REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 465 OF 2016

BRITISH AMERICAN INSURANCE

COMPANY (K) LTD.....APPELLANT

-VERSUS-

JAMES GATHURU MBUGUA.....RESPONDENT

(Being an appeal from the judgment of Honourable E. K. USUI

(Senior Principal Magistrate) delivered on 28th June, 2016

in CMCC NO. 4418 OF 2010)

JUDGMENT

The Respondent in this Appeal was the plaintiff in Chief Magistrate's civil case number 4418 of 2010 in which he sued the appellant herein, British American Insurance Company (Kenya) Limited, claiming a sum of Kshs. 1,923,180.36cts plus interest at 15% and the costs of the suit.

He averred that, on the 12th day of May, 2008, he applied for saving policies being application number 60116839 for a Super Saver Policy number 160-3338 in which a sum of savings Modal Premium of Kshs. 39,777.40cts was saved every month and application number 60108491 for an invest plus Super Saver Policy number 161-19328 was issued in which a sum of Kshs. 50,000/= was saved every month.

He further averred that other than the savings, the plaintiff paid Kshs. 3,307.99cts per month in respect of policy number 161-19328 and Kshs. 2,950.24cts in respect of policy number 160-3338 being the two riders in respect of death cover and the waiver of premium disability.

It was pleaded that during the period between 12th day of May 2008 and 28th January, 2010, the plaintiff debited into defendants account a sum of Kshs. 1,019,445.36cts in respect of policy number 161-19328 and a sum of Kshs. 903,735 in respect of policy number 160-3338 giving a total of kshs. 1,923,180.36cts which he demanded but the defendant failed and/or refused to refund and was informed that he was not entitled to a refund. He states that he is entitled to the amount saved together with interest at 15% per annum.

In its defence filed on the 9th September, 2010, the appellant admitted that the Respondent took out the two policies but avers that, it was an agreed term of both policies that the appellant would pay a surrender value after the policy had been in force for a minimum period of 24 and 25 months respectively, and that there would be no refund payable otherwise.

The Appellant contended that the Respondent's policy had not been in force for the said period and that the Respondent cancelled the policies vide a letter dated 22nd April, 2010 as a consequence of which, he was not entitled to a refund on any of the policies.

The appellant stated that the respondent's Super Saver Policy did not provide for an interest rate of 15% or at all and that he elected for the "Equity Funds" investments in respect of "Invest Plus" policy the terms of which were that;

1. The same would be a medium risk type.

2. Investors should be committed to investment periods of at least 5(five) years.

It denied that it was indebted to the respondent in the sum of Kshs. 1,923,180.30cts as claimed in the plaint or at all.

At the hearing the respondent testified as the sole witness in support of his case. He adopted his witness statement dated the 12th day of September, 2014 and filed on the same day.

The appellant closed it's case without calling any witness.

It was his evidence that on or about May, 2008, he applied for two saving policies with the appellant's investment scheme being application number 60116839 for a Super Saver Policy number 160-3338 in which a sum of Kshs. 39,777.44cts was saved every month and application number 60108491, invest plus Super Saver Policy number 161-19328 for which he paid Kshs. 50,000/= per month.

He stated that other than the savings, he paid Kshs. 3,307.99cts per month in respect of policy number 161-3338 and Kshs. 2,950.24cts for policy number 160-3338 being the two riders in respect of death cover and the waiver of premium on disability.

It was his evidence that on or about February, 2010, he asked for the accumulated amount in the savings component from both policies but he was informed that the policies were endowment policies and that he was not entitled to the money in the Super Saver Policies.

He contended that he was entitled to the total amount that he had saved in the two policies amounting to kshs. 1,923,180.36cts as at the 28th January, 2010 which he claimed from the appellant at an interest rate of 15% per annum. He produced several documents in support of his claim.

Upon hearing the parties, the Learned Magistrate in a judgment delivered on the 28th day of June, 2016 entered judgment for the respondent against the appellant for Kshs. 1,923,180.36cts plus costs.

The appellant being dissatisfied with the same, filed the appeal herein and has listed four (4) grounds of Appeal as follows;

1. That the Learned Magistrate erred in fact and in law in finding that the Respondent had demonstrated on a balance of probability that he was entitled to premium refunds.

2. That the Learned Magistrate erred in fact and in law in holding that the appellant was liable to refund premiums despite the respondent having prematurely cancelled the policies.

3. That the Learned Magistrate erred in fact and in law in holding the appellant must repay the policy premiums while the said policies had attached and risk passed.

4. That the learned magistrate erred in fact and in law in ordering the appellant to repay the plaintiff a sum of kshs. 1,973,180.36ct.

When the Appeal came up for hearing, it was disposed of by way of written submissions which the counsel later highlighted in court.

The court has considered the said submissions, the evidence on record and the authorities cited.

It is a well settled law that the duty of the first appellate court is to analyze and re-evaluate the evidence on record in order to reach its own conclusion bearing in mind that it did not have the benefit of seeing or hearing the witnesses. See the case of ***Selle & Another vs. Associated Motor Boat Co. Ltd & Another (1968) E.A 123*** and that of ***Abok James Odera T/A A. J. Odera & Associates vs. John Patrick Machira T/A Machira & Co. Advocates (2013) eKLR.***

In my view, there are only two issues for determination in this appeal namely;

1. Whether the Learned Magistrate erred in holding the appellant liable to refund the premiums.

2. Whether the Learned Magistrate erred in ordering the appellant to repay the respondent the sum of kshs. 1,973,180.36ct.

I propose to consider the two issues together.

From the evidence on record, it is not in dispute that the appellant and the respondent herein had entered into a contract following which, two insurance policies were issued to the respondent namely policy numbers 161-19328 which took effect on 8th May, 2008 and policy number 160-3338 which took place on 11th August, 2008.

It is also not disputed that during the period between 12th May, 2008 and 28th January, 2010, the respondent had deposited into the appellant's account, a total of Kshs. 1,923,180.36cts.

In or about February, 2010, the respondent demanded his saving back to which the appellant declined arguing that the respondent was not entitled to the refund for he had breached the contract by cancelling the policy before it attained the 24 months when he would have been entitled to surrender value.

In his submissions the respondent has relied on two grounds namely that the Appellant failed to call witnesses before the trial court and that

the contract of insurance entered into by the appellant and the respondent had a vitiating factor that rendered it null and void in that there was misrepresentation on the part of the appellant which left the respondent with no option but to rescind the contract in its entirety.

He has argued that the information contained in the proposal form was misleading as told to him by a Mr. Muchemi to the effect that he would request for his money when he wanted which according to him, was crucial in acceptance of the policy. He contended that the information went against the principle of "utmost good faith".

In his evidence adduced before the trial court, the respondent admitted that he is the one who completed the application forms, gave the details therein, and that he read and signed the same. He further stated that he understood the contents therein. He did not state that the document was read to him by Mr. Muchemi whom he alleged misled him. Though it was his evidence that Mr. Muchemi told him that he could get his money back if he so wished, he admitted that there was no such provision in the policy document which he also admitted he read and understood.

The court has perused the two policy documents and it's clear that they did not allow either of the parties to terminate the policies before the 25th month at which point the policies would have acquired a cash surrender value. The Respondent herein decided to terminate the policy before the 25th month and hence he was in violation of the policy contract. His policies were in force for slightly over a year when he made the decision to cancel the same. None of them was in force for 2 years at which time he could have been entitled to the surrender value. By a letter dated 9th April, 2008, from the appellant he was advised on when the benefits accruing in the two policies were payable. It is also clear that before he took up the policy, he asked for clarification which he got from the appellant.

In his evidence, he admitted that he had not acquainted himself with the provision on default of payment of premiums though he had the policy documents and therefore he had himself to blame.

Though he stated that he received the policy document in June, 2008, there is no evidence that was adduced to that effect. In the letter dated 12th May, 2008, from the appellant he had been advised to contact the Risk Acceptance Department if he does not receive the policy document within 30 days from the date of receipt of that letter. He did not tell the court when he received that letter. The significance of the 30 days period was that he had the option to object to the policy and receive full refund of premium paid as long as he advised the respondent in writing not later than 30 days from the date of the delivery of policy document. This was not done.

It therefore follows that upon expiry of the aforesaid 30 days period, there was an agreement between the parties and upon payment of the first premium, the risk to be insured under the policy passed from the insured to the underwriter.

As rightly submitted by the appellant, once the risk was accepted upon payment of the first premium, the respondent was not entitled to a refund unless he cancelled the policy having been fully paid up for 24 months as provided for in the policy documents.

On the issue of appellant having not called any witnesses, my view is that by his own admission, the respondent was in breach of the contract entered into between himself and the appellant. The documents that he produced spoke for themselves and his own evidence betrayed him as the party in breach. It is trite law that the plaintiff has to prove his case on a balance of probability. In this case, he failed to do so, he did not manage to shift the evidential burden to the defendant and therefore, the appellant did not have to call any witnesses. At the same time, he failed to discharge the legal burden of proof as was required of him under Section 107 of the Evidence Act which provides as follows;

> ***"(1) whoever desires court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.***
>
> ***(2). When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."***

On the issue of misrepresentation, I have perused the plaint that was filed in this case, the respondent has not pleaded misrepresentation at all. Order 2 Rule 10 of the Civil Procedure Rules sets out particulars which should be pleaded in the plaint which include;

> ***"Particulars of any misrepresentation, fraud, breach of trust, willful default or undue influence on which the party pleading relies."***

I have keenly gone through his evidence, the issue of misrepresentation only arose in re-examination. Nowhere in his statement or evidence-in-chief has he alluded to the fact of misrepresentation. In the circumstances, I find that he could not rely on it as his claim was not based on misrepresentation the same having not been pleaded. It is trite law that a party is bound by it's pleadings.

In the end, I find that the appeal has merits and the same is allowed. The decision of the trial court is hereby set aside and it's replaced with an order dismissing the Respondent's suit.

Due to the nature of the case, each party shall bear its own costs of the Appeal and that of the lower court.

It is so ordered.

Dated, signed and delivered at NAIROBI this 7th day of May, 2020.

L. NJUGUNA

JUDGE

In the presence of:

……. for the Appellant

……. for the Respondent