REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: D. S. MAJANJA J.

CIVIL APPEAL NO. 48 OF 2018

BETWEEN

BRITISH AMERICAN INSURANCE COMPANY LIMITED.....APPELLANT

AND

CHIEF WANGUBO CHAMBERI.....RESPONDENT

(Appeal from the original Judgment and Decree of Hon. S.K. Onjoro, SRM dated 6th July 2018 at the Magistrates Court at Kisii in Civil Case No. 161 of 2016)

JUDGMENT

1. The dispute before the subordinate court was between the appellant, as insurer, and the respondent, its insured. The parties agree that the respondent had in force a valid Insurance Fire Policy No. 576/040/1/006857/2014/01 dated 28th January 2015 for the period between 15th January 2015 and 14th January 2016 for the Kshs. 7,000,000/= as the sum assured. The respondent claim was that on 7th April 2015, his leased premises caught fire at 11.30pm and his entire stock valued in excess of Kshs. 7,000,000/= was destroyed in the fire. He stated that he reported the incident to the appellant who sent their loss adjusters. He raised his claim with the appellant but it refused to indemnify without any justification thus precipitating the suit.

2. The appellant denied the respondent's claim in its defence. It also denied breach of the policy and stated, in the alternative, that the respondent failed to follow provisions for the required safety measures and that he was the sole owner of his misfortune which was occasioned by his own recklessness and negligence without due regard to the safety of his leased premises. It also accused the respondent of starting the fire to make a double false claim against it and Madison Insurance Company Limited. It also stated that it was never notified of the accident at all or through a mandatory statutory notice.

3. This is an appeal against the judgment and decree of the subordinate court entering judgment for the respondent against the appellant as follows:

> *(a) The defendant be and is hereby compelled to indemnify the plaintiff for losses incurred.*
>
> *(b) The defendant to pay to the plaintiff Kshs. 7,000,000 being the total sum assured.*
>
> *(c) The plaintiff shall have costs of the case.*
>
> *(d) Interest on (b) and (c) at court rates.*

4. In the memorandum of appeal dated 1st August, 2018, the appellant challenged the judgment on several grounds. The appellant contended that the documents relied on by the respondent were not authentic and the trial court erred in relying on them to make a finding that the respondent had proved his case. The appellant complained that the trial court had awarded the sum of Kshs. 7,000,000/= without taking into account the salvage value of the stock and the sales made by the respondent. It was also aggrieved by the trial court's failure to consider the claim that the respondent had a similar policy with Madison Insurance Co. Ltd and that he had stage managed the accident for his benefit. It was also claimed that the respondent had failed to notify the appellant of its claim as required. Counsel for the appellant relied on the submissions filed before the trial court and in his oral submissions reiterated the grounds of appeal. He added that there had been no basis to award the entire sum assured as opposed to the actual loss suffered.

5. The respondent opposed the appeal. In his written submissions, counsel for the respondent asserted that the respondent had produced sufficient documentary evidence to prove that the respondent had the goods which were burnt in the fire. He submitted that the appellant had

the opportunity to scrutinize the documents and tender its own documents to counter the respondent's but had failed to do so. He dismissed the appellant's claim that the respondent had another policy and stated that the argument by the appellant that the respondent had caused the fire was baseless. He urged the court to dismiss the appeal.

6. Before I consider the facts of the case and the parties' respective arguments, it is important to recall the principle that governs the exercise of this court's appellate jurisdiction. The duty of the first appellate court is to re-evaluate and re-assess the evidence adduced before the trial court keeping in mind that the trial court saw and heard the parties and giving allowance for that and to reach an independent conclusion as to whether to uphold the judgment (see ***Selle v Associated Motor Boat Co.*** **[1968] EA 123**).

7. Chief Wangubo Chamberi (PW 1) testified that he operated his business of selling used clothes in his store at St. Judes building within Kisii Town and had taken up the insurance policy with the appellant. He recalled that on 7th April 2015, he closed his store at around 9.00pm to 10.00pm and at around 11:30pm, as he was taking tea at a nearby hotel, he was informed that his store was on fire. He testified that he was not able to save any of his stock whose value he put at Kshs. 8,805,000/=. He reported the matter to the police and also informed the appellant about the incident but had not been paid despite making numerous calls to the respondent's offices. He produced the stock list he had on 4th April, 2015, a letter informing the defendant about the incident, a police abstract and Kenya Revenue Authority documents and copies of receipts for the purchase of the goods.

8. On cross-examination, he testified that when he took out the policy he had a stock of about Kshs. 8,000,000/=. He conceded that between 4th April and 6th April, 2015 he had sold some of his goods but could not recall the value of what he had sold and stated that his records got burnt in the fire. He also testified that some of his stock had been looted as they tried to put off the fire but he could not tell the value of stolen goods either. He was also unable to tell the source of the fire and denied having a similar policy with Madison Insurance.

9. An employee of the respondent's claim department, Clement Koech (DW 1) admitted that the respondent had taken out a policy with the appellant insuring him against loss as a result of fire. He stated that on 8th April 2015, PW 1 had reported the fire incident and the appellant sent its loss assessors to the site to investigate the matter and make a report. He told the court that the appellant declined PW 1's claim because he did not disclose the cause of the fire which he was expected to know having been the last person to leave the premises. DW 1 testified that their investigations revealed that an accelerant had been left near the premises and PW 1 was suspected to have caused the fire. He stated that PW 1 had also failed to produce sufficient documents to enable the appellant determine the stock he had before the fire other than the suspect stock list. DW 1 also testified that PW 1 had failed to disclose that he had a policy with Madison Insurance and for these reasons the appellant's claim could not be paid.

10. The fact of the policy is not disputed nor is the fact that a fire occurred during its currency. The point of contention is that the appellant declined to indemnify the respondent for three reasons, two of which I shall deal with before turning to the main issue which is whether the respondent was entitled to payment of the entire insured sum.

11. One of the reasons the appellant gave for failing to pay the claim was that the respondent knew or ought to have known the cause of the fire and had failed to disclose this information to the appellant. The appellant based its assertion that the respondent had orchestrated the fire on an investigation report prepared by its loss assessors. The other reason given by the appellant to repudiate the policy was that the appellant had acted contrary to his duty to disclose all material facts by failing to indicate that he had a similar policy with Madison Insurance Co. Ltd.

12. The appellant was required to prove the reasons it had tendered for avoiding the policy in line with **section 107(1)** of the ***Evidence Act (Chapter 80 Laws of Kenya)*** which states that, "*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.*" Likewise, the burden was on the respondent to prove that the respondent caused the fire. In ***Slattery v Mance*** **[1962]1 All ER 525, 526** the court held that, "*[O]nce it is shown that the loss had been caused by fire, the Plaintiff has made out a prima facie case and the onus is on the Defendant to show on the balance of probabilities that the fire was caused or connived at by the Plaintiff.*"

13. The appellant case was that following the fire, it commissioned an investigation by its losses assessors, Parity Loss Assessors. The report was filed as part of the appellant's list of documents but was not produced as evidence in the course of the trial. Since it was not produced in evidence by the maker thereof, DW 1 testimony on the cause of the fire was hearsay. I therefore find that the appellant's allegations on the cause of the fire remained unsubstantiated and were rightly dismissed by the trial court. Indeed, DW 1, in cross-examination, stated that according to the policy, the respondent was not required to state the cause of the fire.

14. The appellant claimed that the respondent had a concurrent insurance cover with Madison Insurance. This fact was not admitted by the respondent and the allegation having been denied, was not supported by any proof like a proposal form, a policy document and evidence of payment of payment of premium that would establish that the respondent had a concurrent policy with another insurance company. I therefore find that in the absence of any evidence, the trial court cannot be faulted for dismissing this ground for avoiding liability.

15. In its statement of defence, the appellant alleged that the respondent failed to the provision for ensuring that all safety measures were in place. Having reviewed the evidence, the appellant did not put before the court the measures it referred to and demonstrate how the respondent failed to follow them. In sum, the appellant did not discharge its burden of showing that it was entitled to avoid the policy.

16. The next question is whether the respondent was entitled to the sum awarded. A claim made under an insurance contract is a claim for indemnity. The respondent's claim is therefore limited to the loss incurred as the sum assured only provides the ceiling for compensation (see ***Madison Insurance Limited v Solomon Kinara t/a Kisii Physiotherapy Clinic*** **KSM CA Civil Appeal No. 263 of 2033 [2004] eKLR**).

17. In this case the appellant prayed for Kshs. 7,000,000/= which was the sum assured. He produced a stock list, revenue documents and receipts in support of the loss suffered which he put at Kshs. 8,805,000/=. The appellant was aggrieved by the trial court's decision to rely on the documents and claimed that they were falsified. Since the appellant was making a serious charge of fraud against the respondent, it was required to plead and prove the claim to the required standard which is higher than that required in ordinary civil cases, that is proof upon a

balance of probabilities; but not one beyond a reasonable doubt (see ***Ndolo v Ndolo*** **Civil Appeal No. 128 of 1995 [1996] eKLR**). I find that the appellant failed to discharge this burden in this respect.

18. The appellant also contended that the sales made by the respondent and the goods stolen during the operation to put off the fire were not put into consideration in computing the award payable. The respondent conceded that his property was looted during the incident and further admitted that he had sold some of his stock from when he compiled the stock list on 4th April 2015 to when the fire occurred on 7th April, 2015. He stated that his sales records were destroyed in the fire which possibility DW 1 acknowledged might have occurred. DW 1 also testified that their loss adjusters had visited the torched premises and found that the respondent's goods were completely burnt. The duty of the respondent was to prove on the balance of probabilities, the value of the goods destroyed which is a question of fact. The respondent produced a stock list which was indicative of the value of goods in his custody prior to the fire. He also produced supporting documents to show that he was importing goods. The appellant did not disclose the conclusions made by its loss assessors. In such a case the court can only use the evidence available as proof of the value of loss. Since the sum assured provides a ceiling, the trial magistrate did not err in awarding the appellant Kshs. 7,000,000/=.

19. For the reasons I have set out I now dismiss the appeal with costs to the respondent which I assess at Kshs. 100,000/- exclusive of court fees.

DATED and **DELIVERED** at **KISII** this 20th day of **MAY** 2019.

D.S. MAJANJA

JUDGE

Mr. Mose instructed by Mose Mose & Milimo Advocates for the appellant.

Mr. Abisai instructed by Abisai & Co. Advocates for the respondent.