REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 76 OF 2010

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

-V E R S U S –

SAMUEL K. CHEPKONGA.....RESPONDENT

(Being an appeal from the ruling of the Hon. T. Ngugi PM (Milimani Commercial

Courts) on 22nd February 2010 in Nairobi CMCCC No. 1171 of 2006)

JUDGEMENT

1. The respondent **Samuel K. Chepkonga** sued the appellant **Kenya Alliance Insurance Co. Ltd** to recover the sum of kshs.291,467/= being the amount of money paid to a third party by the respondent arising from CMCC No. 3534 of 2004, Nairobi. The respondent claims that he had a comprehensive insurance policy with the appellant. It is his contention that upon his involvement in a road traffic accident on 29th September 2001, during the validity of the policy, the appellant failed to enter appearance and defend the suit in the trial court which resulted in him paying the sum of kshs.291,467/= to a third party, which sum was ideally supposed to be paid by the respondent. The trial court upon hearing the suit entered summary judgment against the respondent for the suit sum.

2. The appellant aggrieved by the trial's court decision filed this appeal on the following grounds:

1. ***THAT the learned trial magistrate erred in law and fact by failing to find that the defence on record raised triable issues.***

2. THAT the learned trial magistrate erred in law and fact in failing to find that the application for summary judgment was not supported by sufficient material on record.

3. ***THAT the learned trial magistrate erred in law and fact by ignoring submissions made before her on behalf of the appellant and thereby arrived at an erroneous decision.***

4. ***THAT the learned trial magistrate erred in law and fact by rendering a decision which was against the weight of evidence on record.***

5. ***THAT the learned trial magistrate erred in law and fact in failing to find that the defence on record raised serious issues which remained unresolved by the affidavits on record.***

6. ***THAT the learned trial magistrate erred in law and fact in granting the drastic remedy of summary judgment when the necessary ingredients for granting such a remedy were lacking.***

7. ***THAT in all circumstances of the case, the findings of the learned magistrate were unsupported in law on the basis of the evidence adduced.***

3. This being the first appeal, this court is bound to re-evaluate the evidence tendered before the trial court and arrive at an independent conclusion but also taking into account the fact that it did not have the advantage of hearing and observing the demeanour of the witnesses. In **Peter vs Sunday Post Limited 1958 EA pg 424**, it was held interalia as follows:

> ***"It is a strong thing that 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."***

4. I have re-evaluated the evidence as adduced before the trial court. When the appeal came up for hearing on 6th May 2016, counsels on record representing the parties consented to have the appeal disposed of by way of written submissions. I have perused the submissions and taken them into consideration.

5. The appellant submitted that its defence as filed in the trial court raised triable issues, contrary to the holding by the trial court that it didn't especially due to the fact that it raised pertinent issues as laid down in paragraphs 3, 4, 5 and 6 of the defence. According to the appellant the issues touching on the ownership of motor vehicle registration no. KAH 409D, the validity of the policy in respect of the aforesaid motor vehicle and jurisdiction by virtue of the arbitration clause, ought to have been considered. The appellant contended that there was no evidence of ownership produced in court since an abstract does not denote ownership. It further submitted that the respondent had no valid insurance policy with the appellant since there was no premium paid. It added that the holding by the honourable magistrate that the appellant repudiated the contract unilaterally was misconceived since the appellant was merely entitled to repudiate the claim and not the contract since the respondent failed to give all the information and assistance in dealing with the claim which amounted to breach of condition 5 of the policy. The appellant further submitted that the respondent did not controvert the issue of jurisdiction as raised by the appellant and the arbitration clause. It concluded that a party should not be condemned unheard and stressed that the necessary ingredients for summary judgment were not fulfilled as required.

6. On his part the respondent submitted that the court correctly entered summary judgment against the appellant since the claim was for a liquidated demand of kshs.291,467/= being the decretal amount he had paid to the plaintiff in CMCC 3354 of 2004. He argued that the defence together with the replying affidavit filed is a sham since the appellant failed to produce any evidence to counter the respondents claims as stated in the amended plaint. He averred that the defence only contained mere denials. He added that the police abstract indicated the terms of the policy, the policy number and validity in the same as reflected in the sticker displayed on the respondents motor vehicle. He further argued that on paragraph 6 of the defence, the appellant admitted that the respondent was a policy holder and as such, the defence was a mere sham, since it failed to introduce any evidence that counters the respondents allegations. The respondent further submitted on the issue of jurisdiction where he stated that the appellant waived its right to refer the matter to arbitration by filing the defence and relying on it. It was the respondents claim that the issue of lack of jurisdiction should have been raised on the onset of the suit. On the issue of lack of validity of the policy, the respondent submitted that the sticker was used to draft the police abstract which sticker showed that the respondent had a valid policy. He argued that the appellant did not produce any evidence to support his denial that the respondent was not insured with it. He referred the court to the response to the demand letter by the appellant where he claimed that in that response, the appellant did not deny the fact that it had insured the respondent but only alleged that the respondent failed to adhere to the policy conditions. He argues that the response to the demand letter also

confirms that the respondent was insured by the appellant. He concluded by submitting that parties are bound by their pleadings and therefore the statements in the defence by the appellant which are inconsistent should be taken into consideration and in particular, the fact that the appellant denies the existence of a contract and later indicates that there was a contract that it could repudiate.

7. Order 36 rule 1 of the Civil Procedure Rules provides that in all suits where a plaintiff seeks judgement for a liquidated demand where the defendant has appeared but not filed a defence, the plaintiff may apply for judgment for the amount claimed or part thereof and interest. In this case, a summary judgment in favour of the respondent was entered, since the judgement sum sought by the respondent was a liquidated demand. The honourable magistrate ruled that the appellant cannot claim that there was no policy in place yet they unilaterally repudiated the contract. He further found that the defence filed did not raise triable issues.

8. On appeal, the appellant faults the honourable magistrate's decision and avers that he did not correctly apply the principles before granting the relief for a summary judgment. The Court of Appeal in the case of **Abok James Odera T/A A. J. A Odera & Associates vs John Patrick Machira T/a Machira & Co. Advocates (2013) eKLR** referred to the case of **Magonga General Stores versus Pepco Distributors Limited (1987) 2 KAR 89,** where the Court of Appeal held inter alia that:

> **"An appellate court will not interfere with a trial judges exercise of his/her discretion on an application for summary judgment unless the exercise was wrong in principle or that the judge acted wrongly on the facts."**

On the same light in the case of **Nairobi Golf Hotels (Kenya) Limited Civil Appeal no. 5 of 1997 (UR)** the Court of Appeal observed that:

> **"It is now trite that an application for summary judgment under Order xxxv rule 1 of the Civil Procedure Rules, the duty is cast on the defendant to demonstrate that he should have leave to defend the suit. His duty is however limited to showing prima facie the existence of bonifide triable issue or that he has an arguable case. On the other hand it follows that a plaintiff who is able to show that a defence raised by a defendant in an action falling within the provisions of Order xxxv is shallow or a sham is entitled to summary judgment."**

In a nutshell from the above case law, the burden of proving that a defence raised triable issues lays with the defendant, since summary judgment can be entered where there is a liquidated sum. This court can only interfere with the honourable magistrate's discretion if he applied the wrong principles or acted wrongly on the facts.

9. Looking at the pleadings field by the parties in the trial court, the respondent vide his amended plaint dated 9th September 2005 prayed for a judgment sum of ksh.291,467/= plus costs and interest. The appellant sought to defend that claim by its defence dated 19th April 2006. In that defence, the appellant denied granting the respondent a comprehensive insurance policy no. 08/MVO 141614 in respect of motor vehicle registration number KAH 409D for want of consideration as no premium was paid. On paragraph 6, it proceeded to state that it was entitled to repudiate the respondents' claim for his failure to give all information and assistance in dealing with the claim and proceeded to state that this was in breach of clause no. 5 of the policy. The appellant further added on paragraph 8 that the respondent ought to have exhausted the provisions of arbitration before instituting the suit in court.

10. The question which arises therefore, is whether the defence raised triable issues. It is not in contention that the respondent was involved in an accident which gave rise to CMCC No. 3534 of 2004 where he paid the plaintiff a decretal sum of kshs.291,467/=. It is this sum that he is claiming from his insurance which he claims he had a policy with and ought to have entered an appearance and paid the decretal sum. In their defence, the appellants on one hand claim that they did not have a comprehensive insurance policy with the respondent. On the other hand they claim that they were entitled to repudiate the respondents claim for his failure to give information while dealing with the claim. They further termed this failure to avail information as breach of clause no. 5 of the policy. They further in their defence

intimate that the respondent ought to have exhausted the option of arbitration before instituting this suit.

11. What is coming out clearly from the defence as filed by the appellant is that, it was aware of the accident and the reason it did not perform it's duties in relation to the accident was because the respondent failed to avail all information and failed to assist the appellant in handling the claim, the appellant is also aggrieved by the fact that the respondent instituted this current suit without first exhausting the option of arbitration as required. The appellant in its defence is admitting that it had a policy with the respondent and the only reason it failed to defend the suit was because of the respondents alleged to have breached clause 5 of the policy. The argument by the appellant therefore that a police abstract was not credible evidence to indicate that it had a policy with the respondent, does not hold water because of its own admissions in the defence.

12. In the end, I agree with the trial magistrate that the defence did not raise any triable issues to warrant the setting aside of the summary judgement. I hereby dismiss the appeal. The respondent to have costs of the suit and those of the appeal.

Dated, Signed and Delivered in open court this 11th day of November, 2016.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent