



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NUMBER 12 OF 2016

CONSOLIDATED WITH CIVIL APPEAL NUMBER 13 OF 2016

SOVEREIGN HOTEL LIMITED. APPELLANT

VERSUS

KENINDIA ASSURANCE COMPANY LIMITED. RESPONDENT

(Being an appeal from the whole of the judgment delivered by

the Hon. Lucy Gitari–SRM on the 12th February, 2016)

And

CIVIL APPEAL NUMBER 13 OF 2016

SOVEREIGN HOTEL LTD. APPELLANT

VERSUS

GEMINIA INSURANCE COMPANY LTD. 1ST RESPONDENT

KENINDIA ASSURANCE COMPANY 2ND RESPONDENT

J U D G M E N T

This appeal arises for the judgment and decree of the trial magistrate Hon. Lucy Gitari in Kisumu CMCC 636 of 2014 (**Geminia Insurance Company Ltd and Kenindia Assurance Company (Plaintiffs) Vs Sovereign Hotel Ltd (Defendant)**) and Kisumu 635 of 2014 **Kenindia Assurance Company Ltd (Plaintiff) Vs Sovereign Hotel Ltd and National Bank of Kenya (Defendants)**. The claim arises from outstanding premium in respect of Insurance Policies issued by the Kenindia Assurance Company's to the Appellant Sovereign Hotel Ltd.

In Chief Magistrates Civil Case No. 635/2015 the claim was that: -

a) That at all material times prior to year 2011, the Plaintiff provided Fire and Earthquake and Special perils' (material Damage) insurance to the 1st Defendant.

b) On or about 14th September, 2013, the 1st Defendant instructed the Plaintiff to renew the policies when they fell due. On 24th February, 2014 the aid 1st Defendant instructed the Plaintiff

to delete the interest of I & M Bank and to insert therein the 2nd Defendant's interest with the 2nd Defendants approval and acknowledgment.

c) On the 24th February, 2014, the 2nd Defendant as the Financiers of the 1st Defendant- Hotel Project – requested the Plaintiff to endorse their insurable interest on the polices and undertook to pay the premium then owing the standing at Kshs.823,753/-

d) That the Plaintiff claims that the Defendants refused, failed and/or neglected to make payments for renewal of the polices thus owing the Plaintiff an outstanding premium of Ksh.828,753/-. Full particulars having been supplied and are well within their knowledge.

Particulars

i) Hotel Renewal Kshs.678,078.00

ii) Annex Renewal Kshs.150,675.00

TOTAL AMOUNT Ksh.828,753.00

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In CMCC 636 of 2014 **Geminia Insurance Company Limited & Kenindia Assurance Company Limited Vs Sovereign Hotel Limited** the claim was that: -

a) That At all material times between the periods of 13th September, 2012, - 12th September, 2013 and 12th September, 2013 – 12th September, 2014, the Plaintiffs provided for the Defendant herein fire, goods in transit, WIBA, Stock in Trade, Fixtures and Fittings, Furniture, Kitchen Equipment, utensils, laundry equipment, cutlery and crockery and all other contents insurance cover.

b) The Plaintiffs claims the Defendant has defaulted in payment of the insurance premium resulting to an outstanding premium account for which the Defendant issued cheques to Assured Insurance Brokers Limited in an effort to pay.

c) The Plaintiffs aver that by so doing, the Defendant herein became liable to an outstanding amount for renewal of the policies totaling to Ksh.1,785,803/- which remain unpaid to dated. Full parties are well within the Defendant's Knowledge.

Particulars

i) Renewal 2012 – 2013 – Kenindia Policy No. P/133/0141/0440/2010/34/09 – Kshs. 938,705

ii) Renewal 2013 – 2014 GEMINIA – Buildings contents – - - Kshs.801,190/-

iii) Balance Renewal, Plate Glass, Domestic Package, Motor vehicle 2012 – 2013 Ksh.45,908.00

**TOTAL AMOUNT
Ksh.1,785,803.00**

d) The Plaintiffs aver that towards paying the outstanding debit of Ksh.1,785,803/- the Defendant issued 6 cheques out of which only one Cheque No. 000058 for Ksh.523,000/- was paid but Cheque No. 000059 for Ksh.523,000/- were returned due to insufficient funds.

e) The further content that upon the Defendant's request, the broker did not bank cheque Numbers, 000060, 000061, 000062, and 000063 all for Ksh.523,000/-

f) The Plaintiffs aver that the sum of Ksh.1,785,803 remains outstanding under their broker's account and efforts to recover the same from the Defendant herein have been futile.

By consent both files were consolidated for the purpose of hearing. After full trial the trial magistrate entered judgment for Respondent for the sum of Ksh.1,785,803, interest and costs in respect of Civil Case No. 636 of 2015 and Ksh.828,753/- in respect of Civil Case No. 635 of 2015.

Dissatisfied with the judgment, the Appellant preferred these appeals Kisumu Civil Appeal No. 12 of 2016 and 13 of 2016 which by order dated 30th November, 2016 this court directed both to be consolidated and argued together. The Appellant filed two grounds of appeal: -

1. That the learned magistrate erred in law and in fact in finding that the Assured Insurance through its Director Ann Rama had authority and capacity to sue the Appellant whereas no such authority or capacity existed.

2. That the learned magistrate erred in law and in fact in failing to appreciate the importance to Section 156 (1) of the Insurance Act i.e. that Insurance Cover is a cash and carry business and if one fails to pay then, he or she is not under cover.

Briefly, the evidence before the trial court was that PW 1 Anne Rama the Managing Director of Assured Insurance Brokers which is an agent of Kenindia Insurance Company was requested by Sovereign Hotel to renew their insurance policy and to note the interest of National Bank of Kenya in the policy as it had provided a loan to Sovereign Hotel Limited. She stated that the 1st Defendant had made an effort to pay by giving postdated cheques. One was paid but the others did not go through. The cheques were to clear the whole amount of Ksh.523,000/- each. Cheque No. 1 was paid. He did not produce it as it was dishonoured by the bank. It was No. 000058 of Kshs.523,000/- issued on March, it was paid. Number 000059 dated 6th April, 2014 Ksh.523,000/- was unpaid, returned by bank. It was not paid. The other is No. 000060 dated 6th May, 2014 for Ksh.523,000/-, No. 000061 dated 6th June, 2014 for Ksh.523,000/-, No. 000062 dated 6th July, 2014 for Ksh.523,000/- and 000063 for Ksh.523,000/- dated 6th August, 2014 which were not paid. He produced the cheques as exhibits.

The Defendant/Respondent called DWI James Mactough the Managing Director of the Sovereign Hotel. He testified that he approached the Insurance through the Assured Insurance for Insurance Policy in February, 2013. A policy was issued and Sovereign Hotel Limited which was covered. He did not pay for the period between February, 2013 to February, 2014. He believed Sovereign Hotel was covered because the Interest of National Bank was noted in the Policy Documents. He approached National Bank of Kenya for premium Finance in 2014. He knew that his company issued cheques for premiums. The cheques were not paid. One of the cheques was paid to Assured, Ksh.523,000/-. The cheques they issued were for Ksh.523,000/-. They issued six cheques. The total of Ksh.3,138,000/-. He did not know why the other four cheques were not banked but the 2nd Cheque was dishonoured by the bank used.

It is upon this evidence that the trial magistrate entered the judgment appealed from.

Mr. Ngala for the Appellant premised this appeal on two grounds. He submitted that the trial magistrates erred in finding that the Assured Assurance had capacity to sue the Appellant. The purported letters of authority did not direct Assured Assurance to file suit against Respondent on behalf of Kenindia. He submitted that in law, they should have sued in their own name. The consequence of such action is that no official from Kenindia testified or swore a verifying affidavit and that if any judgment is entered, that payment of the decretal amount would be made to strangers as neither Geminia or Kenindia were parties in the suit. Secondly, Mr. Ngala submits that the trial magistrate did not appreciate the importance of Section 156(1) of the Insurance Act which requires that a party can only have cover if the premium for the insurance policy are paid for. He submitted that Sovereign Hotel did not bring itself under the

exception in Section 156(1) of the Insurance Act as there was no premium financing.

Mr. Kasamani counsel for the Respondent opposed the appeal. He submitted that Assured Assurance was not a Plaintiff in the suit in the Magistrate's court. The Plaints were filed by Gemini and Kenindia and then Rama only verified the affidavit. He submitted that Assured Assurance had a letter of authority to collect the debt on behalf of the Geminia and Kenindia. He submitted that the issue was raised and the trial magistrate analysed the same. Counsel further submitted that this issue in court was not whether the Appellant had been given Insurance cover but the claim is for premium for the cover enjoyed and that they had issued Post-dated cheques which bounced. He urged to court to find no merit in this appeal and dismiss the same.

From the submissions by both counsels the issues that came out for determination by this court can be isolated as: -

1. Did the Assured Assurance or its Managing Director have authority to file the suit?

2. Did Kenindia provide Insurance Cover to Sovereign Hotels to seek payments of premiums?

The issue of the capacity of Assured Assurance in this matter was raised in the trial court. The trial magistrate stated in her judgment that: -

“The plaint herein is verified with an affidavit which is sworn by Anne Rama who has authority to institute the proceedings. From the authorities cited above, it is clear that the way to go is not to strike out the plaint. The court has discretion to make appropriate orders. I find that the submissions to strike out the plaint lack merit. The verifying affidavit properly verifies the plaint in the circumstances of this case. I find that the plaint is verified and is properly before this court.”

Mr. Ngala for the Appellant submits that this was a misdirection by the trial magistrate. He submits that the verifying affidavit must be sworn by the Plaintiff which if as in this case is a company, by a director of the company. He submits that Rama was not a Director of the Plaintiff and, therefore, the verifying affidavit did not properly verify the averments in the plaint by the Plaintiff. Mr. Kasamani for the Respondent submits that the verifying affidavit is to be sworn by a person who had knowledge of the averments in the plaint and she not only has the knowledge but that she had the authority of the Plaintiff Company.

Order 4 Rule 1(2) of the Civil Procedure Rules, 2010: -

“The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in rule 1(1).”

Order 19 Rule 3 (1) of the Civil Procedure Rules, 2010 provides that:

(1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove:

Mr. Kasamani submits that Rama of Assured Insurance Brokers had authority from Kenindia to swear the verifying affidavit. The authority referred to is the letter Exhibit dated 10th November, 2014 from Kenindia Assurance to M/s Assured Insurance Brokers, which I reproduce below: -

“10th November, 2014

M/S Assured Insurance Brokers Ltd

3rd Floor, Solar House

Aga Khan Walk

P O Box 67511 – 00200

NAIROBI

Dear Sirs

OUTSTANDING PREMIUM OF Ksh.1,767,458.00

CLIENT: SOVEREIGN HOTEL

We confirm that the above named mutual client has an outstanding premium account of Ksh.1,767,428.00 under the renewals of 2012/2013 and 2013/2014 with regard to Fire Policy of the Hotel.

Since amounts remain outstanding under your Broker Account; we confirm that you may proceed to institute recovery proceedings with advice to us.

We await remittance of the funds upon recovery.

Yours faithfully

R N Kitheka (Mrs.)

CHIEF MANAGER –LEGAL DEPARTMENT.

It is not in dispute that Assured Insurance Brokers offered Insurance brokerage services to Sovereign Hotel Limited as an agent of Kenindia Insurance Co. Limited. In this transaction, they were the agents of Kenindia. Indeed this particular transaction was a renewal of the policy. Under the principles of Insurance where an existing policy is renewed the payment of the premium to the agent through whom the Insurance was originally effected is as a general rule and in the absence of circumstances pointing to the contrary conclusion a good payment to the insurers. (See Ivamy – **General Principles of Insurance law Page 155**). In this case the cheques for premium payment issued by Sovereign Hotels were all issued in the name of Assured Insurance Brokers. These are the cheques which were dishonoured precipitating this suit. In my view, therefore, Rama, The Director of Assurance Insurance Brokers was in the position of verifying the averments in the plaint as she had personal knowledge of the same and had authority from Kenindia vide later dated 10th November, 2014 to do so. It is important to note that the suit was filed by Kenindia Assurance as Plaintiffs and not by Assured Insurance Brokers. The suit in my view was properly instituted.

The second issue in this appeal raised by the Appellant is that since the Sovereign Hotels never paid the premiums, they did not have insurance cover by dint of Section 156(1) of the Insurance Act which provides: -

“156 (1) No insurer shall assume a risk in Kenya in respect of insurance business unless and until the premium payable thereon is received by him or is guaranteed to be paid by such person in such manner and within such time as may be prescribed, or unless and until a deposit, of a prescribed amount, is made in advance in the prescribed manner.”

Under Section 156 Kenindia would not assume the risks until the premium were paid to them. However, it would assume the risk if the same is guaranteed to be paid. So an insurance company can only assume insurance risk when: -

1) Premium has been paid and received by him or

2) *Where the premium has been guaranteed by such person or*

3) *A deposit of a prescribed amount is made in advance.*

Mr. Ngala for the Appellant submits that since no premium was received by the Respondent, there was no consideration, and therefore no contractual obligations attached on the basis upon which an Insurance Policy would be issued. Mr. Kasamani's submission is that this was a renewal of policy which only required instructions and tendering of post-dated cheques was a commitment by the Sovereign Hotel to pay for the premiums.

It is not disputed that the Insurance Policy cover was re-issued by Kenindia for the period and policy documents issued. This was on the basis that premiums were paid by cheques which were dishonoured. The Respondents claim, is premised on the dishonoured cheques issued by Sovereign Hotels Ltd for the premium. Where a claim is premised on dishonoured cheques, the Defendant cannot deny he owes the amount stated in the cheques to the Plaintiff. This issue was adequately addressed by the court of Appeal in **Paresh Bhimsi Bhatia –vs- Mrs Nita Jayesh Pattni CA Civil Appeal No. 199 of 2003 (Nairobi) (unreported) at page 8;**

“A cheque is a bill of exchange drawn on a bank payable on demand (see Section 73(1) of the Bill of Exchange Act, Cap 27). By Section 55(1) the drawer of a bill by drawing it, engages, inter alia, that on due presentation, it shall be presented and paid according to its tenor and that if it is dishonoured, he will compensate the holder or a subsequent endorser who is compelled to pay it so long as the requisite proceedings for dishonour be duly taken. In Hassanah Issa & Co –vs- Jeraj Produce Store [1967]EA 55, the president of the predecessor of this court when dealing with Section 30 of the Bills of Exchange Act (Tanzania) which is in pari materia with our Section 30(2) of the Bills of Exchange Act, Cap 27 said in part at page 500:

‘...in this case inasmuch as the suit was upon a cheque and inasmuch as the cheque was admittedly given, the onus was then on the defendant to show some good reason why the plaintiff was not entitled to have judgment upon the cheque admittedly given for the figure set out in that cheque. This position stems from Section 30 of the Bill of Exchange Act (Ch 215); which provides that the holder of a bill is prima facie deemed to be a holder in due course; but if an action on the bill is admitted or proved that the issue is affected with duress or illegality, then the burden of proof is shifted unless certain events, which are irrelevant for this purpose, take place. The position is therefore that where there is a suit on a cheque and the cheque was admittedly been given the onus is on the defendant to show circumstances which disentitle the plaintiff to a judgment to which otherwise he would be entitled.’

The other members of the court agreed with that exposition of the law. The appellant's suit is substantially based on the four cheques. The issuance of the cheques is pleaded. The cheque numbers, the date and the amount of each cheque are pleaded. The fact of dishonour is pleaded. It is admitted that the cheques were given. It is also admitted that by the time the cheques were given, the 3rd respondent owed the appellant the money shown in the respective cheques. In the circumstances, the onus was on the respondents to show circumstances which he is disentitle the appellant to summary judgment such as fraud, duress, or illegality.”

The Appellant in this appeal requested for renewal of Insurance Cover from the Respondents, guaranteed payments by issue of cheques and received the Insurance Policy Cover as requested. The cheques it issued were on presentation dishonoured but still enjoyed the cover as there was a valid contract of insurance. The Appellant cannot turn around and say it was not covered as the cheques had bounced. The payment by cheques in my view confirms that the Appellant was indebted to the Respondents for the amount in the cheques, unless fraud is alleged and proved.

In the premises, therefore, I find that the judgment of the trial magistrate was based on evidence adduced and the judgment entered against the Appellant proper. I consequently find no merit in the appeal which I hereby dismiss with costs.

Signed at Nairobi this.....day of.....2017.

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S N RIECHI

JUDGE

Dated and Delivered at Kisumu this 9th day of June 2017.

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JUDGE