REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

Civil Appeal 3 of 2006

KENYA ORIENT INSURANCE CO. LTD …… APPELLANT

VRS

HASSAN KHAMIS SAID ..... RESPONDENT

JUDGMENT

The Appellant in this case Kenya Orient Insurance Co. Limited, appeals against the judgment of Bungoma RM, in SPM CC NO. 463 of 2004, where one Hassan Kamisi Said had sued the Appellant claiming loss of 350 bags of sugar each weighing 50kg, Ksh.761,250/= and costs of the suit. The Senior Resident Magistrate entered judgment in favour of the Plaintiff in that case for the following:

a) Ksh.800,000/= being the value of 320 bags of sugar divide by five accused persons multiply by two who were strangers. This comes to ksh.340,000/= plus Ksh.47,214/= thus Ksh.387,214/=.

b) Costs.

c) Interest from the date of filing suit.

The Appellant was aggrieved by the said Judgment and has appealed before this court relying on several grounds as follows:

i) The learned trial magistrate erred in law and fact in holding the Appellant liable contrary to the evidence on record.

ii) The learned trial magistrate erred in law and fact in failing to take into account the evidence on record to the effect that the Respondent's employees were wholly involved in the theft and therefore the Respondent's claim did not fall within the policy of insurance taken by him.

iii) The learned trial magistrate erred in law and fact in failing to take into account the Appellants' evidence and submissions showing that the insurance policy cover taken by the Respondent did not indemnify him in losses arising as a result of theft from vehicles by the employees.

iv) The learned trial magistrate erred in law and fact in failing to take into account the Appellant's evidence tendered before him.

v) The learned trial magistrate erred in law and fact in making a finding that the value of 320 bags of sugar was Ksh.800,000/ when there was no evidence to that effect.

vi) The learned trial magistrate erred in law and fact in awarding the premium of Ksh.47,214/= paid by the Respondent to him.

vii) The learned trial magistrate erred in law and fact in making an award that was too excessive in the circumstances.

Mrs. Tuter for the Appellant submitted that the appellant and the Respondent entered into an insurance contract vide policy No.3130302 which commenced on 13/6/2003 and was to expire on the 12/6/2004. All risks were covered in regard to transportation of sugar from Mumias Sugar Co. Limited to Bungoma District with two exclusions:

I) Theft from unattended exclusion

II) Infidelity of employees

On 13/6/2003 theft of 350 bags occurred while the employees of the respondent were transporting the sugar in motor vehicle Reg. No.KJJ 754 Fiat lorry. It is the contention of the Appellant that the employees of the company were involved in theft since they were convicted of the offence in Mumias Court Cr. 602 of 2003. All the convicts in that case except one Sarah Chasira were employees of the Company. The driver of the vehicle was not arrested to face the criminal charges and he still remains at large leaving the two loaders to face the criminal charges. It is on the basis that the employees of the company were involved that brought the matter under the 2nd exclusion clause. It was contended that the magistrate found in favour of the Respondent because in his opinion, both the employees and strangers were involved.

Both parties were aware of the exclusion process in the policy. The Respondent understood the effect of the said process and should be bound by them. The amount of premium to be paid was fixed on the basis of the contract terms. The magistrate therefore erred in disregarding the exclusion process. He also failed to consider the Appellant's evidence in arriving at his decision.

The highest value of the goods set in the policy was Ksh.700,000/= but the magistrate awarded Ksh.800,000 which was a figure in excess of the agreed figure. The award exceeded the amount pleaded in the amended plaint which was Ksh.751,000/=. Some invoices were produced in evidence showing the value of the sugar per tone as Ksh.75,000/= and which were disregarded by the court. The magistrate failed to consider that 30 bags of sugar were recovered and went on to award Ksh.800,000/= for 350 bags instead of 320.

The magistrate erroneously awarded to the Respondent Ksh.47,214/= which was the premium paid by him which amounted to invalidation of the contract.

The magistrate wrongly exercised his discretion in law and fact according to the appellant and his decision on liability and quantum should be set aside.

Mr. Onchiri represented the Respondent in this appeal. He submitted that, it is not in dispute that the policy covered property on transit. The insurance company failed to give a copy of the policy to the Respondent which was admitted by DW2 Mary Naliaka Matisi in evidence. The Respondent saw the policy documents in court during the hearing. It was further contended that the Exclusion Clauses relied on are repugnant justice. The policy covered all the risks and that the Respondent acted with all reasonable precautions. When the theft occurred, the Respondent informed the insurance company who commenced the investigations.

The Respondent argued that in the amended plaint he pleaded for value of 350 bags of sugar. It cannot be said that the amount awarded for the value of the sugar was not pleaded. As for the amount of Ksh.47,214/= awarded to the Respondent, the magistrate was correct in refunding the amount to the Respondent.

I have carefully considered the grounds of appeal, submissions of the counsels for the parties and the authorities relied on by the parties. In regarding to the insurance contract, it is not disputed that the parties entered into the contract on the 13/6/2003 which covered all risks for sugar on transit except in regard to the two Exclusion Clauses. The parties executed the contract which became binding on each one of them. On perusal of the schedule of the policy document, it is clearly indicated that, the contract covered goods on transit by vehicle registration KJJ 764 Fiat Lorry and that the sum insured was Ksh.700,000/= for 7 tonnes of sugar. The cover was for all risks save for theft from unattended exclusion and infidelity of employees. After the theft occurred, it was reported to the insurance company and to the police. Police arrested and arraigned in court five people including two loaders who were the employees of the Respondent. The driver of the vehicle remained at large and was never charged together with others. At the conclusion of the criminal case, It is the 3rd 4th and 5th accused who were convicted included the two employees of the Respondent. In finding in favour of the Respondent, the learned magistrate relied on the fact that both employees of the Respondent and strangers were involved in the theft and therefore the exclusion clause could not apply. It is in my finding that, the magistrate wrongly interpreted the Exclusion Clause and misdirected himself on the facts by adding a non existing condition of strangers. The policy is very clear that once the employees were involved in the theft, the Exclusion Clause would apply. The fact that the said employees were convicted together with strangers does not affect the said clause.

The magistrate erred in law and fact by finding that the Exclusion Clause was not applicable in the circumstances.

It was contended by the Respondent that, he was not given a copy of the insurance policy and he only saw it in court during the hearing. The Respondent was a party to the contract and ought to have acted diligently in order to obtain a copy of the insurance contract assuming it was not given to him at the time of execution. Having executed the agreement, the insured is bound by and cannot be exempted from liability for the simple reason that he was not given a copy of the contract.

The sum insured was Ksh.700,000/= being the value of 7 tones of sugar as agreed by the parties. The magistrate therefore exceeded his mandate by awarding a higher figure than the sum insured. The magistrate failed to consider the fact that 30 bags of sugar had been recovered and returned to the Respondent. The value of the 30 bags ought to have been subtracted from the award in the event of a successful claim. This would prevent the Respondent reaping double benefit.

In every insurance contract, the insured is supposed to pay an agreed sum as premium. It is the payment of the premium and the execution of the insurance contract that brings into existence a valid contract between the parties. The lower court wrongly refunded the premium of Ksh.47,214/= to the Respondent. The act of the refund of the said amount, amounts to invalidation of the contract. It is surprising that, the magistrate went on to award the sum insured after ordering refund of the premium. It is my finding that, the magistrate misdirected himself in refunding the premium.

The order of the lower court of awarding Ksh.800,000/= being the value of 320 bags of sugar and then dividing it between the 5 accused persons and further multiplying by 2 who are strangers does not make any sense and was therefore erroneous. Invoices from Mumias Sugar Company Limited for 350 bags each of 50 kg each was valued at Ksh.761,250/=. The magistrate disregarded that evidence in computing the loss suffered by the Respondent.

It is my finding that, the claim of the Respondent in the lower court was excluded from the insurance cover having regard to the Exclusion Clauses since the employees were involved in the theft. The Exclusion Clauses were part of the contract which was valid between the parties and can not be said to be repugnant. In my view, the clauses do not defeat the cause of justice since they were an integral part of the contract. The circumstances of the case before me is distinguishable from the authorities cited by the Respondent's counsel. In this case, the Exclusion Clauses were included in the contract and were straight forward. In the case of *WOOLFALL AND RIMMER LTD V MOYLE [1942] 1 KB 66, [1941] 3 ALL ER 304 AND 111 LJ KB 122, 166LT 49 58 TLR 28, 86 SOL JO 63, CA.* The insurance company sought to avoid liability on the ground that the foreman of the assured was negligent thereby causing injuries to a workman. The meaning of the contract must be given practical application by the court and it must be applied with good sense so as to give effect to the intention of the parties. It is clear from the outset that the parties in the contract intended to be bound by the Exclusion Clauses which they both understood.

For the foregoing reasons, this appeal must succeed. The judgment of the lower court is hereby quashed and the award and all consequential orders are hereby set aside**.**

F. N. MUCHEMI

JUDGE

Dated, Delivered and Signed at Bungoma

this 7th Day of July 2009 in the presence of Mr. Onchiri for Respondent and Mr. Situma for Omwenga for Appellant.