REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL APPEAL NO. 22 OF 2014

BRITISH AMERICAN INSURANCE

COMPANY LIMITED…….....…….....APPELLANT

VERSUS

GEORGE MOKAYA ONDIEKI……....RESPONDENT

(An appeal from the Judgment of Hon., Senior Principal Magistrate Mr.Njoroge in Nakuru CMCC Number 91 of 2011, delivered on 31st January 2014)

JUDGMENT

1. **Background**

The Respondent was at all material times the registered owner of motor vehicle Reg. No. KBA 480Y. On the 25th March 2010 he took out a comprehensive insurance cover with the appellant over the vehicle upon a valuation of Kshs.1.38 Million. He paid the premium of Kshs.104,006/=. The vehicle was involved in an accident on the 25th March 2010 at Nakuru when the policy was in force. It sustained material damage – and loss.

2. Paramount Assessors Limited under instructions of the Appellant assessed the loss and damage and by its report dated 18th September 2010 quoted repair costs at Kshs.635,680/=.

Hashu Garage Nakuru was then instructed to repair the vehicle but by February 2011 the vehicle had not been repaired, more than seven months since the instructions were given.

The unexplained delay caused the Respondent to file the subordinate court case.

3. By a plaint dated 24th February 2011 the Respondent sought damages and loss occasioned by the Appellant's undue delay in the repair of the vehicle being damages for

(1) Hiring a taxi for 30 days at the rate of Kshs.5,000/= per day.

(2) Forced borrowing of a commercial loan to buy another vehicle Reg. No. KBM 036F Toyota Premio to mitigate costs of hiring a taxi.

4. He therefore sought for a declaration that

a) ***The appellant (Defendant) was in breach of the contract of Insurance under policy No.***

572/70011/000098/2010/03 and that the Defendant(Appellant)is liable to compensate the Respondent(Plaintiff) for the value of the vehicle at the sum insured.

b) A sum of Kshs.1,380,000/= being the value of the motor vehicle as per the motor vehicle as per the contract of insurance.

5. In its defence dated 17th March 2011 the Appellant denied the Respondent's claim including having insured the vehicle during the relevant period.

It also stated that it was the Respondent who was in breach of the insurance policy by neglecting to co-operate with defendants garage thereby frustrating and delaying the repairs and further refusing to collect the vehicle from the garage when he was notified to collect thus occasioning loss in terms of storage charges.

6. Upon conclusion of the case the trial magistrate found in favour of the Respondent and entered judgment as prayed in the plaint.

7. The appellant in its Memorandum of Appeal faults the trial magistrate for failure to take into account its defence, misdirecting himself in relying extensively on the Respondent's motor vehicle Assessor and ignoring the defendants Assessor's report, and further for making findings not based on the evidence on record and delivering a judgment that was vague ambiguous and failure to make a finding on special damages.

8. Both parties filed their written submissions which they also highlighted.

The Appellant filed the following documents and statements of its two witnesses:

- Copy of logbook - Pext 1
- Policy document - Pext 2A and 2B
- Police Abstract - Pext 4
- Letter dated 16.8.2010 - Pext 3
- Demand Letter and notice - Pext 5
- Assessment report and receipt – Pext 7 & 8

The Respondent too filed documents in support of its claim being the

- **Assessment Report dated 18.9.2010– Dext 1**
- **Report dated 28.2.2011 – DExt. 2**
- **Policy document – DExt. 3**

9. **Issues for determination**

1. Whether the trial court's findings are based on sound evidence or on no evidence.

2. What were the parties obligations under the policy of insurance and whether there was breach by either party.

3 Whether the trial courts judgment was flawed, vague ambiguous and not in conformity with the law.

10. **Section 78(2) Civil Procedure Act** enjoins the court in the exercise of is Appellate jurisdiction to perform as nearly as may be the same duties as are conferred and imposed by the Act on Courts of original jurisdiction. The duty of an appellate is to re-evaluate and re-consider the totality of evidence adduced before the trial court and come up with own findings and conclusions, and to determine whether the findings were based on the evidence on record or whether all relevant factors were considered **–Butt – vs- Khan (1987) KLR.**

11. The issues as famed are intertwined and shall be conversed simultaneously.

The *gaverman* before the trial court and in this court is a matter of interpretation and application of the

(a) Law of Contract of Insurance

(b) The doctrine of indemnity under the Insurance Act.

(c) Obligations of the insureds and the Insurance Company under the contract.

12. There is no dispute that the Respondent's vehicle was comprehensively insured under the policy stated nor that the vehicle was damaged in an accident.

There is consensus that the Appellant's motor Assessors-Paramount Assessors Limited assessed repair and associated costs at Kshs.635,680/= while the pre-accident value was assessed at Kshs.1,380,000/= as a pre-condition by the Appellants to taking out the policy cover, which is more than 50% of the insured value.

13. At the time of the accident the Appellant's Assessors were satisfied that the vehicle had no pre-accident defects. It is also not in dispute that the Respondent paid the requisite premium prior to the accident thus the insurance cover was valid and inforce – **DW1** evidence.

14. The court shall in the determination of this appeal rely entirely on the recorded evidence before the trial court as it has no way of determining whether or not certain evidence/testimony by the appellant was not recorded or was inaccurately recorded- **Selle –vs- Associated Motor Boat Co. Ltd(1968) EA 123 and Mwanasokoni –vs- KBS (198-88)I KAR 278**, **and Butt –vs- Khan (1987) KLR.**

15. The Court of Appeal in the above decisions held that a court will not readily differ with findings of fact of a trial court who had the benefit of seeing and hearing all the witnesses I add and recording the evidence unless they are not based on the evidence or that the trial court acted on wrong principles in reaching the findings. See also **Nakuru Civil Appeal No. 73/2012 Justus Thairu –vs- Stephen Mwangi _ Karanja & Another (20150 e KLR, Nakuru Civil Appeal No.18/2013 Jericho Furniture Ltd t/a George Wood Funeral Society –vs- Norah Chepng'etich Bett(2015) e KLR.**

16. **<u>Law of Contract of Insurance</u>**

Under the policy and contract of insurance (PEx 2A) the Insurer is under a duty to indemnify the insured by reinstating the insured's vehicle to its pre-accident state or for any loss or accidental damage to the motor vehicle – Section 1 Clause 1. Page 56 Record of Appeal.

17. The Insurance company may also pay the damage in cash but the liability may not exceed value of the parts lost or damaged and reasonable costs of fittings and labour is limited to the value stated in the schedule.

18. The appellant opted to carryout repairs to the respondent's vehicle by its appointed garage Ashu Garage. **PW1** testified that by January 2011 the repairs were not completed necessitating him to complain of the delay to the appellant by letter PExt 5. Nothing was done. It was his testimony that he was never instructed to collect his vehicle, and no letter of instruction was produced to the court.

19. On the **8th August 2011** the Respondent engaged his own Assessor **Car Consult assessors** to assess it. A report was prepared – PExt 7 – with a conclusion that the repairs were not complete. It is then that the Respondent demanded payment for full value of the vehicle being a period of about eight months since the accident.

20. According to the appellants evidence – **DW1** repairs to the vehicle were concluded on 28th February 2011 – six months after the accident. He admitted that the repairs of the vehicle were completed after the

Respondent filed the case.

It was his evidence that the appellant paid Kshs.755,492/= to the garage and that if repair costs are more than 50% value of the vehicle, in this case Kshs.1,300,000/= then it ought to have been written off and deemed constructive loss. This witness also confirmed that the Vehicle had no pre-accident defects.

21. Looking at the Respondent's evidence against the Appellants and particularly **DW1** – the Claims Analyst - it substantially collaborates the Respondents evidence. It cannot be said that the Appellant performed its part of the contract of insurance. The inordinate delay to repair the vehicle was not sufficiently explained, and worse still that the repairs were only done after the case was filed.

22. The evidence on record does not show in what manner the Respondent failed to co-operate with the appellant. None was demonstrated.

The Appellant's claims Analyst (DW1) testified that if the repair costs exceed 50% of the insured value the vehicle is declared a write off. It was not stated why the Respondent's vehicle had to be subjected to shoddy repairs when the cost exceeded 50% of the insured value.

23. In **Kisumu CACA No. 163 of 2002 Concord Insurance Co**. **Ltd –vs- David Otieno Alinyo & Another** citing **Harman LJ. In Darbishire –vs- Waran (1963) WRl 1067 PG 1070** stated that:

> ***"the principle of restitution --- is to put the plaintiff in the same position as though the damage never happened.***
>
> ***It has come to be settled that in general the measure of damages is the cost of repairing the damaged vehicle, but there is an exception if it can be proved that the cost of repairs greatly exceeds the value in the market of the damaged article.***
>
> ***This arises out of the plaintiff's duty to minimize his damages…"***

24. The claims Analyst did not deny the report by the Respondent's Assessor **car consult** (PExt 7). He noted numerous defects after the alleged repairs and concluded that the respondent was not fully indemnified in terms of the contract of insurance.

25. **DW2** Clement Wasike t/a Paramount Assessors testified that he assessed the vehicle and prepared reports – DExt 1 on the 18th September and **Dext 2** – on the 28th February 2011 which showed the vehicle was reparable at a cost of Kshs.635,680/= and noted pre-accident defects with a repair period of approximately 4 weeks. That was on the 28th February 2011 after the suit was filed.

26. By the evidence of the two motor vehicle Assessors and the Appellant's Claims Analyst, it is evident that the Appellant caused the unexplained inordinate delay in repairing the vehicle. It has not been shown why the same was not declared a constructive loss yet the reports showed the repair costs exceeded 50% of the insured value.

27. In its totality I am not persuaded that the Appellant by its agents evidence supported its statement of defence by showing how the Respondent failed to co-operate with it in anyway. It is my view that the appellant was prompted to repair the vehicle when the primary suit was filed, and even then the repairs were shoddy.

28. In the circumstances the Respondent was not under an obligation to collect the vehicle and sign satisfactory note when the repairs were not to his satisfaction. This cannot be termed as non-co-operation with the appellant, in my opinion.

29. The judgment of the trial court in my view is well supported by the evidence on record and I find no misdirection or misapprehension of the law therein. I am satisfied that the trial magistrate took into account all the witnesses evidence and applied the same in his judgment.

The only shortcoming in the trial magistrate's judgment in my view is the phrase he used in conclusion, that ***"Finally I find that the plaintiff has proved his claim on a balance of probabilities and I shall enter judgment against the defendant as prayed in the plaint with costs and interest."***

30. Mr.Kagucia advocate for the Appellant finds the phrase above (underlined) to be vague and ambiguous stating that no findings were made on the claim for special damages contained in the plaint. I have stated the prayers/relief stated in the plaint in Paragraph 4 of this judgment.

31. I agree that the trial magistrate ought to have given definite orders on the reliefs instead of stating "**as prayed for the plaint**."

Should that that however invalidate the entire judgment?

32. At the body of the judgment, the magistrate was clear on the special damage claimed being the insured value of the vehicle the sum of Kshs.1,380,000/= which sum the Appellants witnesses –DW1 and DW2 – confirmed to have been the insured value of the vehicle.

33. Under **Article 159(2) (d) of the Constitution**, the court is enjoined to administer justice without undue regard to procedural technicalities that do not go into the merits of a case. The phrase used in the final declaration in the Judgment is but a procedural technicality which does not go into the merit of the judgment and cannot invalidate the findings and the final verdict of the court.

34. Consequently, I find that the issues as framed (Par 9) have been resolved positively that the trial magistrate's findings are properly based on the evidence on record, and that the Appellant by its agents conduct and omissions breached its obligations to the Respondent insured under the policy of Insurance which was valid at the material times.

35. For clarity purposes, I shall repeat here as would have been expected of the trial magistrate the reliefs granted to the Respondent and as stated in the plaint that

> ***(a) A declaration is issued that the Appellant is in breach of the contract of insurance under policy No. 572/70011/000 98/2010/03 and that the Appellant is liable to compensate the Respondent for the value of the motor vehicle being the sum insured***
>
> ***(b) A sum of Kshs.1,380,000/= being the value of motor vehicle Reg. No. KBA 480Y as per the contract of insurance.***
>
> ***(c) Costs of the suit and interest on (b) from date of filing the primary suit.***

36. Accordingly, I dismiss the appeal with costs to the Respondent.

Dated, signed and delivered this 14th Day of February 2019.

J.N.MULWA

JUDGE