



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
(MILIMANI LAW COURTS)
CIVIL SUIT NO. 224 OF 2007

JOSEPH MWANGI GITUNDU.....PLAINTIFF

VERSUS

GATEWAY INSURANCE CO. LTD.....DEFENDANT

JUDGMENT

PLAINTIFF'S CASE

The claim

[1] According to the Amended Complaint, the Plaintiff's claim is for:-

- a) *Full value of his vehicle, i.e. Kshs. 500,000;*
- b) *Damages for loss of user at Kshs. 3,000 per day for three months from 22.7.1995*
- c) *Cost of suit; and*
- d) *Any other relief the court will deem fit and just*

[2] The Plaintiff filed witness statement and gave oral testimony in court. He also filed submissions which I shall consider in this judgment. In a nutshell, the facts of the case are that: The plaintiff insured his vehicle registration number KAC 695K at a sum of Kshs. 500,000 with the Defendant. The said vehicle was involved in an accident on 23rd July 1993 as a result of which the vehicle was extensively damaged and several passengers were injured. The plaintiff duly informed the Defendant of the accident giving full particulars thereof. He paid an excess premium at the request of the Defendant on the policy of insurance on the said vehicle. Several suits were filed by the injured third parties, to wit, THIKA SPMCC NO 825/94, 826/94, 827/94, 828/94 and 830/94. Judgments were entered in these cases against the Plaintiff. Subsequently, on or about 22nd July 1995, M/S Venus General Merchants attached the plaintiff's vehicle in execution of the decrees arising from the above judgment. The Plaintiff informed the Defendant of the attachment. The Defendant paid only some and not all the decretal sums as a consequence whereof the attached vehicle was sold. Demand was made for the Defendant to make good the plaintiff's claim, but in vain, hence this suit.

[3] In his testimony, the Plaintiff emphasised that he informed the Defendant of the attachment and

asked the auctioneers not to sell the vehicle because he was going to ensure the decretal sums are paid by the insurance. But the next time he went to the auctioneer he found that the vehicle had been sold without even informing him. Therefore, as the vehicle had been sold because of the failure by the Defendant to pay one of the claims listed above; they should pay his vehicle as well as loss of earnings from the vehicle.

[4] During cross-examination, the Plaintiff stated that he had left the matter to the insurance to deal as they were aware and was already paying them. He defended his claim of loss of earnings which he arrived at out of the daily returns and banking he used to make. He did not, however, produce any bank statements. He explained that the records on daily earnings were produced in Nyeri court which heard the case first but the records were lost when it was transferred to Nairobi.

[5] The Defendant filed defence but did not call any witness. They, however, filed submissions which I shall consider. First let me consider what the Plaintiff submitted.

Competence of the Suit

[6] The Plaintiff submitted that, since the Defendant did not call any witness, the suit is uncontroverted. He went ahead to address the issues as set out in the agreed list of issues filed on 27th March 2008. On the first issue, the Plaintiff stated that for clause 9 i.e. the Arbitration clause to apply, the Defendant ought to have intimated to the Plaintiff the reason it refused to settle the claim or the fact of any disclaimer of liability and/or repudiation of the Policy. It failed to do so. And as that is a material fact, clause 9 does not apply. This case was occasioned by the Defendant's breach of the terms of the Insurance Policy, and its failure to communicate any repudiation of policy. Therefore the suit herein is properly before this Court. Another point to note is that the Defendant filed a defence and did not take advantage of the arbitration clause to seek for an order to stay proceedings after entering appearance and before filing a defence. The Defendant having not filed the application for stay herein forfeited his right to rely on the Arbitration Clause. The Court of Appeal restated this position in the case of **Kisumuwalla Oil Industries Ltd. =vs= Pan Asiatic Commodities P.T.E. and Another (2) E.A.L.R. [1995 – 1998] 1.E.A 150(C.A.K.)** as follows:

“The appellant’s application to strike out the plaint and dismiss the suit was a step in the proceedings and by not filing an application for stay of the legal proceedings the appellant had forfeited its right to rely on the arbitration clause.”

[7] Moreover the effect of Arbitration Clauses in contracts is not to preclude parties from accessing Courts of Law. It simply allows parties to apply for stay of the suit and refer the dispute to arbitration. This suit is therefore competent.

Doctrine of Indemnity

[8] The Plaintiff averred that, it is not shown in what manner the Plaintiff was in breach of the doctrine of indemnity. It is merely alleged that the contract was a contract of indemnity and the Plaintiff ought to have met the claim then seek indemnity. The duty to pay the judgment by injured third parties under the law rests with the insurer on being informed of the judgment. See Section 10(1) of CAP 405 which states that;-

***“... the insurer shall subject to the provisions of this section pay to the persons entitled to the benefit of the judgment any sum payable*”**

By operation of the Law the judgement holders (in THIKA SRMCC 825, 826, 827, 828, and 837) need not be privy to the Insurance Contract between the Insured (the Plaintiff) and the Insurer (the Defendant). They are beneficiaries who should get payment and the Defendant should not wait to be sued for this. Accordingly the argument that the Plaintiff had to pay up first and then go for indemnity from the Defendant is misguided and erroneous. This case is not even on the judgment sum; it is for loss he incurred of his vehicle sold in execution of one particular Decree in PMCC 837/99 which the Defendant

did not pay. The Insurance had, on realization and recognition of this obligation, paid other judgments that were given relating to the same accident.

Loss of earnings

[9] The Defendant's breach of its statutory obligations caused the loss of daily income from the vehicle which was used as a matatu at the rate of Kshs. 3,000/- per day for three years from 22/7/1995. This is reasonable and sufficient to cover the loss incurred. There is no dispute that the vehicle was sold and was a public service vehicle. Evidence shows the Plaintiff used it as a matatu and Kshs. 3,000/- is reasonable. A note book where he used to write amounts relating to this vehicle was produced during the earlier trial in Nyeri and was thereafter misplaced. There is evidence of this notebook in the Court file and even the earlier judgement entered confirms this position.

Maximum liability of insurer

[10] On the Insured value and the maximum liability of the Defendant, the Plaintiff submitted that he lost his vehicle and now claims for the full value of the same being the insured sum. The insured value is stated in the Policy document, and is not disputed is **Kenya Shillings Five Hundred Thousand (Kshs. 500, 000/-): therefore**, the maximum liability of the Defendant towards the Plaintiff.

Mitigation and author of loss

[11] The other issues touch on mitigation of loss; whether the Plaintiff was the author of his own misfortune by failing to mitigate his losses and even pursue the difference between the auction price and the decretal sum. It was in the Plaintiff's place to mitigate his losses when there was a contract that guided the conduct of both parties when an event such as the accident herein occurs and secondly the Defendant was already sorting out the issue and had in fact sorted all except one. The above notwithstanding the Plaintiff explained that he would have mitigated his losses but he could not because events happened in a rush and by the time he went back to the auctioneers about three days later the vehicle had already been sold and as such there was nothing he could have done. He informed the insurer immediately the attachment was levied. But worst of all is that the Defendant never deemed it proper to notify the Plaintiff at any given time why they decided to not honour their obligations under the Policy not even when they were informed that the vehicle had been attached and as such they are responsible for the sale of that motor vehicle and they cannot now shift blame to the Plaintiff.

[12] The Plaintiff is convinced that he has proved his case against the Defendant on a balance of probabilities, and the Defendant should be held liable to pay the loss of earnings, value of the vehicle as well as costs of the suit.

THE DEFENCE CASE

[13] The Defendant submitted that the Plaintiff herein had insured his motor vehicle registration number KAC 695K with the defendant under policy number HV/93/MT/02030. The said policy document was filed in the plaintiff's list of documents filed on 16th July, 2012. They confirmed that the said motor vehicle was involved in an accident on 23rd June, 1993 wherein several persons were injured, and that the injured persons filed various suits at the Thika Law Courts seeking compensation for their injuries. The plaintiff's motor vehicle was subsequently attached and auctioned off in settlement of a judgment in Thika SRMCC No. 826 of 1994 being one of the various cases arising out the said accident. The decretal amount in the said suit was Kshs. 97,200/=. They answered each of the issues filed in the following manner

[14] They stated that the policy of insurance between the defendant and the plaintiff was one of indemnity. They cited Section II 1 which provides:-

“The Company will subject to the Limits of Liability indemnify the insured in the event of accident caused by or arising out of the use of the motor vehicle or in connection with

loading or unloading of the motor vehicle against all sums including the claimants costs and expenses which the insured shall become legally liable to pay...”

To them, the above section compelled the plaintiff to meet any obligations that may arise from use of his motor vehicle as covered by the policy and thereafter seek indemnity from the defendant. The plaintiff had a duty to mitigate his loss. This means the plaintiff should have paid off the decretal amount in the said lower Court suit, then sought out the defendant to indemnify him. They submitted that the plaintiff was negligent in failing to pay off the outstanding decretal sum. He allowed his motor vehicle to be auctioned off. He should have mitigated his loss by paying off the auctioneers and thereafter dealing with his insurers.

[15] They relied on the fact that the defendant had already settled all the other 4 judgments that arose from the accident. It would therefore follow it would have fully indemnified the plaintiff if he had settled the decretal amount. The plaintiff testified in Court, upon re-examination, that his motor vehicle was sold 3 or 4 days after it was attached. However according to the Notice of Attachment in the plaintiff's bundle of documents, the motor vehicle was attached on the 22/07/1995 and the plaintiff had 15 days to pay off the decretal amount and save his motor vehicle. This was more than enough time for the plaintiff to attempt to save his motor vehicle and mitigate the foreseeable loss. Instead he stood by and did nothing until it was too late. Also, the defendant's motor vehicle was sold for Kshs. 250,000/= which sum is more than double the decretal amount that was being sought. The plaintiff failed to seek the difference in the sale amount from the auctioneers; he also failed to instruct the auctioneers to render an account of the sale. This means there is some money unaccounted for.

[16] In the upshot, it is clear that the plaintiff did not try and mitigate his loss. The plaintiff is now seeking to have the defendant pay for his abovementioned failure.

[17] Loss of user falls under consequential loss which is expressly excluded by the policy of insurance in question. It should be dismissed straight away. See Clause 5 (a) in the General Exceptions of the policy. The said section provides thus,

“The company shall not be liable for any accident loss or damage to any property whatsoever or any loss of expense whatsoever resulting or arising therefrom or any consequential loss.”

Without prejudice to the foregoing, it is the defendant's contention that the plaintiff has failed to prove loss of user. Loss of user has to be pleaded and also proved. The plaintiff has pleaded for Kshs. 3,000/= for 3 years. There has been no evidence adduced to show that this is indeed the earnings the plaintiff made on a daily basis. There is also no evidence to show why the plaintiff settled on this figure, it is merely estimation. It was the plaintiff's testimony, that even if he was to bring bank statements to Court, he would not be able to decipher which sums of money were attributed to the said motor vehicle. How then would this Court determine what his earnings were if he cannot prove them? The plaintiff claimed at the hearing hereof that he had produced evidence of loss of user when the matter was heard in Nyeri HCCC No.120 of 1997. However, the said evidence had allegedly been lost at the Nyeri High Court. My Lord, it is noteworthy that this matter was moved to the Nairobi High Court in 2007. Over 8 years now the plaintiff has not been able to put together evidence of earnings or even make attempts to recover the allegedly lost exhibits. This claim should be dismissed. Indeed, the plaintiff has failed to prove his suit and the same should be dismissed with costs to the defendant.

DETERMINATION

[17] I can condense issues for determination in three clear and broad-enough headings as follows:-

- a) ***Duty of insurer to satisfy judgments against persons insured:*** Under this title, issues of a contract of insurance being one of indemnity; mitigation of loss by the plaintiff by paying the judgment first and then claim reimbursement; and the nature of the Plaintiff's claim will be discussed.
- b) ***Accounts and or contribution from auctioneer:*** Although claim for accounts from the auctioneer is argued under mitigation of loss, I will treat it separately due to

the intricacies of law involved thereto.

c) ***Proof of case on balance of probabilities:*** I will take the overall impression of the entire case but paying attention to whether proof of the value of vehicle and loss of daily income have been provided to the scale of law.

DUTY OF INSURER TO SATISFY JUDGMENTS AGAINST PERSONS INSURED

Duty is Statutory

[18] Duty of insurer to satisfy judgments against persons insured has been argued here in a profound manner. I appreciate that the issue is not only a subject of paramount importance in the law of insurance but also to this decision. Therefore, I will not deny it a full considered attention. At the risk of monotony, I should state that, the principle of privity of contract has been relaxed under modern statutory law, implied warranty and strict liability cases. Cap 405 of the laws of Kenya is one such law and has provided for a statutory exception to the rule on privity of contract. Third parties for whose benefit the insured takes out a policy of insurance are the direct beneficiaries of the policy of insurance even if they are not parties in the contract of insurance. The duty of insurer to satisfy judgments against persons insured is provided for under section 10(1) of Cap 405 Laws of Kenya as follows;

10. *Duty of insurer to satisfy judgments against persons insured*

(1) If, after a policy of insurance has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of [section 5](#) (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.

[19] Therefore, under section 10(1) of Cap 405 Laws of Kenya, the insurer has a statutory obligation *to pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.* The obligation is statutory and a strict one; it cannot be shifted or abrogated by a term in the contract of insurance or in the manner proposed by the Defendant, lest the noble intention of the Act to guarantee compensation of third parties who suffer injuries arising from by use of the insured motor vehicle on the road should be lost. Similarly, if the statutory obligation placed by law on the insurer was to be shifted to the insured as proposed by the Defendant, the purpose for taking out an insurance policy and the compulsion by the Act for such insurance cover to be taken out on vehicles to be used on the roads to cover third party risks under Cap 405 Laws of Kenya will also be defeated. The only legal way liability and obligation to pay third party claims may be avoided, is by strictly following the prescriptions provided for under section 10 of Cap 405. In this case, the insurer's liability and obligation to pay the judgment entered against the insured is not in dispute. Whereas, a contract of insurance is one of indemnity, in so far as claims by third parties are concerned, the insurance has a statutory obligation to pay the judgment of the third parties unless the liability thereof has been avoided in accordance with the law and specifically section 10 of Cap 405. I do not, therefore, agree with the argument by the Defendant that the Plaintiff ought to have paid first in order to save his vehicle then come for reimbursement. This is a statement based on convenience and not the law, and which I find to be quite careless averment to be made by any serious insurance company involved in insuring the general public of Kenya. In any event, the evidence shows that the Plaintiff took all necessary steps to inform the insurer of the cases and judgments thereto. He also informed them of the attachment and even went back to the auctioneer after three days of the attachment only to find that his

vehicle had been sold.

Consequential loss argument

[20] From the above and the arguments of parties, I see some offshoot but inextricable ideas or issues. First; this is not a declaratory suit or a claim for payment of a judgment of the third party *per se*, or for recovery of loss or damage to property or consequential loss arising out of the accident herein. Therefore, Clause 5 (a) in the General Exceptions of the policy does not apply. The truth of the matter is that, this is a claim for recovery of loss occasioned by the breach of statutory duty by the insurer when it failed to pay a judgment of a third party as required in law. Thus, arguments which the Defendant offered in defence are not really formidable in this case especially in the face of section 10 of Cap 405, and the evidence that the Defendant breached its statutory obligation thereto. It is worth of note that, when a party approaches the court for relief, he must do so with clean hands. The contrary is true about the Defendant and its defence.

Seeking contribution from third party

[21] I now move to the other issue on alleged failure by the Plaintiff to seek for accounts as well as refund of the extra sum realized in the sale of the suit motor vehicle. I note that the Defendant had applied through a Chamber Summons dated 17th March 2010 for third party notice to issue upon the auctioneer C. K. GITAU t/a VENUS GENERAL MERCHANTS. They did not follow through on the process of third party proceedings. They are the Defendant herein and if they thought they are entitled to any contribution from the said auctioneer, they ought to have completed the process of third party proceedings. The right of subrogation would have been easily realized within these proceedings had third party proceedings been properly filed and pursued. Hence, and in view of what I have stated in the foregoing paragraphs, that line of defence taken by the Defendant fails. I will now determine the last issue.

PROOF OF CASE ON BALANCE OF PROBABILITIES

Value of vehicle

[22] The test is: Has the Plaintiff proved its case on the balance of probabilities on the claim of payment of value of the vehicle and loss of earnings? The Plaintiff has shown by way of evidence that the insured sum of the vehicle is Kshs. 500,000. The estimated value of the insured vehicle is indicated in the POLICY SCHEDULE at page 19 thereof to be Kshs. 500,000. There was no contrary valuation which was tendered in court. For all purposes, the value indicated in the policy is the only absolute guide here. I, therefore, find that the plaintiff has proved on balance of probabilities that the value of the vehicle herein was Kshs. 500,000. I award him Kshs. 500,000 as the value of the vehicle.

Loss of earnings or business

[23] On loss of earnings or business, the Plaintiff testified that the vehicle herein was a matatu. That fact is not denied. Indeed, the policy of insurance produced in court shows the vehicle was a matatu. Even at the time of the accident it was being used as a matatu. The question becomes; was it earning him Kshs. 3000 per day? No documentary evidence which was produced except I find that a notebook containing records for the daily earning of the matatu had been produced before the court at Nyeri. The record as well as the notes and the judgment of the trial court at Nyeri confirm that fact. The Plaintiff explained to the court that the exhibit was lost when the file was transferred to Nairobi. Given the fact of the age of the file and the movement thereto, I do not doubt the explanation. The figure quoted for a matatu business is not unreasonable except the Plaintiff did not tell the court whether the figure was gross or net earnings after deduction of daily running costs of the matatu. I will, therefore, use a figure of Kshs. 1,500 per day as my multiplier. The only quarrel I have is with the 3 year period which he claims he lost earnings from the matatu. The period is quite unreasonable and long. In law, a claimant is expected to mitigate his losses by taking such measures which will bring down his losses. This is where the arguments on mitigation proper aid the Defendant. I am aware that the vehicle was lost and buying another one would be impossible or would take time and injection of huge capital. Nonetheless, the Plaintiff cannot stop

working or looking for other means of deriving earnings because he is waiting for compensation by way of an award of damages. I will award loss of business for one year. But, I am aware that a matatu will need to be serviced and sometimes it would break down or be out of business for other reasons. I will, therefore, allow income for 21 days in each month which make up one year. This comes to 252 days. The calculation shall be as follows:-

Kshs. 1,500 x 252 =378,000

On loss of earnings or business, I award a sum of Kshs. 378,000.

The upshot

[24] In the overall, the plaintiff has proved its case on balance of probabilities. Accordingly, I enter judgment in favour of the Plaintiff and against the Defendant in a global sum of Kshs. 878,000 with costs. It is so ordered.

Dated, signed and delivered in open court at Nairobi this 6th day of May 2015

F. GIKONYO

JUDGE