REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 281 OF 1974

DAVID G MBUGUA .....PLAINTIFF

VERSUS

PHOENIX OF AFRICA ASSURANCE CO LTD.....DEFENDANT

JUDGMENT

The plaintiff's claim is for an agreed sum under the insurance policy of his vehicle. It was issued to him by the defendant insurance company of Nairobi.

Under private car policy 201161 the plaintiff's car was duly insured for an estimated value of Shs 12,000. It was agreed that at the time of the issue of the policy the value of the vehicle was Shs 8,000 (less the excess amount payable by the plaintiff in the event of an accident or loss). Since the amount of the claim has now been agreed and limited to Shs 6,577, I need not go into the question of the pre-accident value of the vehicle at the time of the alleged theft.

The plaintiff alleged that his vehicle was stolen from his house on 8th May 1973. He testified that he reported the theft to the police and to the insurance company. He subsequently received information that his car had been recovered and was at the Central Police Station. He saw it there and, later, the vehicle was removed to Hughes (in the industrial area) where the estimated costs of repairs was assessed. The cost of repairs was found by the insurance company to be uneconomical in view of the state of the vehicle. The insurance company refused to meet the cost of repairs or to pay the plaintiff the pre-theft value of the vehicle on the ground that the damages attributable to the theft were far below what the plaintiff had stated. In effect, the insurance company's stand was that major damage to the vehicle had occurred before the theft of the vehicle and that the insurance company was not prepared to assume the responsibility for the pre-theft damage.

The plaintiff on the other hand maintained that his vehicle was all along in good and roadworthy condition and that the damage which had rendered his vehicle beyond economical repair was attributable to the theft or was consequent upon the theft of the vehicle. The insurance company maintained that the vehicle had not been stolen and that the plaintiff wished to take advantage of an alleged theft in order to obtain something for his dilapidated and (almost) valueless vehicle.

On the balance of probabilities and from the evidence available I am bound to hold that the plaintiff's vehicle was stolen from his residence on 8th May 1973 and that he next saw it at the Central Police Station on or about 17th May 1973. The insurance company's suspicion (based on the ground that the plaintiff was indifferent when he was informed of the recovery of his vehicle) will not do. The only issue for determination is whether or not the plaintiff's vehicle was stolen in a roadworthy condition within the conditions of the policy of insurance so as to fix the insurance company with liability to indemnify the plaintiff to the extent of the agreed sum.

According to the assessors' reports, the plaintiff's vehicle was in an unroadworthy condition prior to the alleged theft in that the tyres were (or tyre was) smooth. On this ground the insurance company repudiated liability under the terms of the policy. In addition to this, the assessors' report revealed that the vehicle had been involved in an extensive accident and that crude repairs had been carried out before the alleged theft; the estimated cost of rectifying the previous crude repairs and damage was not acceptable by the insurance company because they occurred before the alleged theft. There was a long list of defects which had occurred before the alleged theft.

From the three assessors' reports (which I accept) the vehicle must have had an accident before the alleged theft and unsatisfactory repairs had been carried out. There were minor items which might have occurred after the theft of the vehicle. The cost of these fell below the excess fixed under the terms of the policy to be met by the plaintiff in the event of accident or theft.

In my view the estimate of repairs report by Hughes Ltd was not a mechanical or expert report aimed at determining what defects occurred before the theft and which occurred after the theft. The Hughes report was an estimate for the cost of repairs which were necessary at the time of the estimate. In my opinion, the Hughes report does not show whether the defects occurred before or after the theft. Consequently the Hughes report is not very helpful. It does not even show who prepared it, nor what his qualification or experience was. No evidence was called to support the Hughes report; nor was a witness called who could be cross-examined as to his experience in these matters. I prefer the three assessors' reports which I am bound to accept as expert evidence, as corroborated by the evidence of Mr Jessey Sherwin (one of the three assessors) whom I found to be truthful and convincing. The result is that, on the evaluation of all the evidence before me and on the balance of probabilities, most of the defects found on the plaintiff's vehicle were pre-theft defects. The few defects which might have occurred after the theft would have cost less than the excess which the plaintiff was responsible to meet under the terms of the policy of insurance. In these circumstances the insurance company rightly repudiated liability for these pre-theft defects.

Now I turn to the question of the insurance company's repudiation of the insurance policy on discovering that the plaintiff's vehicle was in an unroadworthy condition at the time of the accident. It relied on condition 3 of the policy which provides:

> The insured shall take all reasonable steps to safeguard the motor vehicle from loss or damage and to maintain the motor vehicle in efficient condition and the company shall have at all times free and full access to examine the motor vehicle or any part thereof or any driver or employee of the insured. In the event of any accident or breakdown the motor vehicle shall not be left unattended without proper precautions being taken to prevent further loss or damage and if the motor vehicle be driven before the necessary repairs are effected any extension of the damage or any further damage to the motor vehicle shall be excluded from the scope of the indemnity granted by this policy.

Under this condition there is a limitation of the indemnity to exclude any extension of damage or further damage after any loss or accident. It is logical that any damage which occurred before the loss or accident is similarly excluded. However, at the time of the theft, the policy was in force. There had been no inspection by the insurance company to justify the cancellation of the policy. I am urged on behalf of the insurance company to hold that the company had the power to treat the policy as cancelled after the incident of theft had occurred. The ground for this was stated to be that the plaintiff did not keep the vehicle in a roadworthy condition because the tyres were smooth. There was no evidence to suggest that the plaintiff did not take reasonable steps to safeguard the vehicle from theft. There was no evidence either to suggest that the cause of the theft was because the vehicle was in an unroadworthy condition. The phrase used in the above condition was "efficient condition". I am prepared to accept that this phrase is synonymous with the phrases "roadworthy condition" or "serviceable condition".

From the assessor's reports I am prepared to accept that, at the time of the assessment, the vehicle was found to be "dangerous to its occupants" and to "other road users" and therefore unroadworthy. However, this was at the time of the inspection although the reports are emphatic that the pretheft defects were in the majority. These pre-theft defects taken together with the fact that the tyres were smooth reduced the

plaintiff's vehicle to "hack level and unroadworthy". I was not impressed by the plaintiff when he gave evidence . He tended to exaggerate when he testified that his vehicle was in immaculate condition at the time of the accident. In any event he was not an expert witness.

I may mention one more point in conclusion and without necessarily making a decision on the point. It appears to me a generalisation that the insurance company could cancel the insurance policy which was effective at the time of the accident on the ground that it was subsequently discovered that the vehicle was not in an efficient condition at the time of the accident if the cause of the accident or loss was completely unconnected or attributable to such accident or loss. I would have thought that cancellation would only arise where the cause of the accident or loss was directly connected with or attributable to the condition of the vehicle if the insurance company were to be entitled to repudiate liability to pay an indemnity under the terms and conditions of the policy; see *Conn v Westminister Motor Insurance Association Ltd* (1966) Lloyd's Rep 407 in which Willmer, Davies and Salmon LJJ held:

> that "efficient condition", in context of clause, meant in "in roadworthy condition"; A (2) that brakes were effective and their state could only be ascertained by dismantling them; that defendants had failed to show that plaintiff had failed to take all reasonable steps to maintain brakes in efficient condition; and that on that point, defendants' appeal failed; B (3) that, unlike brakes, defects in tyres were visible for anyone to see; C (4) that Court was not concerned with question whether any breach of condition 5 caused accident but only with whether there was a breach of condition 5; D (5) that case had to be decided on evidence before the Court and the evidence that police had not charged plaintiff in respect of tyres carried little weight; E (6) that there was no justification for plaintiff's waiting for the overhaul before renewing tyres; F (7) that having regard to deplorable state of two front tyres plaintiff had failed to maintain taxi in an efficient condition; G and that, therefore defendants' appeal succeeded.
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> Per Salmon, LJ (at p 414): .... I do not like conditions precedent in policies of insurance which enable insurers to escape liability for a breach which has absolutely nothing to do with the loss or damage in respect of which the assured seeks to be indemnified. If one thing is plain in this case it is that whatever did cause this accident, it had nothing to do with the dangerous and inefficient condition of the tyres. But I am far from criticizing the insurers, on the particular facts of this case for having relied on condition 5 …

The result is that the plaintiff has failed to prove his case on the required basis of a balance of probabilities and, accordingly, his claim must be dismissed with costs.

Action dismissed with costs.

Dated and delivered at Nairobi this 19th day of March 1979.

M.G Muli

JUDGE