



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO. 6 OF 2012

JOSEPHAT WAITHAKA WANGUNGU.....PLAINTIFF

-VERSUS-

KENINDIA ASSURANCE COMPANY LIMITED.....DEFENDANT

JUDGMENT

1. By his Complaint dated 18th January 2012, the Plaintiff seeks the following orders:

- (a) **A sum of Kshs. 3,940,000/= being the value of the motor vehicle**
- (b) **loss of user from 22nd May 2010 upto date; and**
- (c) **costs of the suit and interest.**

THE PLAINTIFF'S CASE

2. The Plaintiff was the owner of the motor vehicle registration number KAV 679 V Mitsubishi Fuso. He had taken a comprehensive insurance cover with the Defendant under Policy No. P/116/081/0880/2009/62/07 which commenced on 04/07/2009 and was to expire on 03/07/2009.
3. On 22/05/2010, when the policy cover was still in force, the Plaintiff's motor vehicle was involved in a road traffic accident along the Kisii-Migori Road. He reported the accident to the Defendant.
4. He testified during trial that there is no justifiable cause why the Defendant had failed to honour its obligations under the policy. As at the time of the accident, he had paid the premiums (see exhibit 5). He also reported the accident to the Police and was issued with a Police Abstract (exhibit 6) which he forwarded to the Defendant's office at Kisii.
5. At his own cost, he had the vehicle towed to Kisii Police Station (exhibit 7 which is a receipt for Kshs. 30,000/=) and had the vehicle stored at Practical Garage until February 2011 when it was towed by the Defendant for repairs. He incurred a cost of Kshs. 197,000/= (see exhibit 8).
6. However, the Defendant has neither caused the vehicle to be repaired or in lieu of commissioning the repairs, compensated the Plaintiff for the value of the vehicle which according to the valuation by Automobile Association of Kenya is Kshs 3,940,000/=.
7. The Plaintiff alleges that the Defendant's default has occasioned him severe financial difficulties because he used the vehicle to carry out his various businesses from which he earned a monthly income of Kshs. 400,000/= (see the bank statements produced as "PExb 10". This in turn has caused him to be unable to service a loan he had taken from Co-operative Bank of Kenya Limited

- thereby exposing him to embarrassment.
8. It is for these reasons that the Plaintiff seeks the orders as stated in the Plaintiff.

THE DEFENDANT'S CASE

9. The Defendant filed the Defence dated 7th March 2012. The first objection is that the Plaintiff is bad in law and an abuse of the court process as it does not disclose any cause of action. The Defendant claims that it has not refused to repair the vehicle as alleged. It states that the vehicle was towed to Automobile Warehouse, not Nakuru Warehouse, where it is being repaired.
10. The Defendant imputed liability on The Automobile Warehouse who had been engaged to repair the vehicle and indicated that it would later in the course of the proceedings enjoin this warehouse as a party to the suit. Further, it was alleged that having elected to have the vehicle repaired, the Plaintiff is not entitled to compensation for the value of the vehicle.
11. The Defendant did not call any witness.

SUBMISSIONS

12. The Plaintiff filed submissions dated 20th November 2014 wherein he restated the case and the evidence. In addition, Counsel submitted that the Plaintiff was entitled to a sum of Kshs. 21,600,000 as compensation for loss of user of the motor vehicle. This sum was tabulated using the Kshs. 400,000/= monthly income for a total of 54 months when the Plaintiff was denied use of the motor vehicle.
13. The court was urged to allow the case and in particular because no evidence had been produced by the Defendant to rebut the statements of facts.
14. The substance of the Defendant's submissions was that the Plaintiff did not disclose any cause of action against the Defendant. It was alleged that the Plaintiff only described the parties and made allegations of fact but failed to state the claim against the Defendant.
15. That the claim for loss of user had not been proved must be pleaded and raised.

ISSUES FOR DETERMINATION

16. The two issues for determination are:
- (a) whether the claim is bad in law; and
 - (b) whether the Defendant is liable

WHETHER THE PLAINT DISCLOSES A CAUSE OF ACTION

17. The Defendant argued that the Plaintiff should be struck out because it fails to state the claim or disclose a cause of action against him. His argument was that the Plaintiff should contain an endorsement of the claim against the Defendant which he argued to mean that it did not state that the Plaintiff was making a claim against the Defendant. It should also state whether the Plaintiff's case is for damages for breach of contract, negligence or detention of goods. By failing to state so, the Plaintiff was defective because the case against the Defendant was not stated.
18. One of the definitions of a claim under the **Black's Law Dictionary, 9th Ed, pg 281** is "***the aggregate statement of facts giving rise to a right enforceable by court***". This definition is similar to the provisions of Order 2 Rule 1 of the Civil Procedure Rules. It states that every pleading shall contain information as to the circumstances in which it is alleged that the liability has arisen.
19. Therefore, a Plaintiff which is a statement of the claim should contain material facts giving rise to the cause of action. It is sufficient if from it the Defendant is able to understand the right that is being asserted by the Plaintiff, the grounds on which this right is being exercised and the remedies that are sought.
20. Again, drawing from the Court of Appeal's decision in **D. T. Dobie V. Muchina**, [1980] KLR 1 a

- cause of action is “*an act on the part of the defendant, which gives the plaintiff his cause of complaint*”. A pleading will only be deemed not to disclose a cause of action if from the statement of the claim it is clear that the Plaintiff has no case at all.
21. In the instant case, the circumstances on which the claim is founded have been provided in the Plaintiff. The Plaintiff’s case is hinged on the insurance contract with the Defendant. He alleges that under that contract the Defendant was obligated to repair his vehicle or otherwise compensate him for the damage of his vehicle once it was involved in an accident. He has filed this case alleging that the Defendant has refused to honor its obligation. He seeks the orders of this court to compel it to comply with its contractual obligations and compensation for the loss of use of his car during the time the vehicle was not repaired.
 22. Therefore, to say that the claim does not disclose a cause of action merely because it does not contain an express endorsement is a misapprehension of the law. This is more so when the Defendant does not allege that it was unable to understand the case against it or make its defence because of insufficient facts. It also did not at any point before trial exercise its right under **Order 2 Rule 2** by asking for further particulars.
 23. I find that this objection has no merit.

WHETHER THE PLAINTIFF IS ENTITLED TO COMPENSATION BY THE DEFENDANT

24. The Defendant did not call any evidence to prove its case and in the circumstances the allegations of fact by the Plaintiff are deemed uncontroverted.
25. It was therefore proved, that there was in existence an insurance contract between the Plaintiff and the Defendant. Under the policy the Defendant agreed to insure the Plaintiff’s motor vehicle registration number KAV 697 V Mitsubishi Fuso, for any loss or damage. The vehicle was valued at Kshs. 3,940,000/=.
26. It was also not disputed that on 22/05/2010 the insured motor vehicle was involved in an accident. At this time, the policy was in force and there was no reason for the Defendant to avoid the contract. Accordingly, the Defendant was liable to indemnify the Plaintiff for the damage and loss that resulted.
27. To this end, the Defendant had the vehicle towed to The Automobile Warehouse for repairs. However, these repairs have not been completed to date. The Defendant blamed the repairers for work uncompleted but did not despite indicating otherwise, enjoin them in this suit.
28. The obligation was on the Defendant to ensure that the vehicle is repaired as per the terms of the policy. It was its mandate to pursue the third party to repair the vehicle. These repairs have not been completed at the time the suit was filed and even at the time of the hearing, the Defendant did not offer an undertaking that the repairs were underway. Without any reasonable explanation for this delay, it is safe to conclude that the Defendant intended to abrogate from its obligation.
29. Further, the Defendant cannot argue that having accepted to the vehicle being repaired, the Plaintiff is precluded from seeking compensation. In the circumstances of this case, the Defendant has shown no indication that it is taken reasonable action to ensure that the vehicle is repaired and released to the Plaintiff. The Plaintiff cannot be expected to wait indefinitely and he is entitled to seek compensation in lieu of the repairs.
30. Accordingly, I find that the Plaintiff is entitled to compensation for the insured sum of Kshs. 3,940,000/=.
31. The second claim was one for loss of user. Evidently, the Plaintiff used his motor vehicle for commercial purposes. In his plaint he sought an award for loss of user although he did not plead the particulars of this claim. These, he provided during the trial when he testified that he earned Kshs. 400,000/= and it was only clarified in the submissions that this was a monthly income.
32. It is now settled that the claim for loss of user is a special damage claim which must be specifically pleaded and proved. It cannot be presumed and the court cannot adopt a figure that it considers reasonable compensation.
33. The Plaintiff only provided Bank Statements to prove his claim. This was not sufficient evidence to prove his claim because it cannot be ascertained that the money that was deposited in his account was derived from his businesses which he conducted using the insured motor vehicle.
34. Similarly, although the Plaintiff led evidence to prove storage and towing charges, he did not plead this in his Plaintiff. This claim was therefore made in derogation of his pleading and the

Defendant was not given sufficient time to answer to it.

DETERMINATION

35.I find that the Plaintiff has established that pursuant to the insurance contract, the Defendant is liable to compensate the Plaintiff for the damage and loss that his vehicle sustained in the accident. Having failed to exercise its option to repair the vehicle, the Defendant should be compelled to compensate the Plaintiff for the sum of Kshs. 3,940,000/=

36.Accordingly I allow the Plaintiff's case in the following terms:

- (a) Judgment is entered in favour of the Plaintiff against the Defendant for the sum of Kshs. 3,940,000/-
- (b) The claim for loss of user is hereby disallowed
- (c) Interest is awarded for the sum under (a) at court rates from the date of filing plaint.
- (d) The Plaintiff shall have the costs of this suit.

Dated, Signed and Delivered at Nakuru this 10th day of July, 2015.

A. MSHILA

JUDGE