Kenindia Assurance Company Ltd v Wangungu (Civil Appeal 155 of 2017) [2021] KECA 10 (KLR) (23 September 2021) (Judgment)

Neutral citation: [2021] KECA 10 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPEAL 155 OF 2017

RN NAMBUYE, MSA MAKHANDIA & S OLE KANTAI, JJA

SEPTEMBER 23, 2021

BETWEEN

KENINDIA ASSURANCE COMPANY LTD ..... APPELLANT

AND

JOSEPHAT WAITHAKA WANGUNGU ..... RESPONDENT

(An appeal from the judgment and decree of the High Court of Kenya at Nakuru (Mshila. A, J) dated 10th July 2015) in Nakuru HCCC No. 6 of 2012)

JUDGMENT

1. The background to this appeal is a dispute between the respondent and the appellant which resulted in the respondent suing the appellant in its capacity as his insurer. It was the respondent's claim through a plaint dated 18th January, 2012 that he was the registered owner of motor-vehicle registration number KAV 679V Mitsubishi Fuso. The vehicle was involved in a road traffic accident along Kisii-Migori road on the 22nd May, 2010. The respondent had taken out a comprehensive motor vehicle insurance cover with the appellant, to run from 4th July, 2009 to 3rd July, 2010. He contended that soon after the accident the vehicle was towed from Kisii to a Nakuru Warehouse garage by the appellant for purposes of repair in terms of the insurance cover. The appellant however failed to repair the said vehicle nor compensate him pursuant to the terms of the insurance cover. That the appellant's action had caused him financial ruin and embarrassment as he was unable to service his loan from the Co-operative bank which he obtained to purchase the vehicle. He used the monthly earnings of Kshs 400,000/=from the vehicle business to service the loan. He therefore prayed for a sum of Ksh. 3,940,000.00/= being the value of the vehicle; loss of user from the 22nd May, 2010, to the date of the judgment, costs and interest.

2. The appellant denied the allegations through its defence averring that the vehicle was delivered to Automobile Warehouse (NKU) Ltd and not Nakuru Warehouse for purposes of repair, that it had not

refused to repair the vehicle and that the respondent was not entitled to any compensation once the vehicle had been repaired by it.

3. The suit proceeded to plenary hearing. The respondent testified that he was a businessman in the transport industry. He had bought the vehicle in 2010 and it was valued at Ksh. 3,940,000.00/= for purposes of insurance by the appellant. He was thereafter issued with an insurance policy after paying a sum of Ksh. 220,000/= as the annual premium. The vehicle had been involved in an accident on 22nd May, 2010. Under the terms of the insurance cover the appellant had an obligation to repair the same or compensate him but it failed to do so. The vehicle used to earn him Ksh.400,000/= per month and that he had been unable to repay his loan with the Co-operative Bank of Kenya. In the penultimate the respondent asked the court to grant him the prayers sought in the plaint.

4. The appellant through its learned counsel Mr. Mahida, preferred not to tender any evidence in rebuttal. In other words, the appellant closed its case without calling evidence in support of its defence. The court after considering the claim, the defence, the submissions by both parties and the law held that the respondent had established that pursuant to the insurance policy, the appellant was liable to compensate him for the loss and damage of the vehicle, since it had failed to repair the same. Accordingly, the trial court entered judgment in favour of the respondent as follows:

> "a) Judgment is entered in favour of the plaintiff against the defendant for a sum of ksh.3,940,000.00/=.
>
> b) The claim for loss of user is disallowed.
>
> c) Interest is awarded for the sum under(a) at court rates from the date of filing suit.
>
> d) The costs are awarded to the respondent"

5. Aggrieved by the decision of the trial court the appellant filed this appeal on grounds which in summary are that; the learned judge erred in not addressing herself to clauses 3 and 10 of the insurance policy; awarding the respondent a sum that was excessive in nature yet the subject vehicle had depreciated in value; delivering judgment in the respondent's favour yet he had no cause of action against it; that the sum awarded as compensation were special damages which had not been specifically pleaded nor strictly proved; that the court lacked jurisdiction to try the suit in regard to clause 10 of the insurance policy and that the evidence tendered did not discharge the burden of proof to the required standard. The appellant in the ultimate asked us to allow the appeal by reversing and setting aside the trial court's judgment and decree.

6. The appeal was canvassed by way of written submissions. On the hearing of the appeal Mr. Mwenda, learned counsel appeared for the appellant whereas Mr. Njoroge, learned counsel appeared for the respondent. The appellant in its submissions maintained that its liability should have been limited to the local market value of the vehicle as at the time of the loss which in this case was the date of the accident. The insurance cover was for indemnity purposes and it was liable to restore the vehicle back to its working condition or to pay the local market value and not necessarily the sum insured of Ksh. 3,940,000.00/=. The vehicle had depreciated in value having been in use for the last 10 months. In support of this proposition we were referred to the case of *Joseph Macharia Nderitu v. Real Insurance Company Ltd [2014] eKLR* in which the depreciation value of the subject matter was factored in when determining the amount of compensation.

7. On whether the suit should have been referred to arbitration, it was urged that the proceedings were pegged on an insurance policy entered into by both parties and it was the duty of the court to give effect

to the intention of the policy. Clause 10 of the policy required an aggrieved party to refer any dispute arising with regard to the cover to arbitration. That the respondent had not led any evidence to show that he had referred the dispute to arbitration as specified in the policy. In support of this argument we were referred to the case of *Jiwaji & Others v. Jiwaji & Another* , where the Court of Appeal held that,

> "The courts will not of course make contracts for the parties but they are to give effect to their clear intention.". The Supreme court in *Dhanjal Investments Limited v Kenindia Assurance Company Limited* , stated that:-
>
> "Arbitration proceedings, like judicial proceedings are sacrosanct and must be treated with decorum. The act of ignoring the arbitration process or even responding to correspondence not only by the Respondent but also by a respectable firm of advocates on record for the respondent was totally unwarranted. As slothful and irregular one may perceive a process to be, respect to legal processes should remain sacrosanct. We were indeed not persuaded by the reasons given as to why the Respondent did not participate in the arbitration process even if for the limited purpose of objecting to the jurisdiction of the arbitrator. This could have saved precious judicial time and facilitated expeditious resolution of the dispute one way or the other."

8. Accordingly, the respondent ought, to have invoked clause 10 of the insurance cover and referred the dispute to arbitration. Having failed to do so the suit in the trial court was incompetent and ought therefore to have been struck out.

9. It was further submitted that the award by the trial court was excessive considering the vehicle was being used for transport business and it had depreciated in value. The court had erred when it made an award equivalent to the sum insured as opposed to the market value prior to the time of the accident. It was further submitted that the court erred in relying on an ineffective plaint, which did not disclose any cause of action against the appellant. The plaint was simply a narration of statements of facts and that the claim did not disclose which sections of the policy the appellant had breached.

10. In addition to the above the appellant submitted that the respondent had prayed for judgment against it for a sum of Ksh. 3,940,000.00/= being the pre-insurance value of the vehicle, he should therefore have submitted a pre-accident assessment value of the vehicle. The value of the vehicle at the time of the accident could not have been the same as at the time of taking out the insurance cover. The respondent had therefore failed to discharge the burden of proof as required by Section 107 of the *Evidence Act.* We were called upon to rely on the case of *John Richard Okuku Oloo v. South Nyanza Sugar Co.Ltd [2013] eKLR* where it was held that special damages must first be pleaded and then strictly proved.

11. It was further submitted that the court erred when it shifted the burden of proof to the appellant when it stated that it had failed to call for further and better particulars and that it had also failed to call any evidence. The fact that the respondent's evidence was not challenged did not imply that the court could not scrutinize such evidence. In support of this proposition we were referred to the case of *Kenya Power & Lightning Company Limited v. Nathan Karanja Gachoka & Another*, where the court stated as:

> "I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court should not take it truthful without interrogation for the reason only that it is uncontroverted. A Plaintiff must prove its case too upon a balance of probability whether the evidence is unchallenged or not."

12. Lastly we were called upon to find that the respondent had failed to prove the allegations laid against the appellant and therefore the appeal should be allowed by reversing or setting aside the judgment and decree of the high court and that the respondent be condemned to pay costs.

13. In opposing the appeal, the respondent submitted that he was the lawful owner of the vehicle and had taken out a comprehensive cover policy with the appellant. During the pendency of the cover, the vehicle was involved in an accident on 22nd May 2010 along Kisii-Migori road. He reported the accident and as a result the appellant undertook to repair the same in terms of the cover but failed to do so which prompted him to file the suit. He had as a result suffered loss of monthly income of ksh. 400,000/=. His plaint had raised a cause of action known in law contrary to the appellant's submissions. He further denied the appellant's claim that once the vehicle was repaired then he could not seek compensation. That the appellant never demonstrated to the trial court the steps it had taken to have the vehicle repaired. We were referred to the case of *Mwangi v. Mwangi [1984] KLR 348* for the proposition that an appellate court will not normally interfere with a finding of fact by the trial court unless such findings are based on no evidence or on a misapprehension of the evidence or where the court has clearly failed to take into consideration some material point or alternatively misapplied to those facts and thereby arrived at a wrong conclusion on the matter which no tribunal properly directing its mind to the issue could have arrived at such a conclusion. That the evidence tendered in the trial court proved to the required standard that the averments he had made against the appellant. Therefore, the trial court was right in basing its judgment on the said evidence.

14. We were further urged to find that the appellant had not during the trial sought to establish the value of the vehicle in proof of the fact that it had depreciated in value, neither did it challenge the production of the valuation report by the respondent.

15. Further the appellant's argument was that the matter ought to have been referred to arbitration was neither here or there! The dispute could only be referred to arbitration if there was a difference arising out of any amount payable due to any loss or damage. That his claim was anchored on the appellant's failure to undertake repairs of his vehicle as it was required of it in terms of the cover as it had been more than 11 months since the vehicle was towed by the appellant for purposes of repair and which repairs the appellant had failed and or neglected to carry out, as at the time of the hearing of the suit the vehicle had yet to be repaired. Lastly we were urged to find that the appeal lacked merit and consequently dismiss it with costs to the respondent.

16. We have considered the record of appeal, the submissions by both parties and the authorities relied on and the law. In our view the issues that arise for our determination are:

    a) Whether the dispute should have been referred to arbitration as per the cover.

    b) Whether the sum of ksh.3.940.000.00/= was a special damage claim

    c) Whether the respondent proved his case on a balance of probability

However, we note that this is a first appeal, that being the case, our mandate is to re-assess and re-evaluate the evidence tendered in the trial court and draw our own conclusion. See the cases of *Mercy Kirito Mugeti v. Beatrice Nkatha Nyaga & 2 others*, and *Selle and Another v. Associated Motor Boat Co.Ltd & Others* .

17. The respondent entered into an insurance policy cover with the appellant. The Commercial Vehicle Insurance Policy was prepared by the appellant. The policy indicates that during the period of the cover it was subject to the terms, exceptions and conditions contained therein. Further the document

indicates that the appellant would indemnify the respondent against any loss or damage to the motor-vehicle, its accessories and spare parts, or to any accidental collision. Clause 2 specifically provides that:

> "At its own option the company may pay in cash the amount of the loss or damage or may repair reinstate or replace the motor vehicle or any part thereof or its accessories or spare parts. The liability of the company shall not exceed the value of the parts lost or damaged and the reasonable cost of fitting such parts. The insured's estimate of value stated in the schedule shall be the maximum amount payable by the company in respect of any claim for loss or damage."

18. The contract between the parties was a contract of indemnity. The cover provided security from any damage or loss that would arise. It is not that it ensures that no damage or loss shall occur, rather it is an agreement by an insurer to make good a loss, to pay compensation for the loss or injury which may occur within the terms of this agreement. Therefore, this means that if the insured fulfills his undertaking under the contract, in case of a loss against which the policy has been made, the insured is fully indemnified. Of relevance to this appeal is the requirement that the insured's estimate of the value stated in the schedule shall be the maximum amount payable by the company in respect of any for loss or damage.

19. It is not in dispute in view of the above clause that the respondent was entitled to indemnity from the appellant following the damage to his vehicle and the loss he had sustained as a result. The appellant in its defence did acknowledge that the respondent's vehicle had been delivered by it to Automobile Warehouse (NKU) Ltd for purposes of repair after the accident. However as at the date of the filing and subsequent hearing of the suit the appellant had yet to effect repairs to the said vehicle. It is therefore apparent that the appellant breached the terms of the cover it had entered into with the respondent. Since the appellant had not indicated when it would undertake the repairs 11 months down the line, we think that the respondent was entitled to file suit to enforce his rights.

20. The appellant submitted that the respondent should have in terms of clause 10 of the cover referred the dispute to arbitration instead of filing suit. We were urged to find that the duty of the court was to give effect to the intention of the parties in the policy document. The appellant in its defence did not plead arbitration as a requirement for both parties to embrace. Neither did the appellant raise a preliminary objection on the same. The appellant had an opportunity to cross-examine the respondent on the 5th November, 2014 by its advocate Mr. Winleys who was present for hearing on that day but did not especially on this issue of arbitration. The appellant relied on the supreme court decision in Dhajal Investments Limited v. Kenindia Assurance Company Limited [2018] eKLR, whose circumstances were different from the present case; for in that suit the dispute was referred to arbitration and the respondent chose not to participate unlike in the current appeal where there was no arbitration process initiated at all by either party.

21. Further, both parties did not bring to the court's attention the arbitration clause. The appellant remained silent on that question. The appellant is blaming the respondent for failing to subject the dispute to an arbitration process. However, this is a duty imposed on both parties and counsel on record for the appellant could have raised it but did not. Indeed, had the appellant intended to invoke the arbitration clause, it had the option of applying for stay of the suit pending arbitration which option it never took up.

22. Further clause 10 in this courts interpretation appears to give parties options either to move to court or proceed to the arbitration, the same reads as follows:

> "It is hereby agreed by and between the parties that any dispute or claims arising out of under or in connection with this policy if referable to arbitration will be referred to arbitration only as the place of issue of the policy and if triable by a court of law shall be tried and determined by a court having jurisdiction over the place where this policy has been issued and according to the laws."

23. Unlike what the appellant urged that the respondent was to first embrace arbitration, this clause as already stated gave the parties an option to either move the court or go for arbitration, the word "if" in the clause has been used to differentiate the options. The appellant's argument that the court and or the respondent failed to invoke this clause in its determination has no merit and must therefore be rejected.

24. The foregoing notwithstanding, the appellant submitted that by virtue of Clause 10, the court lacked jurisdiction to hear and determine the dispute. In the case of Motor Vessel "*Lillian S" v. Caltex Oil (Kenya Ltd*, Nyarangi J.A. (as he was then) had this to say:-

> "Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

25. Had the clause been brought to the attention of the court, which was not and it had been in mandatory terms that the claim could only be heard before an arbitrator then the court could have rightly downed its tool. However, this was not the case and therefore the court had jurisdiction to hear and determine the claim as filed by the respondent given the wording of the clause that we have already adverted to.

26. The appellant also submitted that the sum awarded by the court was in the nature of special damage which was not specifically pleaded or strictly proved.

    The sum of ksh.3.940.000/= was specifically pleaded at paragraph 9 of the plaint as compensation for the vehicle which had not been repaired by the appellant as required. In *Hahn v. Sighn* this Court stated: -

> "Special damages must not only be claimed but must also be strictly proved for they are not the direct natural or probable consequences of the act complained of and may not be inferred from the act. The degree of certainty and particular of proof required depends on the circumstances and nature of the act themselves."

27. A special damage claim as stated above is one that is not a direct natural consequence of the act complained of. In this case, the respondent sued the appellant to compensate him for his vehicle which was still in the garage for repair and at the time of hearing of the case in the trial court in 2015, it was yet to be repaired. The consequence of the appellant's failure to repair his vehicle was to indemnify the respondent. This was not therefore a special damage claim as alleged by the appellant but indemnity. That amount was in any event the insured's estimate of the value stated in the schedule in terms of the clause 2. And even if the claim was one of special damages, we are satisfied from the record that the same was specifically pleaded and strictly proved. In addition, the appellant had a general duty to make good the loss under the policy by payment of the sum insured. The respondent was entitled to recover the amount due under the policy as the insurable interest was a sum of ksh.3.940.000/= as shown in the policy schedule.

28. The appellant submitted that the respondent had no cause of action known in law against it and therefore the trial court should not have found in favour of the respondent as against it. This court in *DT Dobie & Co. (K) Ltd Joseph Mbaria Muchina & Another* defined a cause of action to mean,

> "An action with some chance of success when allegations in the plaint only are considered. A cause of action will not be considered reasonable if it does not state such facts as to support the claim prayer."

29. In the plaint, the respondent gave a description of the appellant and their relationship. He went further and stated that the vehicle which had been insured by the appellant had been involved in an accident. That the appellant had failed in its obligations towards him under the cover. The suit therefore sought to enforce those obligations. In our view the above narrative established the fault of the appellant thereby raising a cause of action known in law against the appellant.

30. The respondent sued the appellant and it was his burden to prove the existence of the facts pleaded in the plaint in terms of section 107 of the Evidence Act. The respondent testified that the vehicle was involved in an accident on the 22nd May, 2010 and tendered in evidence a police abstract in support thereof. The respondent also pleaded for compensation to the tune of Ksh. 3,940,000.00/= on account of the insurance cover he had taken out with the appellant. The respondent indeed produced a valuation report by The Automobile Association of Kenya dated 2nd October, 2009 in support of the claim. The policy which was tendered in evidence showed that it was to run from the 4th July, 2009 to 3rd July, 2010. The accident occurred when the policy was still in place. The exhibit further shows that the value of the vehicle had been reduced to ksh.3.940.000.00/=. The policy indicated that the appellant would compensate the respondent for any loss, and having proved his case, the appellant was liable. Clearly therefore the respondent proved his case against the appellant as required contrary to the submissions by the appellant.

31. The appellant in the alternative argued that its liability was limited to the local market value of the vehicle immediately before the loss or the value shown in the policy schedule whichever is the less. The appellant's own document produced in evidence shows that the value of the vehicle had been reduced to ksh.3.940.000/= at the time of taking out the policy. This was the only amount proved by the respondent. The appellant did not challenge the amount in cross-examination neither did it avail any other valuation report. In the absence of this, the respondent's evidence stood unchallenged or uncontroverted and the trial court was justified in acting on it. The appellant did not expect the trial court to pluck a figure from the air as the amount of compensation due to the respondent. Since the appellant did not offer any evidence in rebuttal how was the trial court expected to know that the appellant's liability was limited to local market value at the time of the accident?

32. The appellant claims that the trial court shifted the burden of prove to it during the trial. Going by the record before us nothing can be far from the truth. To our mind the fact that the trial court commented in its judgment that the appellant had not called any evidence in rebuttal to the respondent's claim correctly so in our view as borne out by the record does not amount to shifting the burden of prove.

33. In conclusion, we find that the trial court did not err whatsoever in its judgment. Accordingly, this appeal is dismissed in its entirety with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF SEPTEMBER, 2021

R. N. NAMBUYE

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR