REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL APPEAL NO. 99 OF 2016

ICEA LION GENERAL INSURANCE COMPANY LTD ...APPELLANT

VERSUS

JULIUS NYAGA CHOMBA.....RESPONDENT

(Being an appeal from the Judgment of Hon. R. A. Mutuku (Ms), Ag Senior Principal Magistrate Delivered on 27/7/2015 in Thika CMCC No. 803 of 2013)

JUDGMENT

1. The Respondent herein is the owner of Motor Vehicle Registration No. KBN 051A, a Prime Mover truck lorry ("Subject Motor Vehicle"). He took out a Policy of Insurance – Number 987F011497212 – with ICEA Insurance Company Limited, the Appellant. The policy was a comprehensive insurance and covered the period 29/10/2012 to 28/10/2013.

2. Sometime in June, 2013 – during the pendency of the Insurance Policy Cover – the Subject Motor Vehicle was involved in an accident along the Thika Highway. It was a self-involving accident, the details of which are unimportant for this case. What was important is that the Subject Motor Vehicle was towed to Juja Police Station on the same day of the accident.

3. On 20/06/2013, a Government Motor Vehicle Inspector went to Juja Police Station and inspected the Subject Motor Vehicle. The Inspector concluded that there were no pre-accident defects to the Subject Motor Vehicle. He issued a Report which listed the damage to the Subject Motor Vehicle. They were as follows:

4. The Appellant, through its agent, directed the Respondent to take the Subject Motor Vehicle for evaluation in one of its pre-approved garages. The Respondent chose Foton East Africa ("Foton")in Nairobi. He arranged for the Subject Motor Vehicle to be towed there from Juja Police Station. It is not disputed that the Subject Motor Vehicle was delivered at Foton on 25/06/2013.

5. At Foton, the assessment done revealed much more extensive damage to the Subject Motor Vehicle with a lot of expensive parts missing. When that assessment report was send to the Appellant, it declined to indemnify the Respondent or otherwise repair the Subject Motor Vehicle. The reason was that the Appellant was of the view that the Subject Motor Vehicle was vandalized at some point after it was removed from the Police Station and before it was delivered to Foton for the assessment. The Appellant, therefore, was of the view that the damage shown in Foton's Assessment Report was not covered in the Insurance Policy.

6. The Respondent was aggrieved by that decision by the Appellant. He instituted a suit in Thika CMCC No. 803 of 2013 seeking a declaration that the Appellant was under an obligation to repair the Subject

Motor Vehicle, or in the alternative, to pay the cost of repairing the Subject Motor Vehicle plus compensation for loss of business.

7. The Appellant entered appearance and filed a defence. The suit went to full trial after the Trial Court dismissed an interlocutory application by the Respondent to have the Appellant be mandatorily required to repair the Subject Motor Vehicle.

8. At the trial, the Respondent called three witnesses and then closed its case. These were, the owner of the Subject Motor Vehicle and the Insured; the Business Manager of the Respondent's transport business; and the driver of the Subject Motor Vehicle. The Appellant called one witness – a Motor Vehicle Assessor at the Appellant Company.

9. At the conclusion of the trial, and after considering the parties' submissions, the Learned Trial Magistrate entered judgment for the Respondent as against the Appellant in the following terms:

> a. "That the Honourable Court hereby declares that the [Appellant] is under an obligation to repair the [Respondent's] Motor Vehicle and return it to the roadworthy state.
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> b. That the [Appellant] is hereby ordered to repair the [Respondent's] and return it to a roadworthy state within thirty days from the date of delivery of this judgment, and in default replace the Motor Vehicle with a similar one.
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> c. That in the event the [Appellant] opts to indemnify the [Respondent] in cash, the [Respondent] is entitled to the value of the Motor Vehicle and interests at court rates from the date of filing this suit. The value of the Motor Vehicle to be ascertained by an independent valuer/assessor.
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> d. The [Respondent] is further granted costs of this suit."

10. The Appellant is dissatisfied with the whole of the judgment and decree and has appealed to this Court.

> a. THAT the Learned Magistrate erred in fact and in law in failing to give a reasoned Judgment.
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> b. THAT the Learned Magistrate erred in fact and in law in failing to hold that there was no proof of an accident having occurred on 16th June, 2013.
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> c. THAT the Learned Magistrate erred in fact and in law in failing to hold that parties are bound by their pleadings.
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> d. THAT the Learned Magistrate erred in fact and in law in failing to hold that the accident damage noted by the Government Motor Vehicle Inspection was the only damage attributable to the cause of action.
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> e. THAT the Learned Magistrate erred in fact and in law in holding that the subject motor vehicle was received at Foton Garage in a cannibalized state.
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> f. THAT the Learned Magistrate erred in fact and in law in stating that malicious acts were covered under the policy document but failed in not holding that malicious acts by the plaintiff were not and could not be anticipated to be covered under the policy.
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> g. THAT the Learned Magistrate erred in fact and in law in interpretation of the policy document.
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> h. THAT the Learned Magistrate erred in fact and in law in holding that the plaintiff had proved his case on a balance of probability.
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> i. THAT the Learned Magistrate erred in fact and in law in declaring that the defendant was under

an obligation to repair the plaintiff's motor vehicle and return it to a road worthy state.

j. THAT the Learned Magistrate erred in law in holding that the defendant in default of repair to replace the motor vehicle with a similar one.

k. THAT the Learned Magistrate judgment is invalid in law.

11. The court directed the parties to canvass the appeal by way of written submissions thereafter followed by oral highlighting if necessary.

12. In their advocate's written submissions, the Appellants clustered the grounds into three: Ground 1, 2, 3, Ground 4,5,6,7 and 8 and Ground 9, 10 and 11.

13. The Respondent has opposed the Appeal stating that it is a waste of Court's time and is meant to delay the Plaintiff's fruits of its judgment.

14. I have read and considered the respective arguments in those submissions.

15. As a first Appellate Court, it is my duty to subject the whole of the evidence to a fresh and exhaustive scrutiny and make my own conclusions about it, bearing in mind that I did not have the opportunity of seeing and hearing the witnesses first hand. The duty of the court in a first appeal such as this one was stated in ***Selle & another –vs- Associated Motor Boat Co. Ltd.& others (1968) EA 123*** in the following terms:

> I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (**Abdul Hammed Saif –vs- Ali Mohamed Sholan (1955), 22 E.A.C.A. 270**).

16. This same position had been taken by the Court of Appeal for East Africa in ***Peters –vs- Sunday Post Limited [1958] EA 424*** where Sir Kenneth O'Connor stated as follows:-

> It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of Lords in Watt –vs- Thomas (1), [1947] A.C. 484.
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> "My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence

to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given."

17. The appropriate standard of review established in these cases can be stated in three complementary principles:

a. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;

b. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and

c. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

18. These three principles are well settled and are derived from various binding and persuasive authorities including ***Mary Wanjiku Gachigi v Ruth Muthoni Kamau (Civil Appeal No. 172 of 2000***: Tunoi, Bosire and Owuor JJA); ***Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another*** (Civil Appeal No. 345 of 2000: O'Kubasu, Githinji and Waki JJA); ***Virani T/A Kisumu Beach Resort v Phoenix of East Africa Assurance Co. Ltd*** (Kisumu High Court CC No. 88 of 2002).

19. With the above principles in mind, I will now proceed to deal with the appeal.

20. The Respondent testified that he was the owner of motor vehicle KBN 051A. He stated that on 19/6/2013, the said motor vehicle was involved in a road traffic accident at Juja when it was transporting tea from Embu. He stated that he had paid for an insurance cover with ICEA. He stated that the accident had been reported at Juja Police Station where the lorry was towed and later taken to Eston Garage. That in December he was called by someone from the insurance who informed him that they had sent an assessor and it was reported that parts were missing in the vehicle and as such the vehicle would not be repaired unless he purchases the missing parts a condition he was not agreeable to. He added that he had a contract with KTDA and East African Portland Cement to transport tea and cement respectively. He prayed that the defendant repairs his vehicle or replace the same with a new one.

21. Anthony Maina Muhia testified that he was informed of the accident at 11.30 p.m. by the driver. He went to the scene together with Police Officers from Juja. The Subject Motor Vehicle was taken for inspection the following day morning when he informed the insurance. That 4-5 days the Subject Motor Vehicle was moved to Foton Garage. He later learnt that the Appellant had refused to repair the Subject Motor Vehicle due to some missing parts.

22. The driver of the Subject Motor Vehicle stated that he was involved in a road accident as he swerved to avoid a collision and his motor vehicle overturned. He stated that he was not present when the vehicle was towed from Juja Police Station to Foton Garage.

23. Peter Mzungu testified that he works for ICEA as a motor vehicle assessor. He testified that the Appellant was notified of the accident by their agent and he requested for a claim support document

where he was issued with a police abstract, copy of log book and inspection report. That the motor vehicle report gives a detailed report of what was damaged. He listed all the parts that were missing and concluded that the vehicle was cannibalized at the Police Station.

24. In its Statement of Defence, as in its Appeal before this Court, the Appellant raised two issues:

> a. The first one was that the evidence adduced by the Respondent at the trial was at variance with his pleadings as to the date of the accident and that, since parties are bound by their pleadings, no finding on liability against the Appellant could be made in the suit.
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> b. The second issue raised by the Appellant is much more substantive. It is that the Appellant is not responsible for the damage to the Subject Motor Vehicle or parts found missing in it for the loss that happened between 19/06/2013 when the Subject Motor Vehicle was first assessed while at the Police Station, and 25/06/2013 when it was re-assessed at Foton and found to have much more extensive damage.

25. Since the whole suit and the whole appeal centre on these two issues, I will delve into them immediately.

26. First, did the Respondent adduce evidence on the accident that was at variance with his pleadings; and did this disentitle him from any relief?

27. The Respondent pleaded as follows in his Amended Plaint dated 11/02/2014 at paragraph 5:

> 5. While the Plaintiff's Motor Vehicle was carrying on its business and being driven by an agent of the Plaintiff, it suffered an accident on the 16/06/2013 through no fault of the Plaintiff or of his driver/agent.

28. The Appellant responded as follows in its Statement of Defence dated 3rd March, 2014:

> 7. With regard to paragraph 5 of the Amended Plaint, the Defendant avers that it received a motor accident report form duly completed by the Plaintiff dated 28/06/2013 relating to an accident involving motor vehicle KBN 051A on 19th June, 2013. The Defendant put the Plaintiff to strict proof of paragraph 5 of the Amended Plaint.

29. It is true that despite the Appellant having raised the issue of the date of the accident which was, clearly, wrongly typed in the Plaint and Amended Plaint, the Respondent's advocates did nothing to correct it. The case proceeded to full hearing without an amendment to that error. Throughout the trial, there was no dispute that the accident occurred on 19/06/2013 – and all the witnesses referred to that date as the date the accident occurred. The relevant documents produced in the case indicated as much. It was an irresponsible omission on the part of the Respondent's lawyers to fail to ask for leave to amend the Amended Plaint to correct the error even after the issue was flagged out in the Statement of Defence. Even an oral amendment would have done the trick.

30. As sloppy as the mistake was, however, I do not think that in the context of this case it would have justified the Trial Court to dismiss the entire suit on this score alone. While it is true that parties are bound by their pleadings, as the authorities cited by the Appellant clearly state, the rule applies to substantive issues not technical or scrivener's errors. See ***Galaxy Paint Company Limited v Falcon Guard [2000] eKLR; Captain Harry Gandy v Caspar Air Charters Limited [1956] EACA 139;*** and ***Associated Electrical Industries Limited v William Otieno [2004] eKLR.*** When it comes to analysis of pleadings and the utilization of the Court's draconian power to strike them out or deny substantive remedies purely on their textual strength, the general rule is to ask if the other party can be said to have sufficient and fair notice of the issues they were confronting at trial. When an error is typographical such as the one here, it would be to fetishize formalism and technicalities to deploy the pragmatic rule of due process that parties are bound by their pleadings to defeat substantive claims. The rule that a party is bound by its pleadings is a functional one – aimed at ensuring fair notice is given to a party about the

issues it will confront at trial; it is not a formalistic rule – aimed at ensnaring litigants to the altar of technical banalities.

31. I will now turn to the second issue raised by the Appellants. In short it is this: is the further damage or loss that occurred to the Subject Motor Vehicle between 20/06/2013 when it was first assessed by the Government Motor Vehicle Inspector and 25/06/2013 when it was assessed by Foton covered under the Insurance Policy?

32. The Respondent argued both in the Court below and here that the additional loss is covered because it occurred at the Police Station where the Subject Motor Vehicle was towed to after the accident awaiting, first, instructions of the Appellant, then a vacancy at Foton. The Respondent argues that the Subject Motor Vehicle was a victim of vandalism at the Police Station and that the loss is therefore covered under the Insurance Policy. He insists that the Subject Motor Vehicle remained at the Police Station until 25/06/2013 when it was towed to Foton.

33. There is no question that if the Subject Motor Vehicle remained at the Police Station until 25/06/2013 when it was towed to Foton the Appellant would have been responsible for all the damage and loss to the Subject Motor Vehicle. Differently put, if the vandalism leading to the extra damage and loss had occurred at the Police Station, the Appellant would be obliged to pay for it. The Appellant's witness admitted as much – and so does the Appellant in its submissions.

34. The question, however, is whether the vandalism or additional loss occurred at the Police Station. Looking at all the documents presented as well as the evidence tendered by the parties, I am of the view that the Respondent did not explain how the additional damage or loss occurred in a situation where he was obliged to do so. Consequently, having failed to discharge his burden to demonstrate that the loss was not self-inflicted, then the Court should not have declared that the Appellant was obliged to cover the loss.

35. I say so for two related reasons.

36. First, the Respondent and his two witnesses conceded that a Police Abstract is issued on the day that a Motor Vehicle is towed away from the Police Station – and that one cannot, as a practical matter, obtain a Police Abstract when a Motor Vehicle involved in a road accident is still at the Police Station. Yet, a Police Abstract was produced in this case. It states that it was issued on 21/06/2013. None of the Respondent's witnesses could explain why the Police Abstract was issued on 21/06/2013 if, in fact, the Subject Motor Vehicle was removed from the Police Station on 25/06/2013. In the circumstances of this case, the burden fell on the Respondent to offer a satisfactory explanation of this seeming discrepancy.

37. If that were the only discrepancy, it would probably have been ignored. However, second, there is another one waving for attention: the receipt issued by the towing company. The receipt is issued by Kenmart Towing Services for towing services. It unmistakably indicates that it was issued on 21/06/2013. This would typically mean that the services were offered on 21/06/2013. It would be tremendously odd for a customer to pay a towing company four days in advance. Yet, that is what the un-explained receipt would suggest: that the Respondent paid the towing company Kshs. 80,000/- on 21/06/2013 for services which were, in fact, offered on 25/06/2013.

38. I think, without satisfactory alternative explanation, it is more reasonable to conclude that the convergence of the date in the Police Abstract and the receipt for the towing company mean that the Subject Motor Vehicle was, actually, towed from Juja Police Station on 21/06/2013 and remained in the custody and possession of the Respondent until 25/06/2013 when it was presented to Foton. This means that any additional damage or loss the Subject Motor Vehicle suffered during that period is not compensable by the Appellant.

39. The conclusion, then, is that this Appeal succeeds. The judgment and orders of the Trial Court are hereby set aside. Instead, there will be a judgment ordering the Appellant to indemnify the Respondent for the damage to the Subject Motor Vehicle only to the extent reflected in the

Certificate of Examination and Test of Vehicle by the Government Motor Vehicle Inspector which is dated 20/06/2017 and which was produced as Exhibit 6 in the Trial.

40. The Appellants will also have the costs of this appeal.

41. Orders accordingly.

Dated and delivered at Kiambu this 7th day of June, 2018.

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JOEL NGUGI

JUDGE