REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

(CORAM: R. MWONGO, J)

CIVIL APPEAL NO. 60 OF 2016

BRITISH AMERICAN INSURANCE CO. LIMITED.....1ST APPELLANT

EQUITY BANK LIMITED.....2ND APPELLANT

VERSUS

ISAAC NJENGA NGUGI.....RESPONDENT

(An appeal from the judgment of the honourable Magistrate E. Kimilu (SRM) in Naivasha Chief Magistrate Civil Suit No. 83 of 2013, delivered on 23rd August 2016.)

JUDGMENT

Background

1. In the lower court, the respondent herein claimed compensation following a motor vehicle accident on 1st June 2012 along the Kabati-Kakiani-Kithyoko road. The vehicle was being driven Samuel Mulunga a police officer then residing in Naivasha. The Plaintiff had taken out an insurance cover with the 1st Defendant through its agent the 2nd Defendant. The nature of policy was PSV Chauffeur driven-commercial under policy number 5/0/034/000112/2009/01 for motor vehicle KBQ 347N. It is not disputed that the policy was valid at the time of the accident.

2. The amount awarded by the trial court was Kshs 345,000/= for motor vehicle repairs and Kshs 24,000/= for storage – amounts for which documentary proof was availed. The trial court found that the respondent had proved on balance that the vehicle was damaged whilst in use for insured business. The court rejected the claim of the appellants that the vehicle was involved in a collision whilst hired out for reward in breach of the insurance contract.

3. Dissatisfied with the judgment of lower court, the appellants have appealed to this court on the following grounds.

> ***1. The trial Magistrate erred in Law in failing to comply with the provisions of Order 21 Rule 4 & Rule 5 of the Civil Procedure Rules, 2010.***
>
> ***2. The trial Magistrate erred in fact in concluding that the plaintiff was entitled to any payment from the Defendant despite evidence to the contrary.***
>
> ***3. The trial Magistrate erred in law and fact in concluding that the plaintiff discharged his duty to prove his case on a balance of probabilities.***
>
> ***4. The trial Magistrate erred in law and in fact in finding that the plaintiff was free of obligation in respect of the principle of Uberimae Fidei, a policy term in Insurance Contracts.***
>
> ***5. The trial Magistrate erred in law and in fact in disregarding the defence testimony on the Plaintiff's conduct which resulted in the First Appellant rescinding the Insurance contract.***
>
> ***6. The trial Magistrate erred in Law and in fact in absolving the Plaintiff of gross misrepresentation upon the circumstances surrounding the alleged collision.***
>
> ***7. The decision was arrived at, to the extent that that this was done, on wrong principles of law.***

4. In my view, the grounds of appeal truly raise only two major issues:

a) Whether the trial magistrate complied with **Order 21 Rule 4 & Rule 5** of the **Civil Procedure Rules, 2010.**

b) Whether it was proved on balance in the trial court that the award of damages was properly due to the respondent.

Compliance with Order 21 Rules 4 & 5 of the Civil Procedure Rules

5. The appellants' argument is that the trial magistrate's judgment did not meet the standards prescribed for a competent judgment set out in **Order 21 Rules 4 & 5** of the CPC. These Rules provide as follows:

"4. Judgment in a defended suit shall contain a concise statement of the case, the points for determination and the reasons for such determination

"5 in suits in which the issues have been framed, the court shall state its finding or decision with the reasons therefore, upon each separate decision on each issue"

6. In terms of compliance with the said provisions, I note from pages 60-62 of the record of appeal, that the trial magistrate identified the following issues for determination in her judgment:

a) Whether or not the plaintiff was in breach of the principle of utmost good faith "Uberrimae fidei"

b) Whether or not there was wrong or incorrect usage of the motor vehicle

c) Whether the defendants are liable for the alleged loss by the plaintiff as a result of the accident

d) The quantum of damages

7. The learned magistrate clearly analysed the evidence of each of the stated issues in her judgment. In respect of issue (a) she identified the essence of *uberrimae fidei.* She concluded that *"there is not (sic) misrepresentation that plaintiff was in control of the said vehicle"* – pg 60 line 19 – based on the evidence.

8. In respect of issue (b), the trial magistrate at lines 1-3 on pg 60-61 of the record, found that the allegation that the person in charge of the vehicle at the time of the accident was his friend was unsubstantiated because he did not call his friend to give evidence. At line 20 page 61, however, the learned magistrate also found that the defendant failed to prove the existence of any contract for hire between the plaintiff and the driver as alleged. What the trial magistrate did not do, therefore was to state which of the two parties' evidence was more persuasive in terms of proof and disproof, or failure to prove under **sections 3(2), 3(3)** and **3(4)** of the **Evidence Act**. In other words the trial magistrate did not state which party's story taken as a whole was more probable.

9. In the motor claim form (Exb 3), the respondent placed on record that the vehicle was being used for private hire –chauffer driven in tandem with the insurance policy (Exb 2) which stated the driver had to be *"Any person authorized by the insured and with a valid driving license"* and the *"use as private hire – chauffer driven."* The plaintiff in paragraph 9 of the plaint, asserts that the defendants failed to keep their part of the bargain to repair the vehicle, whilst the defendant's assertion in paragraph 11 of its defence is stated in its particulars of defence: that the vehicle was put to use that amounted to breach the conditions of the policy.

10. In that regard, the plaintiff did provide evidence that the defendants stated they would pay the storage costs but did not either refund such money or make the repairs. On the other hand, the defence did not provide the particulars of breach of the contract. Overall, therefore, the trial magistrate appeared to find the plaintiff's evidence more persuasive without stating so. On my part, having evaluated the evidence, I find the plaintiff's story more probable.

11. In respect of issue (c) as to whether the defendants are liable for the alleged loss by the plaintiff as a result of the accident, the trial magistrate found at pg 61 in lines 27-30 and pg 62 line 1-3 that the defendants collected repair excess but failed to cause the repair; that as result, the plaintiff suffered financial embarrassment and inconvenience due to the act of the defendant; and concluded that she was satisfied that the defendant should make good the plaintiff's claim.

12. In respect of issue (d) on quantum, the trial magistrate found proof for the amounts claimed through the invoices produced.

13. I therefore take the view that the trial magistrate's judgment was in overall compliance with **Order 21 Rules 4 & 5 of the Civil Procedure Rules**. In any event, in respect of any failure of the trial magistrate to comply with the Rules, I have separately re-evaluated the evidence hereunder, and find that the four issues in the lower court were adequately addressed.

Whether it was proved on balance that the award of damages was properly due to the respondent.

14. Simply put, the core of the case and the appeal concerns whether the insurance contract was breached, and if so by which party. By the measure of its breach, and by the party responsible for breaching it, so will liability or failure thereof lie.

15. It is not contested that the insurance contract is premised on *"uberrimae fides"*, the principle of good faith and full disclosure, that the

contract of insurance requires that the assured knows everything about the risk he wants to insure and he must disclose to the insurer every fact material to the risk. The Court of Appeal in ***Co-operative Insurance Company Ltd v David Wachira Wambugu [2010] 1 KLR 254*** put it this way

> ***"… a contract of insurance is one of uberrimae fidei. The insurer is entitled to be put in possession of all material information possessed by the insured. In policies of insurance, whether marine insurance or life insurance, there is an understanding that the contract is uberrimae fidei, if you know any circumstances at all that may influence the underwriter's opinion as to the risk he is incurring, and consequently as to whether he will take it, you will state what you know. There is an obligation there to disclose what you know, and the concealment of a material circumstance known to you, whether you thought it material or not, avoids the policy…Contracts of insurance are contracts of utmost good faith and this gives rise to a legal obligation upon the insured, prior to the contract being made, to disclose to the insurer all material facts and circumstances known to the insured which affect the risk being run. Insurance is a contract of speculation and the special facts upon which the contingent chance is to be computed lie most commonly in the knowledge of the assured only; the underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge to mislead the underwriter into a belief that the circumstance does not exist. The keeping back such circumstance is a fraud, and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention, yet still the underwriter is deceived and the policy is void; because the risqué run is really different from the risqué understood and intended to be run at the time of the agreement. The policy would be equally void against the underwriter if he concealed. The governing principle is applicable to all contracts and dealings. Good faith forbids either party, by concealing what he privately knows, to draw the other into a bargain from his ignorance of the fact and his believing the contrary."***

16. The actual insurance policy instrument is not in the court file. The only document in the court file evidencing the insurance policy is the risk note and the claim form. Both provide the use of the vehicle as Private Hire- Chauffer driven. Also, Exhibit 6, the letter from the 1st plaintiff, affirms this. Thus, both the Plaintiff and the defendant agree that the policy was PSV Chauffer driven – commercial policy. The nature of the policy is not in dispute.

17. Was the policy breached? The plaintiff's assertion was that he gave the vehicle to his friend who had a valid licence and that he had not hired the vehicle out. The evidence he availed was contained in the claim form where he stated the purpose for which the vehicle was being used as private hire –chauffer driven. He also exhibited the driving licence of the driver, Samuel Mulunga. However, the plaintiff did not call the driver to give evidence

18. The defendant's evidence came through DW1 the defendant's claims officer. He confirmed that the vehicle was insured for private hire – chauffer driven; that after the accident he directed it be taken to Prime Movers for assessment. He said they declined to pay because:

> ***"We engaged an investigator to look at the circumstances of the accident. The motor vehicle had been hired out to a police officer at the time of the accident"***

19. 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. Jaiswal, Law of Insurance, Eastern Book Company (2008)**, the learned writer at p. 495 states:

> ***"If the claim is being repudiated by the Insurance Company on the ground that the insured had suppressed the material facts, the burden shall lie heavily on the Insurance Company, who pleads suppression, to prove it."***

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."***

20. This is in tandem with **Section 107(1)** of the **Evidence Act (Chapter 80 of the Laws of Kenya)**, which provides:

> ***"107. (1) Whoever desires any 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."***

21. The defendant's failure to prove the findings of the alleged investigator is fatal to his defence. In addition, in cross-examination DW1 admitted that:

> ***"According to the policy, the driver is any person mandated by insured todrive and has a driving license. We do not object the driver was authorized by plaintiff and has a licence"***

22. There is also the defendant's letter of 2nd August 2012 to Prime Time Garage (Exb. 7) in which the defendant confirms they will pay the storage fees The letter states follows:

> ***"The abovementioned vehicle was brought to your premises for repairs. Kindly allow the bearers of this letter or their appointed representatives to collect it from your garage. We confirm to settle the charges"***

Disposition

23. All these facts taken together provide a basis for a finding of liability of the defendants on a balance of probability.

24. In conclusion, the appeal is dismissed with costs to the respondents.

25. Orders accordingly.

Dated and Delivered at Naivasha this 7th Day of March, 2019

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RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Mr. Mukungu for the Appellant

2. Mr. Gichuki holding brief for Wairegi for the Respondents

3. Court Clerk - Quinter Ogutu