REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 67 OF 2011

GOLICHA GANGE OMAR::APPELLANT

VERSUS

KENYA ORIENT INSURANCE COMPANY LIMITED:::::::RESPONDENT

(Being an appeal from the judgment and decree arising from Eldoret Chief Magistrate's Court Civil Case No. 1008 of 2002 delivered on 2nd march, 2011, by Hon. C.G. Mbogo, Chief Magistrate)

JUDGMENT

This is an appeal from the judgment of the Hon. C. Mbogo, Chief Magistrate, delivered on 2nd March 2011 in Eldoret Chief Magistrate's Court Civil Case No. 1008 of 2002. The appellant herein Golicha Gange Omar, side, a memorandum of appeal filed herein on 31st March, 2011 has listed a total of 14 grounds of appeal. The appeal is otherwise opposed by the Respondent, Kenya orient insurance Company Limited. By consent of the parties, it was ordered that the appeal be canvased by way of written submissions and matter to come up only for the highlighting of the submissions. Both sides duly filed their set of submissions and the matter came up for highlighting of the same on 25th April, 2017.

I have read the proceedings of the lower court and the exhibits produced by the parties (appellant) therein, and also carefully considered the filed submissions and the oral submissions made by learned counsel in court. The circumstances leading to this case are fairly straight forward. That the appellant, being owner of motor vehicle Registration Number KAJ 709R took out a comprehensive motor vehicle insurance cover over the said vehicle of Kshs. 2,025,000/= with the Respondent, Kenya Orient Insurance Company Limited. That the same was to run from 3rd October, 1997 to 4th October, 1998; While the policy was subsisting, the motor vehicle was involved in an accident with another vehicle (KAK 880D) and was declared a total loss. The vehicle was assessed by PW5 (Mr. Fernanda's) on directions of the Respondent and determined to have had a pre-accident value of Kshs. 1.5million. That upon the occurrence of the accident, the appellant duly reported to the Respondent and was adviced to make a 10% payment, which he did. The said payment was however, paid back to him after the Respondent later disclaimed liability. This, basically, is what led to the filing of the original case whose Judgement this appeal seeks to challenge and overturn.

Having considered the grounds of appeal as listed and also the submissions of both learned counsel of the parties, I am convinced that the following issues have come up for determination in this appeal: -

i. Whether the appellant was the owner of Motor Vehicle KAJ 209R.

ii. Whether the vehicle was insured at Kshs. 2,025,000/- as alleged by the Appellant.

iii. The issue of loss of user.

iv. Whether the appellant proved his case against the Respondent on a balance of probabilities as required by the law.

v. Whether the Respondent raised any viable defence to the plaintiff's claims.

I shall deal with these issues in no particular order. On the first issue raised by the respondent on whether the appellant was the owner of the Motor Vehicle KAJ 709R, this court notes that the appellant in the original trial only gave oral testimony that he is the owner of the said vehicle. He did not produce the Log Book in respect of the vehicle. So, was this failure to produce the log book as an exhibit fatal to the appellant's case on the issue of ownership? This court has considered other pieces of evidence regarding this issue. First, it is clear from the defence filed by the Respondent (par. 2) that the issue of ownership was denied and the appellant was put to strict proof of the same. On the same defence at Paragraph 3, the Respondent, however, admits that it insured the appellant's motor vehicle i.e.

"the Defendant admits that it insured the plaintiff's motor vehicle and issued policy number 302970103 subject to the terms and conditions set therein in the said policy".

With this admission in the defence, it is clear that the Respondent dealt with the appellant herein as insured. They would not have done this unless of course they were convinced that the appellant was the registered owner of the said motor vehicle. In the same defence (par. 12), the Respondent goes on to suggest the necessity of pursuing arbitration process over the dispute. Again, the Respondent would not have made this proposal if it doubted that the appellant was the owner of the vehicle. Further, the Respondent even filed an application dated 6th January, 2000 seeking an order staying this case for the matter to be handled through arbitration. The body of the said application also severally alludes to the agreement between the parties. And amongst the exhibits that the appellant produced during the trial were copy of the Log Book in the name of the appellant and NIC Bank, and the insurance sticker also bearing both names. The police abstract of the relevant accident also at paragraph 1 shows name of the appellant as the owner of the motor vehicle.

All these factors put together convinces me that the appellant indeed proved on a balance of probabilities that he was the owner of the said motor vehicle. The failure to produce the original Log Book therefor was not fatal to the appellant's case that he was the owner of the accident motor vehicle.

On the 2nd issue of whether the vehicle was insured at Kshs. 2,025,000/-, again the plaintiff gave oral testimony of this. At Paragraph 3 of the defence, the Respondent has admitted the existence of the insurance agreement between the parties vide insurance Policy No. 302970103. The denial of the Respondent at paragraph 4 is on the fact that the vehicle was worth Kshs. 2,025,000/- at the time of the accident. Nowhere in the proceedings or in the pleadings has it been denied the insurance sum of Kshs. 2,025,000/=. In the trial, the Respondent gave no evidence to rebut the evidence of the appellant that th sum insured was Kshs. 2,025,000/=. I am therefore convinced and persuaded by the Appellant that the sum assured was indeed Kshs. 2,025,000/=.

On the issue of loss of user, the Appellant claims a sum of Kshs. 3,000/- per day. No evidence of this income was produced by the plaintiff during trial. This to me, is a specific claim in the nature of a special damage which ought to have been specifically proved by the claimant. It was not enough for the appellant to simply claim 3,000/- per day. He was under a duty to specifically prove the same. He failed in this duty as he gave no evidence to prove this claim. To this extent I agree with the learned trial magistrate that this claim would not be awarded. I therefore decline to make any award to the appellant on this heading of loss of user. I dismiss this claim.

This court notes that the defence filed by the Respondent made several denials. Of interest was the denial of the Respondent on the value of the vehicle at the time of accident, the position of arbitration in the settlement of this dispute, and whether the Appellant was indeed in breach of any fundamental term of the agreement as to give the Respondent room to avoid settlement of the sum claimed. The Respondent

was given opportunity to present its case. They closed their defence case without calling any witness. On record therefore, the Respondent offered no defence to the claims of the Appellant.

So, did the appellant prove his case as required? And is he entitled to any damages? And if so, how much? As already opined above, the appellant, on a balance of Probabilities, duly proved that he was the owner of the accident vehicle. He also proved that the vehicle was indeed insured comprehensively by the Respondent at 2,025,000/= and that the said vehicle was a total write off. He even paid the insurance excess of 10% demanded by the Respondent.

This was a comprehensive cover. There is nothing on record to show that the appellant was in any breach of the conditions of the agreement. So what is the justification for the Respondents failure to settle? I see none. I accordingly find that having held a valid comprehensive policy at the time of the accident, the Respondent is under a duty, a contractual duty, to compensate the appellant for the loss. As to the how much, I am guided by the fact that this was a comprehensive cover of a definite amount. This is the amount the parties had agreed to be the insured value and for which the Appellant paid the premium. He did not pay the premium based on the pre-accident value of the vehicle. Just before the accident, and it would be improper to use the pre-accident value as the insured sum.

An issue was raised on the insurance principle of scibrogation i.e. that one is not supposed to enrich himself from an insurance contract. On my part, I do not see how the Appellant would enrich himself from this claim which is simply based on the insured sum as per the signed contract of insurance. I therefore find that the Appellant is entitled to be compensated by the Respondent for the whole insured sum in view of the fact that the vehicle was a total loss, or a write off.

Considering the above observations, I find fault with the finding of the learned trial magistrate that the appellant failed to prove his case on a balance of probabilities. He in fact did. The learned trial magistrate clearly erred in dismissing the appellant's suit with costs. I accordingly therefore set aside the Judgment of the lower court dated 24th March, 2011 and enter Judgment herein in favour of the appellant for Kshs. 2,025,000/- against the Respondent. I also award costs of this appeal to the Appellant together with interests at court rates.

DATED, SIGNED and DELIVERED at ELDORET, this 19th day of July, 2017.

D.O. OGEMBO

JUDGE
Ruling read out in open court in presence of: -

1. *Ms. Isiji for the Respondent &*

2. *Mr. Suter for the Appellant*

D.O. OGEMBO

JUDGE