



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

Civil Appeal 216 of 1996

PROVINCIAL INSURANCE COMPANY OF EAST AFRICA LIMITED now known as

UAP PROVINCIAL INSURANCE COMPANY LIMITED.....APPELLANT

AND

LENNY M. KIVUTI.....RESPONDENT

(Appeal from a judgment and decree of the High Court of Kenya at Nairobi

(Mr. Justice Pall) dated the 29th day of February, 1996

IN

CIVIL CASE NO. 3919 OF 1994)

JUDGMENT OF THE COURT

This is an appeal by Provincial Insurance Company of East Africa Limited now known as UAP Provincial Insurance Company Limited (hereinafter referred to as “the insurer”) from a judgment and decree of the superior court (Pall, J. as he then was) of 29th February, 1966 by which the insurer was ordered to pay to the respondent Mr. Lenny M. Kivuti (hereinafter referred to as “the insured”) a sum of shs.1,800,000/= plus interest and costs. The judgment was entered by the learned judge after hearing a summary judgment application brought before him under Order 35 rule 1 and Order 6 13(b) to (d) of the Civil Procedure Rules.

During the year 1992 a company known as Joy Import & Export Company Limited, imported into Kenya, one Mitsubishi Pajero Saloon purportedly for private use as per declaration made by the said company on 4th June, 1992.

On 27th October, 1992 the said company transferred the ownership of the said vehicle to the insured. The agreement shows that the insured paid a sum of shs.1,950,000/= for the said vehicle to one Mr. D. S. Kandola vide a banker’s cheque payable to Mr. Kandola who acknowledged receipt of the said sum and undertook to transfer the vehicle to the insured.

The insured had the said vehicle insured with the insurer at a declared value of shs.1,800,000/= and by an endorsement effective from 27th October, 1992, the insurer insured the said vehicle which was

registered as KAC 852Q. This insurance cover was transferred from the insured's previous vehicle registration number KVH 306 for which transfer the insured paid an additional premium of shs.12,609/=.

On 14th May, 1993 the insured was allegedly robbed of the said vehicle by sword-wielding robbers and he insured made a claim under the policy of insurance. To put the record straight the policy of insurance was numbered 9103069-1.

The insurer then started making inquiries as to the propriety of the importation of the vehicle into Kenya and sought and eventually obtained the relevant import documents. Triplicate copy of Import Entry document which carries customs Entry number 492 (this number being supplied by the Registrar of Motor Vehicles) refers to one "used motor vehicle Toyota Carina" with country of origin as Japan. Another copy of the same Customs Entry (No.492) refers to one "Mitsubishi Station Wagon" with country of origin as Dubai. It is his discrepancy which bothered the insurer and which led the insurer to repudiate liability to the insured.

The insured's stand in the superior court was simple. He said he was not the importer and had bought the vehicle from Joy Import & Export Company Limited after satisfying himself that the vehicle registration book entries tallied with the engine number and the chassis number on the vehicle. The learned judge accepted this position as exonerating the insured from any import irregularities and entered judgment in his favour.

In an application for summary judgment even one triable issue, if bona fide, would entitle the defendant to have unconditional leave to defend. See Kundanlal Restaurant v. Devshi & Company [1952] 19 E.A.C.A. 77. Also see Hasmani v. Banque du Congo Belge [1938] 5 E.A.C.A. 89.

In the instant case the insurer took defences to the effect that the said vehicle was not properly imported into Kenya as the records held at the Road Transport Office show that the vehicle was imported from Dubai (that is it may not have been a new vehicle); that the bill of lading shows that the vehicle was imported from Chiba, Japan; that Import Entry number 492 related to a Toyota Carina vehicle which was imported from Singapore; that the engine and chassis numbers are incomplete; that therefore the insurer's insurable interest in the subject vehicle was doubtful; that the contract was unenforceable and tainted with illegality. The insurer in fact counterclaimed seeking a declaration against the insured to the effect that it was entitled to avoid the contract of insurance and that the same was not enforceable.

The issues raised by the insurer are not the kind of issues which can be tried in a summary manner on affidavits. These are weighty issues to be canvassed at the trial and, with respect, the learned judge fell into error when he dismissed the issues raised by the insurer by reference simply to the fact that the insured was a bona fide purchaser without notice of the discrepancies regarding the importation on local registration of the vehicle. It was, with respect, not open to the learned judge so to say that the insured was a bona fide purchaser without notice of discrepancies. That would have been a matter for the trial court. The issue as to whether a purchaser who buys an item which may have been unlawfully imported or improperly imported is bound by the provision in section 203(1) of the Customs & Excise Act (Cap 472, Laws of Kenya) which would be a matter for trial.

The defence and counterclaim by the insurer was not a sham. In our view it raised triable issues and it is our considered view that the insurer ought to have its day in court to call evidence to establish its defence and counterclaim.

The learned judge, although he was not asked to do so, proceeded to strike out the insurer's counterclaim. That order was, in our view, wrong and ought to be set aside. The counterclaim, although interwoven with the defence, is a distinct claim and does not merit striking out as was done.

Whilst a judge of the superior court is bound to carefully consider any summary judgment or striking out application he ought to, when specific bona fide triable issues are raised, give unconditional leave to defend. We are unable to say that in the instant case the issues raised were not worthy of consideration at trial.

The upshot of all this is that this appeal is allowed. The judgment and decree of the superior court is set aside, the defence and counterclaim is restored and the appellant is granted unconditional leave to defend the suit and prosecute its counterclaim. The appellant will have costs of this appeal whilst the costs of the application in the superior court will be costs in the cause in the superior court. These are our orders.

Dated and delivered at Nairobi this 11th day of July, 1997.

R. O. KWACH

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JUDGE OF APPEAL

P. K. TUNOI

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JUDGE OF APPEAL

A.B. SHAH

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR