REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CIVIL APPEAL NO.12 OF 2018

THE KENYA ALLIANCE INSURANCE CO. LTD.....APPELLANT

VERSUS

BERNARD OKEYO AJWANG.....3RD RESPONDENT

(Being and appeal from the judgment/decree in Mbita CMCC NO.8 of 2014 delivered on 21st March, 2018 – Hon. S. Ongeri, SRM)

JUDGMENT

[1] This appeal arises from the judgment of the Senior Resident Magistrate at Mbita delivered on 21st August 2018 in Mbita **CMCC NO.8 of 2014**, in which the **Kenya Alliance Insurance Company Limited** (Appellant) was sued by **Bernard Okeyo Ajwang** (respondent) for a declaratory order that the defendant/appellant was liable to indemnifying the plaintiff/respondent to the full extent of the value of **M/V Reg. No. KBB 419 X** as per the existing insurance policy.

[2] Alternatively, the plaintiff sought against the defendant a declaratory order that the defendant meets all costs of repairs and restoration of the said Motor Vehicle arising from an accident which occurred on 25th May 2014, causing extensive damage to the vehicle.

The plaintiff also claimed loss and damage arising from the accident. These included special damages in the sum of Kshs.18, 100/= and general damages for breach of contract together with interest and costs of the suit.

[3] The plaintiff pleaded that at the material time, he was the registered owner of the motor vehicle Registration No. KBB 419 X Toyota Rav4 and that on the 30th August 2012, he took out a comprehensive insurance cover for it from the defendant company. He was then issued with a policy No. MP1/CH/POL/046272 which expired on or about 24th August 2013, on which date he renewed the policy and it remained valid upto and until the 23rd August 2014, with an express and/or implied term that the defendant would meet the cost of repairing the motor vehicle in the event of an accident and/or that the defendant would fully indemnify him to the extent of the full value of the vehicle were it involved in an accident.

[4] The plaintiff/respondent further pleaded that on or about the 25th May 2014, the insured motor vehicle was involved in a road accident along the Homa Bay-Mbita Road while being driven by his authorized driver and was in the process extensively damaged. The accident was reported to the defendant who instructed that the vehicle be towed to its authorized garage in Kisii town known as Jassy Motors & Auto Garage at the plaintiff's expense.

An assessment of the damage was carried out by the garage on 4th June 2014 and it was determined that the vehicle was extensively damaged.

[5] The plaintiff thereafter sought an undertaking from the defendant company to have the vehicle repaired or to indemnify him for the value of the vehicle together with towing charges. However, in a letter dated 18th August 2014, the defendant repudiated liability and refused and/or neglected to indemnify him thereby occasioning him loss and damage. He contended that the defendant's refusal was unreasonable and in breach of their contractual relationship as insurer and insured. He therefore prayed for judgment against the defendant.

[6] In its statement of defence, the defendant denied the plaintiff's claim by disowning the alleged insurance cover but in the alternative, the defendant admitted that in the month of August 2014, it accepted to renew and indeed renewed the insurance cover in favour of the plaintiff vide a renewal notice dated 9th August 2014 which was the basis of the insurance contract.

The defendant pleaded that even if the policy of insurance existed either as fresh or pursuant to the renewal and on the faith of statements made by the plaintiff contained in the declaration and if the policy NO.MP1/CH/POL.046272 was granted, then the motor vehicle was strictly assured only against any accident loss and damage for the period of one year from the 24th August 2014 to the 23rd August 2015, which period the vehicle did not suffer any accidental loss and/or damage through or by reason of any accidental violence within the meaning

of the policy and its conditions.

[7] In denying the occurrence of the accident on the material date – 25th May 2014 – along the Homa Bay – Mbita Road, the defendant contended that if indeed an accident occurred, then the same did not cause the alleged extensive damage nor was the damage caused by any accidental violence but by factors which were not envisaged by the policy of insurance and its terms and conditions.

[8] The defendant pleaded and contended that on 9th June 2014, the plaintiff made a claim for compensation by virtue of the subsisting policy and in so doing made a false statement or declaration to the company, as such, the claim could not be maintained as the loss and damage allegedly suffered by the plaintiff was expedited and assisted or brought, about by himself or by members of his family and even if he was directed to Jassy Motors & Auto Garage in Kisii town, this was done in good faith, pursuant to the terms and conditions of the subsisting policy and is the normal cause of duty towards establishing the alleged damage and its extent, a process which was investigatory and did not amount to admission of liability or confirmation of the plaintiff's assertions.

[9] The defendant further contended that even if any claim was made by the plaintiff, the company was unable to honour the obligations in the policy and had every justification to repudiate the contract as per the letter dated 18th August 2014, due to intervening circumstances rendering it impossible to honour the terms and conditions of the contract. That, the contract was based on among others, the duty of utmost good faith but the plaintiff acted in bad faith thereby breaching the terms and conditions of the contract and giving the defendant the right to avoid, repudiate or even refuse to effect the terms of the policy with the result that the plaintiff's accrued benefits were lost.

[10] The defendant maintained that the plaintiff was not entitled to any of the prayers in the plaint and further contended that the plaintiff's suit was an abuse of the process of the court and intended to cause unnecessary anxiety and discomfort to the company which therefore prayed for the dismissal of the suit with costs.

[11] The suit was set down for hearing after the close of the pleadings. Ultimately, on the 13th April 2016, the plaintiff/respondent testified and called a witness, **Humphrey Obach Odhiambo (PW2)**, who was the driver of the insured motor vehicle at the material time of the alleged accident.

The defendant testified through its claims investigator, **Isaac Njoroge Kimani (DW1)**, who concluded in his report that the plaintiff's claim was not made in good faith and honesty as the alleged accident may never have occurred as alleged by the plaintiff.

[12] After trial, the court rendered its judgment on the 21st March 2018 and made the following concluding remarks:-

> **"As a police abstract was produced I find that it was proved that motor vehicle Reg. No. KBB 419X was involved in an accident on 25/8/14.**
>
> **The plaintiff produced a logbook to show that he was the registered owner of the vehicle. He produced premiums that was paid to show that by the time of the accident the policy was valid. I do not find that the defendant proved there was any**
>
> **bad faith on the part of the plaintiff. He reported the accident and defendant instructed his agents to assess the vehicle in time. The defendant has a duty to "owner his" (sic) part of the contract.**
>
> **I proceed to declare that the defendant is liable to indemnify the plaintiff to the full extent of the insured value of the motor vehicle as per the insurance policy or the loss and damage resulting from the accident on 25/5/14 to motor vehicle Reg. No. KBB 419X.**
>
> **The plaintiff did not produce the receipt for special damages the same is disallowed.**
>
> **As the plaintiff has succeeded in the first prayer he is not entitled for the remedy of breach of contract. The plaintiff shall have costs of the suit and interest."**

[13] Being dissatisfied with the judgment, the defendant/appellant preferred twelve (12) grounds of appeal contained in the memorandum of appeal dated and filed herein on the 16th April 2018.

The hearing of the appeal proceeded by way of written submissions. In that regard, the appellant's submissions dated 25th June 2019 were filed herein on 27th June 2019, by **Mbugwa, Atudo & Macharia Advocates**, while those of the respondent/plaintiff were filed on 29th April 2019 by **Anyumba & Associates**.

[14] The grounds of appeal have duly been considered by this court in the light of the rival submissions. Against that background, the duty of the court was to re-visit the evidence adduced at the trial and draw its own conclusions bearing in mind that the trial court had the benefit of seeing the witnesses.

In that regard, the evidence led by the respondent (**PW**1) and his witness (**PW2**) was considered along that of the appellant through its witness (**DW1**).

[15] From the evidence, this court is satisfied that there was no dispute or substantial dispute that at the material time of the accident there existed a valid insurance policy executed between the appellant and the respondent in the year 2012.

Accordingly, the appellant provided comprehensive insurance cover for the respondent's motor vehicle Reg. No. KBB 419X with effect from 24th August 2013 to 24th August 2014, being policy No. MP1/CH/046272 (**P. Exhibit 4**). This was a renewal of the initial cover which commenced on 19th August 2012 as per the necessary proposal form dated 14th August 2012.

[16] The occurrence of the accident on the 25th May 2014, was also not substantially disputed. In any event, this was confirmed by the necessary police abstract from Mbita Police station dated 29th May 2014.

In view of the foregoing undisputed facts, it would follow that the appellant was under an obligation to indemnify the respondent for the loss and damage suffered by the respondent on account of the accident, unless of course, the appellant could establish by necessary facts and evidence that the respondent acted in breach of the terms and conditions of the existing insurance policy thereby giving the appellant the right to repudiate the policy.

[17] It was the respondent's evidence that he acted in good faith during the existence of the policy and the presentation of his claim for compensation.

He implied that he did all that was required of him in the fulfillment of the terms and conditions of the policy and contended that he never made any false declaration.

Even though the appellant indicated otherwise and contended that the respondent acted in bad faith by making a false and exaggerated claim and failing to make an accurate account of the circumstances leading to the alleged accident, no credible evidence was led to support the contentions.

[18] The evidence by the appellant's witness (DW1) was insufficient and devoid of credibility as it was skewed in favour of the appellant company which was the instructing client.

The witness (DW1) indicated that he was a claims investigator available to any insurance company in need of necessary investigation.

It is quite intriguing that the appellant did not see the need to call its own

employees as witnesses to prove even on the balance of probabilities the respondent's alleged bad faith or even show in one way or the other that the company was within its right to repudiate the policy.

[19] The authors of the appellants' letter to the respondent dated 18th August 2014 (**P. Exhibit 11**) were not even called to testify and defend it, yet it was the document which was used by the appellant to communicate the reasons for which the impugned policy was purportedly repudiated.

Even most intriguing is the fact that the policy document was never tendered in evidence by the appellant even if it proved lack of utmost good faith by the respondent.

In essence, the respondent's evidence was neither discredited nor disproved by the appellant.

It was therefore proper for the trial court to arrive at the conclusion that the appellant was liable to indemnify the respondent the full value of the insured vehicle in terms of the insurance policy or for any loss and damage arising from the material accident. This court would arrive at a similar conclusion on the basis of the evidence adduced at the trial by all sides.

[20] It would therefore follow that all the grounds of appeal and the supporting written submissions are incapable of being sustained by this court. Accordingly, this appeal must and is hereby dismissed with costs.

Ordered accordingly.

J.R. KARANJAH

JUDGE

02.10.2019

Dated and delivered this **2nd** day of **October, 2019**