Kenya Orient Insurance Limited v Mwangi Kimwele (Civil Appeal E112 of 2022) [2024] KECA 231 (KLR) (8 March 2024) (Judgment)

Neutral citation: [2024] KECA 231 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E112 OF 2022

AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA

MARCH 8, 2024

BETWEEN

KENYA ORIENT INSURANCE LIMITED ..... APPELLANT

AND

MWANGI KIMWELE ..... RESPONDENT

(Being an appeal from the Judgment and Decree of the High Court of Kenya at Mombasa (Olga Sewe, J.) delivered on 5th August 2022 in H.C.C.A No. 130 of 2019)

JUDGMENT

1. The appellant, Kenya Orient Insurance Limited, issued a comprehensive motor insurance cover to the respondent, Mwangi Kimwele, for motor vehicle Registration No. KVR 789V (the motor vehicle) under Motor Commercial Insurance Policy No. MBS/0807/005860/2014. The cover was valid for a period of one year commencing 19th March 2014 to 18thMarch 2015 on express terms and conditions therein specified.

2. The General Cartage Policy Schedule expressly stated the insured value of the motor vehicle as Ksh. 3,000,000 and, in consideration of the cover, the respondent paid the requisite premium of Kshs. 182,859.

3. The risks for which the motor vehicle was insured included, inter alia, third party fire and theft, loss or damage caused directly by fire, self-ignition, lightning, explosion, theft or attempted theft, loss or damage to the vehicle or its accessories and spare parts while in or on the vehicle, recovery and removal.

4. On 3rd September 2014, the respondent's motor vehicle aforesaid was involved in a road traffic accident along Mombasa/Nairobi Highway and damaged beyond repair and, consequently, written off.

5. When the respondent claimed compensation under the policy, the appellant denied liability allegedly on the grounds that the motor vehicle was used to carry "... passengers or loads in excess of the

assessment by the licencing authority," and in breach of the Carrying Capacity and Seating Capacity clause.

6. Following the appellant's disclaimer, the respondent instituted proceedings against the appellant vide a plaint dated 16th May 2017 and filed in the Chief Magistrates' Court at Mombasa in CMCC No. 1450 of 2017 seeking replacement of the motor vehicle; costs of the suit; and any other reliefs that the court deemed fit and just to grant.

7. In its defence, the appellant denied liability. Though admitting the occurrence of the accident, it denied that the motor vehicle was damaged beyond repair. It also alleged that the respondent was in breach of the terms of the policy of insurance, which provided that it shall not be liable "... in respect of any accident, loss, damage or liability caused, sustained or incurred whilst the motor vehicle is being used

to carry passengers and/or loads in excess of the assessment by licencing authorities".

8. In its judgment dated 24th June 2019, the Chief Magistrate's Court (C. N. Ndegwa, SPM) found that the respondent had proved his case on a balance of probability and entered judgment against the appellant for Kshs. 3,000,000, being the sum assured, costs of the suit and interest thereon at court rates from the date of filing suit.

9. Dissatisfied with the trial court's decision, the appellant preferred an appeal to the High Court of Kenya at Mombasa in HCCA No. 130 of 2019 faulting the learned Magistrate for failing to hold that the respondent had failed to plead the special damages claimed specifically and with particularity, and also failed to strictly prove them; holding that clause TP004 and Q00012 created uncertainty on the amount payable as the issue was neither pleaded nor raised in the parties' submissions; failing to hold that the respondent's claim was a special damage claim which needed to be strictly pleaded and proved; and for failing to hold that the

respondent had failed to discharge the burden of proving the market value of the motor vehicle, and had not strictly proved the extent of damages (if any) to which he was entitled.

10. The only issue raised for determination in the appeal was whether the respondent had proved on the required balance that he was entitled to the sum of Kshs.3,000,000 being the value of the motor vehicle. In its judgment dated 5th August 2022, the High Court (Olga Sewe, J.) found no merit in the appellant's appeal and dismissed it with costs to the respondent.

11. This is a second appeal in respect of which our mandate is limited. On the Court's jurisdiction of a second appeal, this Court had this to say in the case of Charles Kipkoech Leting vs. Express (K) Ltd & another [2018] eKLR:

> "Our mandate is as has been enunciated in a long line of cases decided by the Court. See Maina versus Mugiria [1983] KLR 78, Kenya Breweries Ltd versus Godfrey Odongo, Civil Appeal No. 127 of 2007, and Stanley N. Muriithi & Another versus Bernard Munene Ithiga [2016] eKLR, for the holdings inter alia that, on a second appeal, the Court confines itself to matters of law only, unless it is shown that the Courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. See also the English case of Martin versus Glywed Distributors Ltd (t/a MBS Fastenings) 1983 ICR 511 where in, it was held inter alia that, where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court (s) and resist the temptation to treat findings of fact and law, and, it should not interfere with the decisions of the trial or first appellate

court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law."

12. Having carefully examined the record as put to us, the grounds of appeal, the submissions and the law, we find that only one point of law falls to be determined in the appeal, namely: whether the respondent's claim for special damages in the trial court in the sum of Kshs. 3,000,000, being the insured value of the subject motor vehicle was specifically pleaded and strictly proved. The other grounds of appeal relate to matters of evidence on which we need not pronounce ourselves.

13. In support of the appeal, learned counsel for the appellant, M/s. Jengo Associates, filed written submissions dated 13th March 2023 citing 9 authorities, including Antique Auctions Limited vs. Pan Africa Auctions Limited [1993] eKLR; Robert Okeri Ombeka vs. Central Bank of Kenya [2015] eKLR; Attorney General vs. Zinj Limited (Petition 1 of2020) [2021] KESC 23 (KLR) (Civ) (3 December 2021)(Judgment); Kenya Industries Estate Limited vs. Lee Enterprise Limited [2009] eKLR; and Janmohamed (Suing as the executrix of the estate of Daniel Toroitich Arap Moi) & 2 Others vs. Chelungui & Another (Suing as the administrators of the estate of the late Noah Kipngeny Chelungui) & 6 Others (Civil Appeal 159 and 254 of 2019

(Consolidated) (2022) KECA 720 (KLR), submitting, inter alia, that "... special damages must be pleaded with as much particularity as circumstances permit and, in this connection, it is not enough to simply aver in the plaint as was done in this case that the particulars of special damages were to be supplied at the time of trial."

14. In addition to the foregoing, counsel cited the case of Janmohamed vs. Chelungui and Another (supra) for the proposition that

> "... in granting special damages for deprivation of property, a trial court is guided by a valuation report and that, in the absence of a contrary report on record, the court has no basis upon which to deny the award."
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> Opposing the appeal, learned counsel for the respondent, M/s. M. K. Mulei & Company, filed undated written submissions and list of authorities citing Civil Appeal No. 40 of 2016 – Charles Kipkoech Leting vs. Express (K)Limited & Another (Unreported), submitting that "... there was no contract rewritten. The sum of KShs. 3,000,000 is stated clearly in the policy document as the insured sum, which is what the respondent prayed for, proved and was awarded."

15. Pronouncing herself on the issue in contention, the learned Judge observed:

> "The terms of the subject Policy were dictated by the appellant; and therefore having covenanted to replace the insured motor vehicle in the event of total loss, or in the alternative pay the insured sum, it cannot be permitted to wriggle out of that relationship
>
> by simply arguing that the sum assured ought to have been specifically mentioned in the respondent's pleadings.
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> In the premises, I find no merit in the appeal. The same is hereby dismissed with costs."

16. With regard to special damages, the law is well settled that they must be pleaded and proved before they can be awarded. Suffice it to quote from the decision of this Court in Hahn vs. Singh [1985] eKLR where it was held thus:

> " ...special damages must not only be claimed specifically (pleaded) but also strictly proved for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves."

17. On the authority of the afore-cited decisions, The immutable rule at common law is that, in a claim for special damages, the amount claim must be pleaded with particularity and strictly proved. The rule serves to enable the defendant ascertain the nature and extent of the claim raised against him or her. Such a claim must be supported

by evidence in proof of the actual loss suffered. In effect,

special damages are unlike general damages, which are discretionary albeit proportionate to the extent of injury or damage suffered in consequence of the breach complained of.

18. In Peter Ndegwa Kiai t/a Pema Wines & Spirits vs. Attorney

General & 2 others (Civil Appeal 243 of 2017) [2021] KECA

328 (KLR) (17 December 2021) (Judgment), this Court

observed that special damages are awarded for losses that

are not presumed but have been specifically proved and that

can be quantified, such as out-of-pocket expenses or

earnings lost during the period between the injury and the

hearing of the action. The attendant common law rules of

proof are also applicable, in the absence of specific rules that

regulate awards of compensation in constitutional petitions.

It is trite under common law in this regard that special

Damages must be specifically pleaded and proven.

19. This Court is guided by the reasons why special damages must be pleading and proved as set out in D.B. Casson and I.H. Dennis, Odgers Principals of Pleading and Practice in Civil Actions in the High Court of Justice at pp.170-1 where the learned author observed that "... special damage ... is such a loss as the law will not presume to be the consequence of the defendant's act, but which depends in part, at least, on the special circumstances of the case. It must therefore always be explicitly claimed on the pleadings, and at the trial it must be proved by evidence both that the loss was incurred and that it was the direct result of the defendant's conduct. A mere expectation or apprehension of loss is not sufficient. And no damages can be recovered for a loss actually sustained, unless it is either the natural or probable consequences of the defendant's act, or such a consequence as he in fact contemplated or could reasonably have foreseen when he so acted. All other damage is held remote."

20. Likewise, in the English case of Perestrello e Companhia Ltda vs. United Paint Co. Ltd [1969] 3 All E.R. 479, Lord

Donovan observed at pp.485-6:

> "... if a plaintiff has suffered damage of a kind which is not the necessary and immediate consequence of the wrongful act, he must warn the defendant in the pleadings that the compensation claimed will extend to this damage, thus showing the defendant the case he has to meet and assisting him in computing a payment into court. The limits of this requirement are not dictated by any preconceived notions of what is general or special damage but by the circumstances of the particular case. "The question to be decided does not depend upon words, but is one of substance" (per Bowen L.J., in Ratcliffe v. Evans ([1892] 2 Q.B.
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> 524 at 529)). The same principle gives rise to a plaintiff's undoubted obligation to plead and particularize any item of damage which represents out-of-pocket expenses, or loss of earnings, incurred prior to the trial, and which is capable of substantially exact calculation. Such damage is commonly referred to as . . . "special" in the sense that fairness to the defendant requires that it be pleaded. The obligation to particularize in this latter case arises not because the nature of the loss is necessarily unusual, but because a plaintiff who has the advantage of being able to base his claim upon a precise calculation must give the defendant access to the facts which make such calculation possible."

21. We take to mind the fact that the respondent's claim against the appellant was clearly set out in paragraphs 3 and

5 of the plaint, which made calculation of the specific amount claimed possible. The two paragraphs read:

> "3. On the 3rd day of September 2014, the plaintiff's motor vehicle registration number KBR 789V was involved in an accident along the old Mombasa - Nairobi road at Kyulu area and as a result the vehicle was damaged beyond repair and thereby written off. Some of the passengers in the said motor vehicle were fatally injured.
>
> 4. ... ...
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> 5. The plaintiff has requested for compensation and/or replacement of his motor vehicle as per the policy but the defendant has refused to replace the motor vehicle or pay to the plaintiff the value of the said motor vehicle"

22. Our reading of the plaint shows that the respondent had sued the appellant for "... compensation and/or replacement of his motor vehicle as per the policy" on the grounds that it had "... refused to replace the motor vehicle or pay to the plaintiff the value of the said motor vehicle". According to the policy, the value of the motor vehicle had been agreed at KShs. 3,000,000 on account of which he paid the premium set and demanded by the appellant. We find nothing to suggest that the value claimed was unknown to the appellant, which admitted that the motor vehicle was damaged beyond repair. In the same vein, submission by counsel for the appellant that the contested value ought to have been confirmed by production of a valuation report of an independent assessor does not hold. To our mind, if the appellant had wished to have such valuation undertaken, nothing would have been as easy as making a request to that end. To disclaim liability right at the onset, and to turn around in resistance to the claim and contend that the value was unascertained in the face of the amount expressly stated in the policy, is tantamount to attempted denial of the express terms as to the insured risk, and as contracted in consideration for the premium charged. As the old adage goes, you cannot have your cake and eat it.

23. Having carefully considered the record as put to us, the pleadings in the trial court, the impugned judgment on the first appeal, the rival submissions of learned counsel and the law, we find nothing to fault the learned Judge and reach the conclusion that the appellant's appeal fails. Accordingly, we hereby order and direct that:

    a. the appeal be and is hereby dismissed;

    b. the judgment of the High Court of Kenya at Mombasa (Olga Sewe, J.) delivered on 5th August 2022 in HCCA No. 130 of 2019 be and is hereby upheld; and

    c. that the costs of this appeal be borne by the appellant

DATED AND DELIVERED AT MOMBASA THIS 8TH DAY OF MARCH, 2024

A. K. MURGOR

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**JUDGE OF APPEAL

DR. K. I. LAIBUTA**

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR