IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, SICHALE & KANTAI, JJ.A.)

CIVIL APPEAL NO. 302 OF 2017

BETWEEN

OCCIDENTAL INSURANCE COMPANY LIMITED.....APPELLANT

AND

CRYSTAL MOTORS (K) LIMITED.....RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya

***at Nairobi (Tuiyott, J.) dated 19th April, 2017* in H.C.C.C. No. 91 of 2017)**

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JUDGMENT OF THE COURT

This is a first appeal from the judgment and orders of the High Court (Tuiyott, J.) delivered on 19th April, 2017 in **H.C.C.C. No. 91 of 2007**. It is our duty as a first appellate court to review the record as provided by **Rule 29** of the rules of this **Court** and come to our own conclusions. See the oft-cited case of **Selle v Associated Boat Company Limited [1968] EA 123** where at page 126 the duty of the court was stated to be:

> ***"An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."***

We shall revisit the record and retrace the evidence to enable us carry out that duty to reconsider the evidence and evaluate it ourselves but be mindful that we did not hear or see the witnesses, an advantage that the trial judge enjoys. We are entitled to depart from findings of the trial judge if they are based on no evidence or findings are made on account of failure to take into account particular circumstances, but because we have not seen or heard the witnesses, we must give allowance for that.

In an amended plaint filed at that court on 15th April, 2008 the respondent **Crystal Motors (K) Limited** sued the appellant, **Occidental Insurance Company Limited** for a sum of money being **Shs.6,139,194** for what was said to be on account of repairs done to various motor vehicles at the appellant's request between the period March 2001 to March 2003.

The appellant delivered a defence, counterclaim and set off. The respondent's claim was denied and it was said that the suit was incompetent and vexatious to the appellant because, according to the appellant, the suit was an abuse of the court process as the respondent was aware that it was the one that owed the appellant sums of money out of their business relations and the suit should be dismissed with costs. It was also said that the suit did not have particulars of the claim and in the counterclaim and set off, the appellant introduced a 2nd defendant, Kingsgate Insurance Brokers Limited. This 2nd defendant was to be represented by the appellants advocates and it was stated in the defence, counterclaim and set off that the appellant would apply under the then **Order VIII Rule 7 and 8** of the **Civil Procedure Rules** for issuance of summons to the said Kingsgate Insurance Brokers Limited as the 2nd defendant and further that the appellant would apply for consolidation of the suit with another suit at Nairobi H.C.CC. No. 20 of 2003 for purposes of execution in which the appellant (Occidental Insurance Company Limited) held a decree for a sum of Shs.22,767,634 which it had obtained on 19th March, 2004 against Kingsgate Insurance Brokers Limited which the appellant stated to be a **"sister company"** of the respondent. Further, and by way of counterclaim and set off the appellant stated that it had written to the respondent demanding a sum of Shs.4,528,384 on account

3 of repairs done to various motor vehicles at the respondent's request; that the respondent had responded asking for particulars of repairs and proof of premium payments and policy excess payments and how the same were paid. The appellant further stated that it had notified the respondent that the vehicles most of which had been on insurance cover through the said Kingsgate Insurance Brokers Limited had an outstanding and unremitted premiums of Shs.22,767,634 which sum was to be set off against any legitimate repair claims. Further, at paragraphs 12, 13, 14 and 15 of the defence, counter-claim and set-off it was pleaded as follows:

> ***"12. During the said period, Kingsgate Insurance Brokers Limited whose Directors were common with Crystal Motors (K) Limited entered an arrangement with Occidental Insurance Company in which Kingsgate was conducting Insurance Brokerage for Occidental, collecting premiums and remitting the same less their Commissions and in turn any accident repair business would be given to Crystal Motors who had to ensure that for every damage claim, full premiums had been paid, excess on the damage claim paid and then they would be paid their repair charges.***
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> ***13. The Broker (Kingsgate) noticed that they had not remitted Premiums together with financed policies in the sum of Kshs.22,769.634/= and their Garage (Crystal) had repair claims totalling Kshs.4,528,384/= as at October 2002, where upon they stopped pursuing the claim.***
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> ***14. On 16/01/03, the Defendant (Occidental) filed Suit against the 2nd defendant (Kingsgate) in H.C.C.C. 20/03 for recovery of Kshs.22,767,634. Appearance and defence was entered by the plaintiff's advocates on record and the defendant applied for Summary Judgment but shortly before entry of Judgment herein on 19/03/04, the Advocates withdrew from the Suit and the said 2nd defendant (Kingsgate) closed its offices and continued operating under Crystal Motors (K) Limited (the plaintiff herein) in a bid to evade paying this claim and Decree.***
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> ***15. The two companies – Crystal and Kingsgate are Sister Companies and are one and the same outfit and the defendant shall apply that any legititmate outstanding claim for repair of vehicles be set off from the unremitted Premiums which form the Decree in HCCC 20/03 and the Defendant (Occidental) be granted liberty to execute for the balance thereof together with interest todate with costs…."***

It was therefore prayed by the appellant that the respondent's suit be consolidated with said H.C.C.C. No. 20 of 2003 and the **"unsupported claims"** be dismissed with costs, any legitimate claims if proved be set-off from the decree in H.C.C.C. No. 20 of 2003 and the appellant be granted leave to execute for the balances due against both the respondent and the company called Kingsgate Insurance Brokers Limited jointly and severally.

The respondent filed a reply to defence, counterclaim and set off where the matters there were denied.

The defence was filed before the amended plaint and no further defence was filed but we will not address to that issue because it is not an issue in this appeal.

We have seen on record the decree in H.C.C.C. No. 20 of 2003 in a suit between the appellant herein and Kingsgate Insurance Brokers Limited where judgment was entered for the appellant in the sum of Shs.22,767,634. There is also an amended chamber summons filed on behalf of the appellant dated 16th July, 2008 whose essence was that principal officers of Kingsgate Insurance Brokers Limited be orally examined on the accounts and assets of the company. There is no record on the fate of that application.

There is no record of an application being made for joinder of the company called Kingsgate Insurance Brokers Limited and there is also no application for taking out third party proceedings by the appellant in the suit before the trial court.

When the suit came up for hearing **Eric Mwenda Kanyuuru,** the Managing Director of the respondent in his testimony relied on a witness statement which he had filed as part of the evidence. He also produced various documents as part of the evidence. He testified that the claim set out in the plaint was due and had not been settled even after demand had been made. Further, that his company had continued to transanct business with the appellant and that the industry practice was that the insurance company would authorize repairs of damaged motor vehicles either directly or through its appointed assessors. Shown various documents in cross examination he testified that the appellant had given instructions for repairs to be underaken and that those instructions were either by telephone, email or by ordinary mail. He also identified various release letters issued by the appellant after successful repairs of motor vehicles for which his company had not been paid. Further, that he and one **Esther Wachu** and **Rita Waithaka** had purchased the respondent company in the year 2004 as a going concern and he denied any association with a company called Kingsgate Insurance Brokers Limited. He admitted that some invoices contained overstated amounts and he conceded that overstated amounts should be deducted from the claim. He concluded by denying the counter claim stating that it was not related to the respondent's claim at all.

Esther Kagure Wachira was the next witness called by the respondent and she stated that she had been the director of the respondent company until the year 2002 when she sold her shares to one Eric Mwenda. In cross examination she testified that the appellant refused to settle invoices for work done claiming that there was a relationship between the respondent company and the company called Kingsgate Insurance Brokers Limited. She testified further that once the garage (respondent) received a vehicle for repair it would notify the appellant and the appellant would send an assessor who would assess damage and authorize repairs on behalf of the appellant (insurance company).

On behalf of the appellant **Richard K. Mwombo** the **Assistant Claims Manager** was called. He adopted his witness statement and bundle of documents as part of the evidence. He testified that once an accident had been reported to the appellant an independent assessor would be sent to the garage where the vehicle was; that the assessor would write a report to the appellant and the appellant would authorize repairs after checking whether premium had been paid; also excess on premium and that an authority letter would be issued before repairs were commenced. He denied that any authority had been given for the claims forming the suit that was before the court. According to him authority had been given by officers of the company called Kingsgate Insurance Brokers Limited with whom they had a dispute. Shown authority letters produced in the case which were on the appellant's letterhead the witness identified those letters but denied that the signature was his. According to him:

"The defendant refused/declined to pay because authority was not given – the underlying issue was premiums. Crystal colluded with Kingsgate to have vehicles repaired."

On his assertion that the directors of the company called Kingsgate Insurance Brokers Limited had committed a fraud on the appellant it was his evidence that no report had been made to the police.

That was the case made out before the judge who in the said judgment gave credit to the appellant for a sum it had paid but found in favour of the respondent for a sum of Shs.5,692,156. Those were findings that provoked this appeal.

There are 8 grounds taken in the Memorandum of Appeal drawn by the appellant's lawyers **Messrs T.O. K'Opere & Company Advocates**. It is stated that the judge erred in fact and law by ignoring primary pleadings and evidence before court forming the basis of the claim to the effect that the claim by the respondent against the appellant arose on account of repairs to various motor vehicles when according to the appellant the evidence by the respondent was that there had been no express request or authority to undertake those repairs. It is stated that the judge erred by ignoring discrepancies in invoices which made the claim doubtful and fraudulent and not proved as required in law. Further, that the judge was wrong to ignore evidence that instructions to repair were given to the respondent by a third party without express authority from the appellant. It is stated that the judge erred in not finding that the authority to repair motor vehicles by a garage must be given by the Insurance Company but not its agent. It is also said that there was collusion betwen various parties to the prejudice of the appellant which the judge was wrong not to find and, finally, that the judge erred in law and fact by entering judgment for the respondent against the weight of evidence. We are therefore asked to allow the appeal, to set aside the judgment and find that there is nothing to set off by the appellant in respect of the decree in H.C.C.C. No. 20 of 2003 which remains unexecuted.

When the appeal came up for hearing before us **Mr. T.O. K'Opere,** learned counsel appeared for the appellant while **Miss J.M. Chege**, learned counsel appeared for the respondent. Both counsel had filed written submissions which we have perused. In a highlight Mr. K'Opere submitted that there were no written authorization from the appellant to the respondent to repair motor vehicles which is why claims were not settled. According to counsel, instructions to repair were given by a third party which party had no authority from the apepllant to give instructions. Further, that invoices had discrepancies leading to the conclusion that the claims were doubtful. He referred to a notice of grounds for affirming decision filed on behalf of the respondent stating that the claim referred to was for a specific motor vehicle. According to counsel, all undisputed claims had been met and for all that we should allow the appeal.

In opposing the appeal it was Miss Chege's submission that there was an arragement between the appellant and the respondent on how authority would be given and when and how repairs were to be carried out on motor vehicles involved in accidents. According to her there was evidence by witnesses that authority was even given verbally. Further, that there was no evidence of unpaid premiums and according to her the counterclaim had been introduced into the matter unprocedurally. On the set off it was counsel's submission that the judge had reduced the claim on sums found to have been paid.

In a brief rejoinder Mr. K'Opere wondered why the judge had allowed a sum for set off but not disallowed the whole claim.

We have considered the whole record and the submissions made.

Having done that this is what we think of this appeal.

The respondent made a specific claim for money in the amended plaint. It called witnesses who testified on a contractual relationship between the appellant and the respondent where the respondent would on behalf of the appellant repair motor vehicles damaged in accidents. The trial judge considered the matter before him and considered the statement made by the witness called by the appellant to the effect that the reason why the appellant was unwilling to meet the respondent's claim was because a company called Kingsgate owed the appellant money on which the appellant held a decree. The judge perused pleadings in H.C.C.C. No. 20 of 2003 and found that the appellant had sued for unpaid premiums and a refund of finance premiums against the company called Kingsgate.

We have referred to various paragraphs of what was called counterclaim and set off. The appellant took as part of its defence, counterclaim and set off that it had notified the respondent that most of the vehicles repaired had been on insurance cover through the company called Kingsgate Insurance Company Brokers Limited which had not remitted premiums to the appellant in the sum of Shs.22,767,634. It also took as part of its defence that Kingsgate and Crystal Limited were what it called sister companies and that Kingsgate Insurance Brokers Limited collected insurance premiums on behalf of the appellant which it had not remitted.

Going through the defence, counterclaim and set off and considering the evidence before the judge there was ample evidence that the respondent had carried out repairs of motor vehicles that were insured by the appellant. The appellant or its witness did not specifically deny that the sum claimed by the respondent was owing. The counterclaim and set off amounted to an admission that the sum was owed but there was introduction of a different party (Kingsgate Insurance Brokers Limited) introduced into the suit by the appellant as a second defendant to the suit filed by the respondent. The respondent and the said Kingsgate Insurance Brokers Limited we note are both corporate entities. The appellant introduced the company called Kingsgate to the suit for the reasons that it called it a sister company of the respondent. No evidence was placed before the judge to show any relationship between the respondent and that other company. Although it was stated in the witness statement of the appellant's witness Richard K. Mwombo dated 15th June, 2012 filed in court that:

> ***"That the defendant will request is (sic) Honourable Court to lift the veil of both Plaintiff Company and Kingsgate Insurance Broker Limited to ascertain the real Director of the two (2) Companies and shielding themselves behind the veil of legal personalities of the said Company to perpetuate evasion to pay debts ...."***

We have not seen any application presented before the trial court to lift the corporate veil against either that company called Kingsgate Insurance Brokers Limited or the respondent company. The application that was presented before the court in H.C.C.C. No. 20 of 2003 for principal officers of the Kingsgate Insurance Brokers Limited to be examined on the assets of that company does not appear to have been

pursued. Without any evidence of any relationship between the respondent and Kingsgate Insurance Brokers Limited the judge was right in finding that the appellant owed the sum claimed by the respondent as sufficient proof was produced on a balance of probabilities. In the old oft-cited company law case of **Salomon v Salomon & Company Limited (1895-9) ALL ER 33**, the corporate legal entity of a company was recognized as separate and distinct from its members. A company which has complied with requirements relating to the incorporation of companies in the Companies Act is a legal entity separate and disticnt from the individual members of the company.

The respondent was a legal corporate entity as was the company Kingsgate Insurance Brokers Limited. There was evidence that the appellant gave instructions to the respondent to repair motor vehicles in a relationship where formal instructions could have been given by letter, email, telephone or verbal instructions. The judge considered the documentation presented, the evidence given and gave a credit for a sum he found to be in favour of the appellant. The respondent was entitled to judgment for the sum awarded by the judge. This appeal has no merit and it is dismissed with costs to the respondent.

Dated and Delivered at Nairobi This 8th Day of November, 2019.

M.K. KOOME

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JUDGE OF APPEAL

F. SICHALE

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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.

DEPUTY REGISTRAR