed under the title "**loss of user**" are special damages which must be proved. The Court stated as follows:-

"We must and ought to make it clear that damages claimed under the title "loss of user" can only be special damages. That loss is what the claimant suffers specifically. It can in no circumstances be equated to general damages to be assessed in the standard phrase "doing the best I can". These damages as pointed out earlier by us must be strictly proved."

17. The Appellant pleaded Kshs.200,000/= per month from the date of the Accident to the date of entry of Judgment. To support her claim, the Appellant produced a note book, in which she had noted down her earnings from the Vehicle per day, which she claimed was totaling to Kshs. 200,000 per month. The date of Judgment was also open ended and could not be ascertained.

18. The court of Appeal in **Ryce Motors Limited & Another versus Elias Muroki (1996) eKLR** stated that a claim for loss of user must be supported by acceptable evidence. The Court stated as follows:-

"The learned judge had before him by way of plaintiff's evidence Exhibits 2 and 3 as proof of alleged loss of profits. Exhibit 2 consisted of figures jotted down on pieces of papers showing dates and figures. Nothing about these pieces of paper can be accepted as correct accounting practice to enable the court to say these are the accounts upon which the court can act. These pieces of paper do not show at all if the alleged accounts were in respect of 'the matatu', or the two matatus owned by the plaintiff, or included the business of the plaintiff as a shop-keeper. The said pieces of paper in our view, do not go to prove special damages. There are umpteen authorities of this court to say that special damages must not only be specifically pleaded but must be strictly proved. Such authorities are now legion. The plaintiff simply gave evidence to the effect that his matatu was bringing him income of Shs. 4500/= per day. He did not support such claim by any acceptable evidence. There was absolutely no basis on which the learned judge could have awarded the sum of Kshs. 2,830,500/= for special damages and we set aside the award in its entirety."

19. I therefore find that the Appellant in the present case did not prove that the vehicle was bringing an income of Kshs.200,000/= per month. The mere production of a note book is not sufficient proof that the Appellant used to earn Kshs. 200,000 per month.

20. On the issue as to whether the Respondent was responsible to pay loss of user, both parties relied on several cases and one of them is the case of **JOHNSON M. MBURUGU -VS- FIDELITY SHIELD INSURANCE LTD (2006) eKLR** where the Court held that where the Insurance Company repudiates the policy or fails to pay the insured sum, it will not meet damages resulting from loss of earnings from the business that the insured vehicle was engaged in.

21. However, In the current case, I find that the Appellant did not prove loss of user and therefore the Respondent is not liable to pay the same.

22. I accordingly find that the Respondent is not liable to pay the loss of user and I dismiss the appeal.

23. On the issue as to who pays the costs of this appeal, I find that the Respondent said he has already settled the claim. I direct that each party bears its own costs of this appeal.

Delivered, signed and dated at Kericho this 5th day of February, 2021.

A. N. ONGERI

JUDGE