



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL APPEAL NO. 19 OF 2017

FIDELITY SHIELD INSURANCE

COMPANY LIMITED.....APPELLANT

VERSUS

PAMELA ATIENO WAGA.....RESPONDENT

(Being an appeal from the judgment of Hon. J.M. Njoroge Chief

Magistrate in Kisii Law Courts in Civil Case No. 291 of 2012 dated 21st March, 2017)

JUDGMENT

1. The Appellant herein being aggrieved by the trial court's decision compelling it to pay a sum of Kshs. 4,000,000/= to the respondent has preferred this appeal whose grounds of appeal are outlined in the memorandum of appeal dated 28th March, 2017 as follows:

- a. That the learned trial magistrate erred in law and fact in failing to find that the respondent had not proved her case against the appellant;
- b. That the learned trial magistrate erred in law and fact in disregarding the documentary and oral testimony on record;
- c. That the learned trial magistrate erred in law and fact by failing to take into consideration the respondent's own admission that she was married to Dismas Bundara Waga who had taken out an insurance policy with the appellant and that the said policy holder was not the person who allegedly died after a road accident on the 14th December, 2004;
- d. That the learned trial magistrate erred in law and fact in failing to take into consideration that the documentary evidence tendered in court related to the death of Dismas Waga Bundara who was not the policy holder with the appellant;
- e. That the learned trial magistrate erred in law and fact in failing to appreciate that the policy holder Dismas Bundara Waga and the alleged deceased person DismasWaga Bundara were two different and distinct persons;
- f. That the learned trial magistrate erred in law and fact in failing to appreciate that the person whose compensation is being sought by the respondent was not deceased as alleged and therefore the respondent had no cause of action against the appellant;
- g. That the learned trial magistrate erred in law and fact in finding that the appellant was liable to compensate the respondent against the evidence on record
- h. That the learned trial magistrate erred in law and fact in failing to apply proper legal principles and thus arriving at a bad decision;
- i. That the learned trial magistrate erred in law and fact in finding that the Respondent warranted an award of Kshs. 4,000,000/=; and
- j. That the learned trial magistrate erred in law and fact in failing to find that the claim by the respondent was time barred.

2. Both parties filed written submissions in support of their respective positions which they briefly highlighted when this appeal came up for hearing.

3. From the evidence adduced and the parties' submissions the predominant issue arising was whether the respondent had proved her case against the appellant on a balance of probabilities. The appellant also contends that the respondent's suit was time barred.

4. The brief facts of the respondent's case are that the appellant issued a personal accident policy cover to Dismas Bundara Waga for a period running from 28th October 2004 to 27th October 2005 through its agent Miran Insurance Brokers Ltd. The respondent, who was listed as the insured's beneficiary made a claim for payment when her husband died in a road traffic accident during the subsistence of the policy cover. She claimed that the appellant had processed the claim but later instructed the bank to stop the payment of the cheque on 24th June 2005 in breach of the insurance contract.

5. The appellant denied the respondent's claim and in its statement of defence filed on 10th September, 2012, it contended that it had received a call from Co-operative Bank of Kenya, Migori branch informing it that its policy holder Dismas Bundara Waga whom they presumed was dead had presented himself at the bank with the respondent claiming that the cheque they were depositing was for an insurance claim for their house which had burnt down.

6. The record shows that the respondent together with 3 others were arraigned before the Resident Magistrate's Court in Criminal Case No. 1683 of 2005 in Rongo and charged with forgery, conspiracy to defraud, uttering false document and false swearing the complainant being the appellant. The Court in Rongo found that the prosecution had failed to prove a *prima facie* case against the accused and acquitted them under section 210 of the Criminal Procedure Code on 26th October 2011.

7. After her acquittal the respondent, filed her plaint dated 8th August, 2012 against the appellant for payment of the money owed on the insurance contract. Counsel for the respondent contends that the cause of action commenced when the criminal charges she was facing terminated in her favour. It is his position that the respondent's suit was filed within time.

8. The appellant having properly pleaded the defence, the trial court was required to deal with the question of limitation of actions as it goes to jurisdiction and must be dealt with first before the court proceeds any further with the matter. (See *Thuranira Karauri Vs. Agnes Ncheche Civil Appeal No. 192 of 1996 [1997] eKLR*).

9. Being a claim for breach of contract, the suit against the respondent should have been filed within 6 years as per **section 4 (1) (a)** of the **Limitation of Actions Act** which provides as follows;

4 (1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued—

(a) actions founded on contract;

10. The respondent's pleadings show that her cause of action arose when the appellant breached the insurance contract by directing the respondent's bank to halt payment of the cheque to the respondent on 24th June 2005. The reasons given by the appellant for failing to file the suit within time did not fall under the scope of the scenarios under which time stops running as provided in **section 26** of the **Limitation of Actions Act Cap 22** which states;

26. Where, in the case of an action for which a period of limitation is prescribed, either—

(a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or

(b) the right of action is concealed by the fraud of any such person as aforesaid; or

(c) the action is for relief from the consequences of a mistake,

the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it:

hence by the time she filed her suit time had lapsed by a year.

11. Additionally, nothing on record shows that the respondent sought the leave of the court to file the suit out of time therefore the respondent's suit was time barred and the trial court lacked jurisdiction to hear the matter. The appeal succeeds on this ground alone. However, due to the gravity of the issues raised by the parties I will proceed to address the question of whether the respondent proved her case against the appellant.

12. This being a first appeal, the court is required to analyse and re-assess the evidence on record and reach its own conclusions taking into account the fact that it neither saw nor heard the witnesses testify (see *Selle v Associated Motor Boat Co. [1968] EA 123*).

13. Before the trial court, the respondent testified that her deceased husband, Dismas Waga Bundara had taken out a policy with the appellant and had listed her as the beneficiary. When he died following a road traffic accident, she followed up on payment by opening a joint account with her brother-in-law, Dismas Bundara Waga who had inherited her customarily after her husband's death. She explained that the names were common as many people had been named after her polygamous father-in-law. She stated that she had no intentions to defraud anyone and pointed out that she had been acquitted of the charges facing her before the trial court at Rongo. She urged the court to compel the company to pay the compensation as well as costs and interest.

14. The respondent called Dr. Aggrey Edagisa (PW 2) who testified that he performed the post-mortem on the body of the Dismas Waga Bundara in the presence of family members at Akidiva Hospital.

15. George Ouma Olala (PW 3) described himself as an insurance broker trading as Miran Insurance Brokers. He testified that he had issued Dismas Waga Bundara a proposal form from the appellant and when he died he had facilitated the preparation of the claim documents. He stated that he knew the deceased as he had interacted with him for about 20 years and was adamant that he was not the one with whom he had been arrested together with.

16. Mathew Nyakuri Kaayota (PW4) produced a copy of the death certificate of Dismas Waga Bundara which he had issued in his capacity as the former registrar of births and deaths in Migori. PC Ahmed Bishar Abdille (PW5), who was stationed at Macalder police station, produced a copy of the Occurrence Book and a police abstract dated 12th April 2005 in respect of motor vehicle registration number KYU 007, Mercedes Benz which had been involved in the accident where the deceased was a victim.

17. Gladwell Wathaiya Kamau (DW1) gave evidence as the defence first witness. She testified that she had been working for the appellant at the time when the respondent had made a claim against the appellant, alleging that her husband had died in a road traffic accident. The respondent had however gone with her husband to collect the money claiming that it had been paid for a fire that had burned down their house. She testified that the 'deceased' had been found alive and was arrested together with the respondent, Jared Otieno and George Odela and charged in criminal case no. 1683 of 2005 but were acquitted for lack of evidence. She stated that the appellant engaged Invespot Insurance Investigators who made a finding that there had been fraud as the policy holder was still alive. She also admitted on cross-examination that the proposal form had no provision for an Identity Card number or photo.

18. Reuben Mwangi (DW 2) an investigator with Invespot Insurance Investigators testified that they had carried out the assignment given by the appellant to find out whether the policy holder was dead. They had visited the chief of Muhuru Bay who led them to the policy holder's shop and upon questioning him the policy holder told them that he had received the cheque for their premises which got burnt down. When they visited Macalder police station, one IP Moganya denied that a fatal injury involving Dismas Bundara Waga had been reported. DW2 also found out that the vehicle which had been involved in the accident belonged to Odongo & Co. Advocates who had filed the application for letters of administration. From their investigations, they concluded that Dismas Bundara Waga was still alive and the claim made had been fraudulent.

19. Paul Ekutei (DW3) who worked with Co-operative Bank testified that the respondent had gone to Migori branch where he worked, in the company of a man wanting to open a joint account. The respondent stated that she was being paid for her house which had burnt down but on inquiry with the appellant it was realized that the payment was being made as a result of the death of the respondent's husband. This raised suspicion as the person who was alleged to be dead was also involved in opening the account. The police were alerted and effected arrest of the couple.

20. From these facts, the trial court was required to find whether the appellant had discharged her burden of proof.

21. It is trite law that contracts of insurance are contracts based on utmost good faith requiring the insured to disclose every material fact. (**See Co-Operative Insurance Company Ltd vs. David Wachira Wambugu [2010] 1 KLR 254**). The insurer on its part is required to settle claims arising out of the policies of insurance it issues according to **Section 203(1) of the Insurance Act**.

22. In the present case, the appellant sought to avoid the contract on the grounds that the appellant could not be compelled to pay for the death of a person other than the one it had insured. Counsel for the appellant submitted that the respondent had testified that her deceased husband was Dismas Waga Bundara as opposed to Dismas Bundara Waga who had taken out the policy with the appellant. He pointed to the post-mortem report, certificate of death and letters of administration which had been issued in respect of Dismas Waga Bundara. In the appellant's view there was no evidence that Dismas Bundara Waga was deceased and in fact from the respondent's evidence Dismas Bundara Waga was alive and they were living together.

23. The appellant had engaged the services of DW 2 to investigate whether the respondent's claim was fraudulent. DW 2 prepared a report of his investigations which showed that the police abstract, the post-mortem report, the death certificate and the letters of administration relied on by the respondent had been procured fraudulently. None of the people referred to in that report were called to testify.

24. The admissibility of such evidence was dealt with by the Court of Appeal in **Kinyatti V Republic Nairobi [1984]eKLR CA 60/1983** where the court held that

“ The rule against hearsay is that a statement other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of a stated fact... Evidence of a statement made to a witness by a person who is not called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is not inadmissible when it is proposed to establish by the evidence not the truth of the statement, but the fact that it was made.”

25. The investigation report sought to prove that the appellant's insured was alive and the respondent had come up with an elaborate scheme to fleece the appellant. As none of the witnesses who were mentioned in the report were called to give oral evidence, the report could not prove the appellant's case as it was mere hearsay.

26. On her part, the respondent called five witnesses in support of her case. PW 2 testified that he conducted the post-mortem on the deceased at Akidiva Hospital. PW 4 confirmed that he had received a notification of the deceased's death from the hospital and testified that he had issued the death certificate. PW 5 verified that the accident had been reported and verified the authenticity of the police abstract.

27. PW 3 had prepared the claim in respect of the deceased. He testified that he had known him for 20 years and stated that he could

physically distinguish him from the person with whom he had been arrested. PW 3 and the respondent had been arrested with Dismas Bundara Waga on suspicion of attempting to defraud the appellant. The respondent explained that the man with whom she had gone to collect the cheque was her husband and had remarried her traditionally. She further explained that her father-in-law had been polygamous and the name was common in the family.

28. The appellant conceded that other than the name on the proposal form there was no other way to identify its insured. The insured's fingerprints, photo or identity card had not been taken at the time of issuing the policy.

29. Mathew Nyakuri Kaayota (PW4) produced a copy of the death certificate of Dismas Waga Bundara which he had issued in his capacity as the former registrar of births and deaths in Migori. PC Ahmed Bishar Abdille (PW5) who was stationed at Macalder police station, produced a copy of the OB and a police abstract dated 12th April 2005 the accident where the deceased had suffered fatal injuries.

30. The standard of proof in civil cases on a balance of probabilities. If the evidence is such that the tribunal can say: "*we think it more probable than not,*" the burden is discharged, but if "*the probabilities are equal,*" it is not. See **Miller vs. Minister of Pensions [1947] 2 All ER 372.**

31. In this case, I find that the trial court's finding that that there was no evidence adduce to demonstrate that the policy holder was alive was proper. The trial court however did not make a finding on the issue that the suit was time barred. As already stated the Respondent's suit was time barred, for her claim to succeed she should have filed the suit on or about the 23rd June 2011 and not in 2012. For the reasons already given above, I allow the appeal on the ground that the Respondent's suit was time barred, I set aside the trial court's judgment Each party shall bear its costs.

Dated, signed and delivered at Kisii this 6th day of June 2019.

R.E.OUGO

JUDGE

In the presence of;

Miss Angasa h/b Mr. Wainaina For the Appellant

Respondent Absent

Rael

Court clerk