



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 396 OF 2017

NELSON MUTURI DUMBAYIA.....APPELLANT

VERSUS

INTRAFRAICA ASSURANCE COMPANY LIMITED.....1ST RESPONDENT

STANTECH MOTORS LIMITED.....2ND RESPONDENT

Being an Appeal from the Judgement of the Chief Magistrate's Court

at Nairobi Milimani Commercial Courts Hon. E. Wanjala (Miss)

delivered on 31st March, 2017)

JUDGMENT

This appeal arises from the Judgment of the lower court delivered on 31st March, 2017. The appellant had sued the respondents vide a plaint dated 16th and filed on 17th October, 2014 seeking an order of mandatory injunction directed to the respondents jointly and severally, to repair motor vehicle registration No. KAN 527T and release it to him. The motor vehicle was said to have caught fire leading to some damage. He also claimed general damages for loss of use of the said motor vehicle, plus costs of the suit.

The respondents denied the appellant's claim in the joint statement of defence dated 18th and filed on 26th November, 2014. After the trial the court dismissed the appellant's case with an order that parties bear their own costs. The appellant was aggrieved by the said judgment and filed this appeal raising several grounds contained in the memorandum of appeal dated 12th July, and filed on 3rd August, 2017.

The appellant filed submissions to address this appeal and cited one authority, while the respondents relied on their submissions made in the lower court. It is my duty to reconsider the evidence presented to the trial court, evaluate the same and arrive at independent conclusions.

There was no dispute that the 1st respondent insured the appellant's motor vehicle. While that policy was in operation, the motor vehicle caught fire. The incident was then reported to the 1st respondent who then assigned the repair works to the 2nd respondent. In the process however, this was not done because from the evidence it was not going to be economical to carry out the said repairs and the appellant was advised accordingly.

In the process, a valuation was made where the cost of repair had been communicated to the appellant, but the information that the vehicle was beyond repair was communicated long thereafter. An offer is said to have been made to the appellant to accept an ex gratia payment which he refused and insisted on the repair of the motor vehicle. This was declined by the respondents.

There is evidence that the fire incident was reported to the 1st respondent by the appellant about four months after the incident. That was way beyond the period required for such a report.

At the filing of the suit, the appellant was required to lodge, alongside the plaint, the witness statement and all documents that would be required during the trial in line with Order 3 rule 2 of the Civil Procedure Rules. The appellant's documents in the list dated 16th October, 2014 did not include the Insurance Policy issued by the 1st respondent. In a claim of this nature, it was incumbent upon the appellant to include the said policy because that was the basis upon which his claim would either stand or fall.

In dismissing the appellants case, the lower court set out some issues for determination, which included whether or not the 1st respondent had insured the appellant's motor vehicle, and if the fire incident was covered in that policy. The other issues were whether or not the 1st respondent had admitted the appellant's claim and if the vehicle was repairable. Lastly, whether or not the appellant established his case against the respondents.

In dismissing the appellant's case on the issue of mandatory injunction, the lower court stated that the motor vehicle could not be repaired and this had been communicated to the appellant. In any case, such a claim cannot succeed because the assessment made by the 1st respondent indicated it was beyond repair and therefore, to compel the respondents to carry out such repairs would be an exercise in vain.

On the other hand, the claim for loss of use of the motor vehicle has been held to be a claim in special damages. – **see Kengeles Management Group Limited vs. English Foods Limited (2011) e KLR**. Special damages must be specifically pleaded and strictly proved. The appellant did not comply with that requirement, but made a blanket pleading of general damages of loss of use of the motor vehicle according to his plaint aforesaid. In his evidence, he did not give any particulars of such loss, and therefore the court could not rely on generality of the loss contained in his pleadings and the evidence as a whole. In any case, there was no evidence presented by the appellant that the fire incident was covered in the policy.

There was evidence that the appellant had a long and cordial relationship with the 1st respondent which was considered in the offer to pay an ex gratia sum but which the appellant rejected. He should have accepted such a payment in view of the weak case that he subsequently presented before the court leading to its dismissal.

The other point that comes out is the joinder of the 2nd respondent in these proceedings. The 2nd respondent was assigned the duty to repair the motor vehicle by the 1st respondent. There was a contract in the form of insurance policy between the appellant and the 1st respondent. The appellant did not show any connection between him and 2nd respondent to establish privity of contract between the two.

The respondents properly resisted the appellant's claim and the evidence of the assistant claims manager of the 1st respondent remained firm even under cross-examination.

After assessing the evidence adduced before the lower court, I have come to the conclusion that the appellant did not establish his case on a balance of probability against the respondents to deserve judgment in his favour.

The lower court was correct in rejecting his claim and therefore this appeal is lacking in merit and is accordingly dismissed. Like in the lower court, each party shall bear their own costs.

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

A. MBOGHOLI MSAGHA

JUDGE

This judgment has been delivered in the absence of the parties and transmitted electronically, after due notice and in line with Article 159 of the Constitution as read with Section 1 B (e) of the Civil Procedure Act, which compliment Order 21 Rule 1 of the Civil Procedure Rules.