



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO. 151 OF 1995

CORPORATE INSURANCE COMPANY.....APPELLANT

AND

LOISE WANJIRU WACHIRA.....RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Nyeri (Justice Tunoi) dated 28th March, 1995

in

H.C.C.C. NO. 270 OF 1991)

JUDGMENT OF THE COURT

Geoffrey Wachira Mahinda was the original plaintiff (the plaintiff) in this case. After his death during the pendency of the suit in the superior court, he was substituted by his wife Loise Wanjiru Wachira (the respondent) as his legal representative.

The Plaintiff was the owner of a motor vehicle registration No. KVF 090 (the vehicle) in respect of which there was a comprehensive insurance policy issued by Corporate Insurance Company Ltd (the appellant) on 25th January 1986. Under this policy, the appellant agreed to indemnify the plaintiff against loss of or damage to the vehicle and injury to third parties. On 25th December, 1987, the plaintiff instructed his son to take the vehicle to a garage at Kiawara, in Nyeri, owned by Julius Ndegwa Gathuku, so that the exhaust which was said to be leaking, could be repaired. Gathuku assigned his apprentice welder, one Wilson Kinyua, to carry out the necessary repairs. Without the knowledge, consent or authority of Gathuku, and apparently against his express instructions barring Kinyua from driving customers' vehicles, Kinyua took the vehicle out of the workshop on a road test and crashed into an electric power pylon causing extensive damage to the vehicle. He did not hold a driving licence. Kinyua was charged and convicted of careless driving and driving a motor vehicle without a driving licence. The plaintiff submitted a claim to be indemnified for the loss and damage arising from the accident but this was rejected by the appellant which disclaimed liability.

Notwithstanding the fact that the insurance policy contained a clause stipulating that all disputes arising had to be referred to arbitration, and before any such reference was made, the plaintiff filed a suit against the appellant claiming damages for alleged breach of contract. The reliefs sought in the plaint included a sum of Shs.124,938/- made up of Shs.64,938/- (being repair charges) and Shs.60,000/- in respect of loss of user at the rate of Shs.1000/- per day. There was also a claim for general damages.

The appellant entered appearance and also filed a defence denying liability on the grounds:-

- (a) That at the time of the accident the vehicle was being driven by an unauthorised driver in breach of the policy;
- (b) that the suit was premature and incompetent because of a clause in a policy referring all disputes to arbitration before going to court; and
- (c) that the appellant had repudiated the claim.

This defence was filed on 22nd April, 1988. At the commencement of the trial on

12th August, 1992, counsel for the appellant raised a preliminary objection and asked for the suit to be struck out on the ground that it had been prematurely brought without the dispute first being referred to arbitration as stipulated by Clause 10 of the policy. The Judge overruled the objection because he found as a fact that the appellant had not complied with the mandatory provisions of section 6 of the Arbitration Act (Cap 49). The appellant after filing an appearance delivered a defence and made no application for stay. The Judge gave judgment for the plaintiff for Shs.124,938/- because he held that although Kinyua was not an authorised driver within the meaning of Section 1 of the policy, in the circumstances in which the accident happened, the claim fell under Section IV of the policy where damage occurs while the motor vehicle is in the custody of a motor trader for the purposes of being repaired.

The Judge did not stop there. He went further and awarded the plaintiff a sum of Shs.1,080,000/- in general damages which he referred to as direct consequential loss which had resulted from the appellant's failure to expedite payment of the repair charges within a reasonable period. This amount was arrived at on the basis that because of the delay in settling the claim, the plaintiff's suit-making business, from which he made Shs.12,000/- per day, grounded to a halt for 90 days for lack of transport. Evidence was given that the plaintiff used to sell six suits day at Shs.2000/- a piece and that he needed transport to make deliveries to his customers.

The memorandum of appeal contains 14 grounds of appeal but looking at them closely the appellant's complaints relate to:

- (1) The sum of shs.1,080,000/- awarded as general damages for loss of business.
- (2) Shs.60,000/- for loss of user for 60 days and Shs.64,938/- in respect of repair charges.
- (3) The Judge's rejection of the appellant's defence based on the arbitration clause.

We deal first with the complaint relating to the arbitration clause. Clause 10 of the policy provided that all differences were to be referred to arbitration and that the making of an award was to be a condition precedent to any right of action against the company. As we have already said, the appellant filed its defence on 22nd April 1988, the same day that it also entered an appearance. The appellant made no application for stay of proceedings but when the case came up for hearing on 12th August 1992, more than four years later, the appellant's Advocate raised the arbitration issue in the form of a preliminary objection which the Judge overruled.

Section 6(1)(a) of the Arbitration Act (Cap 49) (the Act) provides that -

"6(1) If a party to an arbitration agreement or a person claiming through or under him, commences any legal proceedings in any court against any other party to the agreement, or against a person claiming through or under him, in respect of a matter agreed to be referred-

- (a) any party to those proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings;"

In the present case the appellant did more than just enter an appearance. It delivered a defence, which is of course a pleading, raising clause 10 of the policy as a defence. The appellant made no

application for stay of proceedings. The appellant was a party to an arbitration agreement within the meaning of section 6 of the Act but Mr. Muthoga's submission before us was that because of the nature of the clause, the appellant was not bound to apply for a stay of proceedings but could raise it as a defence to the claim. Arbitration clauses such as clause 10 in the policy are known as "Scott v Avery" arbitration clauses named after a leading case decided by the House of Lords in England way back in 1856 in which their efficacy was considered and have long been accepted as valid. These clauses do more than provide that disputes shall be referred to arbitration. They also stipulate that the award of an arbitration is to be a condition precedent to the enforcement of any rights under the contract; so that a party has no cause of action in respect of a claim falling within the clause, unless and until a favourable award has been obtained.

While we agree with the proposition that a Scott v Avery arbitration clause can provide a defence to a claim, we cannot accept the submission that the party relying on it can circumvent the statutory requirement to apply for a stay of proceedings. In the present case, if the appellant wished to take the benefit of the clause, it was obliged to apply for a stay after entering appearance and before delivering any pleading. By filing a defence the appellant lost its right to rely on the clause.

The procedure in England in relation to these clauses is summarised at page 165 in The Law and Practice of Commercial Arbitration in England by Mustill and Boyd (2nd Ed.) as follows:

"A Scott v Avery clause performs two different functions. Firstly, it creates an obligation to arbitrate: and as such, it gives the defendant in a High Court action the right for a stay of the proceedings. Second, it creates a condition precedent to the plaintiff's right of action; and as such, it gives the defendant a substantive defence to the claim. A defendant sued in breach of a Scott v Avery provision thus has a choice of remedies. In law, he is entitled to bide his time and rely on the Scott v Avery point at the trial. But the court does not approve of this procedure, because it wastes the costs of the action. The right course is for him to apply for a stay."(underling ours).

That is what the appellant should have done and that is what this Court said should be done in the case of Kenindia Assurance Company Ltd v Patrick Muturi (Civl Appeal No. 87/93)(Unreported). In our view, therefore, the Judge was right to reject the appellant's preliminary objection. This ground of appeal accordingly fails.

We now deal with the awards made in respect of repair charges and loss of user. The award of shs.60,000/- for loss of user was quite plainly erroneous as there was no provision in the policy for this kind of loss and secondly, because the appellant was not the tort-feasor or the employer of the person who actually caused the damage to the plaintiff's vehicle. If the plaintiff had sued the owner of the garage he would have been entitled to an amount for loss of user. Insurance claims arising from damage or loss are of such a nature that they take quite a bit of time to investigate and to attempt to impose time limit within which they must be settled would not only be unreasonable, but would also impose an intolerable burden on insurance companies. This ground of appeal accordingly succeeds and we set aside the award of Shs.60,000/- made in respect of loss of user.

We now consider the sum of Shs.64,938/- in respect of repair charges. To determine the propriety or otherwise of this award we have to interpret the relevant clauses in the policy.

Clause 1 in Section 1 of the policy provides:

"(1) The company will indemnify the insured against loss of or damage to the motor vehicle and its accessories and spare parts whilst thereon.

The liability of the company shall not exceed the value of the parts lost or damage and the reasonable cost of fitting such parts it being understood that the company's liability shall be limited to the reasonable market value of the motor vehicle at the time of the loss or damage but not exceeding the insured's estimate of value stated in the Schedule."

Exceptions to Section 1 provide, inter alia, that the company shall not be liable to pay for consequential loss. Under General Exceptions it is provided that the company shall not be liable in respect of any accident loss damage or liability caused sustained or incurred whilst on the insured's order or with his permission or to his knowledge any motor vehicle in respect of which indemnity is provided by the policy is being driven by any person other than an authorised driver or is for the purpose of being driven by him in the charge of such person. Authorised driver is defined as the insured or any person driving on his order or with his permission and is a holder of a valid driving licence.

As the accident occurred while the motor vehicle was in the custody of a motor trader, the appellant's liability for the repair charges has to be determined under Section IV of the policy which so far as material states:

"Notwithstanding General Exception 1(b) the indemnity provided by this policy shall be operative but only so far as it relates to the insured whilst the motor vehicle is in the custody or control of a member of the motor trade for the purpose of overhaul upkeep or repair."

General Exception 1(b) provides that the Company shall not be liable in respect of any accident, loss, damage or liability caused or incurred, whilst on the insured's order or with his permission or to his knowledge the motor vehicle, is being driven by any person other than the authorised driver. Although the motor vehicle was in the custody and control of a motor trader for the purpose of repair, the appellant cannot be held liable because Kinyua was not an authorised driver. Julius Ndegwa Gathuku (the motor trader) who was the employer of Kinyua and who would have been responsible for his actions disowned him. He was called as a witness by the plaintiff and he gave evidence in support of the plaintiff's claim against the appellant. Ndegwa testified that Kinyua was not authorised to drive customers' motor vehicles but Kinyua's evidence was that he was driving the motor vehicle on test after repairs. In the final analysis, since Kinyua was not an authorised driver, that risk was not covered by the policy. Accordingly, we allow this ground of appeal and set aside the award made by the Judge in respect of repair charges.

The award of Shs.1,080,000/-, general damages, for loss of business cannot stand for two reasons. First, it is compensation for consequential loss which is expressly excluded under the terms of the policy. Secondly, the claim is in fact one for special damages and it was neither pleaded nor strictly proved as required by law.

For all these reasons, we would allow this appeal, set aside the judgment and decree of the High Court and substitute therefor an order dismissing the plaintiff's suit with no order as to costs. In view of the fact that the original plaintiff is now dead, we make no order for costs in the appeal as well.

Dated and delivery at Nairobi this 5th day of January 1996.

J.E. GICHERU

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JUDGE OF APPEAL

R.O. KWACH

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JUDGE OF APPEAL

A.B. SHAH

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JUDGE OF APPEAL