IN THE COURT OF APPEAL

AT MALINDI

(CORAM: VISRAM, KARANJA & KOOME, JJ.A)

CIVIL APPEAL NO. 74 OF 2016

BETWEEN

INVESCO ASSURANCE CO. LTD....................................APPELLANT

AND

GRANATA ERNESTO *(suing as*

ATTORNEY OF DENISE GRANATA*)*...........................RESPONDENT

(Being an appeal against the Judgment and Decree of the High Court of Kenya at Malindi (Chitembwe, J.) dated and delivered on 9th July, 2015

in

H.C.C.C. No. 145 of 2012)

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JUDGMENT OF THE COURT

[1] As a holder of a special power of attorney donated to him on 31st January, 2011 by one Denise Granata *(the donor)*, the respondent instituted an insurance claim in the High Court at Malindi against Invesco Assurance Co. Ltd (appellant). According to the claim, the donor had taken out an insurance cover worth Kshs.9,000,000 in respect of her house on Plot No. 794/4 Angels Bay Mambrui against fire perils and burglary; another cover for electrical items at Kshs.3,000,000 as well as an occupiers' liability cover of Kshs.1,000,000, all were issued by the appellant vide a joint cover note dated 23rd December, 2010. The insurance cover was to run for 365 days at an annual premium of Kshs.72,500 which the donor duly paid.

[2] The bone of contention that gave rise to the present appeal was that on 27th October, 2011, while the premises were still under the said cover, a fire erupted and consumed the entire buildings on site as well as the donor's motor vehicle, make Mercedes Benz. Upon reporting the matter to the appellant, an assessment was done by the appellant's agent on the basis of which the appellant undertook to compensate the donor with Kshs.2,794,144 as total compensation for the entire loss. Feeling that the appellant was grossly understating the compensation payable, the respondent rejected that offer, claiming that the rightful amount of compensation payable under the cover was Kshs.13,000,000 not the paltry Kshs.2,794,144 the appellant was offering. It was on account of this impasse that the respondent moved court as aforesaid.

[3] In its amended statement of defence, the appellant admitted that an insurance cover was availed to the respondent, but denied that the motor vehicle was covered under the policy, adding that on the whole, the respondent had the duty of exercising utmost good faith at all times and if at all a fraudulent claim was made, the policy would be rendered voidable. It was the appellant's assertion that the respondent's claim was exaggerated and fraudulent, and that the description of the building insured was at variance with what was on the ground. To begin with, the land on which the insured property sits is comprised of a different acreage from the land which was indicated in the claim form. In addition, under the policy, the building insured was described as having been constructed using coral blocks with makuti roofing and concrete ceiling; yet the building claimed to have been razed in the fire was a coral rendered house beneath a traditional *makuti* roof on timber trusses.

[4] Further, that the insured building was a single storey dwelling and not the double storey structure whose compensation the respondent sought. The appellant added that upon the fire setting in, the respondent unilaterally proceeded to repair the house without the benefit of the appellant's loss adjuster's report, thereby impacting on the sum insured. With regard to the electronic items, the appellant contended that the respondent was disentitled to her claim under this head as well, as she failed to provide a schedule of the respective electronic items together

with their serial numbers; which was a fundamental requisite under the policy. In conclusion, the appellant denied that the sum recoverable under the policy was 13,000,000 as claimed by the respondent and instead argued that even if the appellant were to be found liable under the policy, the sum recoverable for the buildings is Kshs.2,294,114 and Kshs.500,000 for the motor vehicle.

[5] By way of a brief rejoinder, the respondent in her reply to defence denied all allegations of fraud, adding that her unilateral decision to renovate the premises was necessitated by the appellant's laxity in dealing with the matter. Moreover, she claimed that the premises were a going concern commercially and she stood to suffer loss of income if the same were allowed to cave in due to the leaking roof.

[6] Upon hearing the oral testimony tendered by the parties' respective witnesses as well as the documentary evidence tabled in that regard, judgment on the matter was delivered on 9th July, 2015; by **Meoli J.,** who found and held that there was no material discrepancy in the description of the property. She however agreed with the appellant's assertion that the respondent had misrepresented the number of storeys the building had. That notwithstanding, she found the appellant had failed to prove that the misrepresentation had induced them to offer and enter into a contract. With regard to the contention by the appellant that the respondent had also misrepresented the type of roofing materials used, the learned Judge also found this an unmerited complaint which she termed an afterthought, as there existed proof that the appellant was aware of this fact at the time of contract. The Judge also dismissed the claim that the property was undervalued. With regard to the claim for compensation for the electronic items and the motor vehicle, the same were dismissed for want of proof of liability. On the whole therefore, the learned Judge held the appellant was liable for the respondent's damaged house and awarded the respondent a sum of Kshs.4,648,024.72 together with costs and interest.

[7] Dissatisfied with that verdict, the appellant has lodged the instant appeal, contending that the learned Judge erred by; failing to consider that the property indicated in the proposal form was not the same as the one on the ground; considering only one valuation report instead of the two reports placed before her; failing to find that the respondent had breached her duty of utmost good faith by undervaluing the property; placing more weight on the respondent's submissions while ignoring those of the appellant; considering extraneous matters; failing to hold that there was material non-disclosure by the respondent which rendered the contract voidable and; generally failing to consider and apply the principles of insurance law.

[8] At the plenary hearing of this appeal, both **Mr. Njenga** learned counsel for the appellant and **Mr. Obaga** who held brief for **Mr. Lughanje** for the respondent, adopted their written submissions which had earlier on been filed with leave of court. For the appellant, it was submitted that the principle of utmost good faith or *uberrimae fidei* is the cornerstone of an insurance relationship and that both parties are always under a duty to be open and to make full disclosure during negotiation. By extension, therefore, any fraud or misrepresentation automatically calls for the repudiation of the contract at the instance of the injured party.

[9] In this case, the appellant's counsel submitted that, the respondent had misrepresented herself in the proposal form; by describing the building as a non-storey house with a concrete roof and *makuti* decorations. This description it was contended, in turn led the appellant to under assess the value of the house at Kshs.9,000,000. The appellant added that this was a stark contrast to what was prevailing on the ground; because as it later emerged, the actual risk assessment of the house was actually Kshs.27,000,000. Citing the decisions in ***Steel Rolling Mills Company Ltd & Another v. Pine Top Insurance Company Limited [1994] All ER 581*** and ***Sita Steel Rolling Mills v. Jubilee Insurance Co. Ltd (2007) eKLR,*** the appellant submitted that it was entitled to avoid the contract *ab initio* and the respondent's claim should have been disallowed on this ground.

[10] Opposing the appeal, the respondent submitted there was no discrepancy in the description of the land or the building; that the respondent owned only one parcel of land, which was described as Plot No. 798 Mambrui (Orig. No. 794/4). Elaborating further, the respondent indicated that Plot no. 794/4 is the mother plot from which plot no. 798 was hived off and as such, no discrepancy existed between the land under the policy and the one stated in the claim form. The respondent refuted the allegation that extraneous matters were considered or that the learned Judge turned a blind eye to some of the assessment reports. To the contrary, it was submitted that the Judge referred to both assessment reports before coming to her conclusion and that she cannot be faulted for failing to consider the appellant's submissions for none were filed.

[11] With regard to the description of the roofing, the respondent maintained that in the proposal form, she indicated the building as having a concrete ceiling and *makuti* decoration in its roofing and as such, that detail was not new to the appellant. Consequently, the assertion that the respondent withheld that information is misleading. As to whether the building was a single or double storey building, the respondent echoed the findings by the learned trial Judge that the mis-description did not render the contract voidable. In conclusion, we were urged to dismiss the appeal with costs.

[12] This being a first appeal, the responsibility of this Court is to reanalyze and reevaluate the evidence on record afresh and reach its own conclusions bearing in mind however, that it neither saw nor heard the witnesses testify (see. ***Selle v Associated Motor Boat Co. [1968] EA 123***). In ***Kiruga v Kiruga & Another [1988] KLR 348***, where this Court observed that:-

> "***An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the Judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but this is a jurisdiction which should be exercised with caution***."

[13] That said, from the grounds of appeal and the submissions, the record of appeal we discern two issues for determination in this appeal to wit;

> ***a) Whether there was material mis-description and/or non-disclosure by the respondent regarding the land and the building and the effect thereof and;***

b) Whether the learned Judge failed to consider evidence and/or submissions placed before her.

On the first issue, the appellant contended that the discrepancies in the way the property was described entitled it to repudiate the contract. They argued that the insured building sat on a different parcel than what was on the ground. The record however shows the property that is described in the lease document as Plot No. 798 (Original 794/4). This is the same property alluded to in the provisional cover note and the accompanying schedule which describe the respondent's residence as Plot No. 794/4 Angel's Bay Mambrui. Furthermore the two reports prepared by Messrs Universal Adjusters (K) Ltd and Messrs Safety Surveyors Ltd dated 18th November, 2011 and 18th October, 2012 respectively describe the same premises as Plot No 794/4, Angels Bay Malindi. We find there was no material discrepancy that was shown in evidence to prove the parcel of land where the fire occurred was different from the parcel described under the policy. This allegation was rightly dismissed by the trial Judge.

[14] The other issue raised by the appellant was in regard to the house design; the contention here being that the respondent withheld the fact that *makuti* roofing was used and that the house was double storey structure. According to the appellant, these factors would have had an impact on the insured sum. Consequently, that their misrepresentation meant that the respondent failed in her duty to act in good faith, thereby causing the underwriter to under assess the value of the premises as well as the risk involved. Indeed, the respondent did not indicate the number of storeys the building had. That much, is not disputed. The impact of this shall be revisited shortly. As to the roofing materials used however, the appellant seems to have been made aware that *makuti* was part of the roofing. This is borne out by provisional cover note which details part of the interest insured as being;

> ***"Section A- On a building constructed of coral blocks with makuti roofing and concrete ceiling Kshs.9,000,000…"*** (Emphasis added).

Just like the learned Judge we are not persuaded that the information that was provided regarding the roofing was inaccurate and dishonest of the appellant to nullify the contract; we find the appellant was all along aware the building insured was made of *makuti* roofing. Similarly, it is not open to the appellant to allege that when pegging the sum insured for the house at Kshs.9,000,000 it was unaware that *makuti* formed part of the roofing. It would seem that the appellant was the sole author of its misfortune if at all an under assessment occurred; for the agreement was based on full disclosure in so far as the *makuti* roofing was concerned.

[15] Going back to the mis-description of the number of storeys the building had, the record shows the respondent filled out a form titled the '**general particulars of the proposer'** dated 1st January, 2011. The form was availed to court as defence exhibit 3. In it, the respondent appears to have been faced with the question; **'How many storeys has the dwelling?**' to which she answered **'none'**. Later, the report done by Messrs Safety Surveyors Ltd, revealed that the damaged building was a double storeyed structure. The appellants contended that this misinformation also caused them to under assess the sum insured, a contention the learned trial Judge dismissed for lacking in credibility.

[16] We have considered the authorities cited by the appellant, whereas the **Sita Steel Rolling Mills** decision *(supra)* is a High Court decision and thus not binding on this Court, we find the **Steel Rolling Mills** *(supra)* most illuminating in this regard. As earlier mentioned, both authorities were heavily relied on by the appellant, although both authorities incidentally seem to favour the respondent's case. According to the **Steel Rolling Mills** case, for an insurer to avoid liability on account of misrepresentation and/or non-disclosure by the insured, two conditions must be satisfied. The insurer must not only prove the misrepresentation and/or non-disclosure was material, but that the same induced him to contract on the terms agreed. The burden of proving both aspects lies with the insurer. In the **Steel Rolling Mills** case, the appellant (Pan Atlantic Insurance Company) relied on the argument that mere material misrepresentation or non-disclosure is sufficient ground to rescind an insurance contract. In dismissing that contention, **Lord Mustill** had this to say:-

> ***"…Furthermore, the argument for Pan Atlantic demands an assumption that the prudent underwriter would have written the risk at the premium actually agreed on the basis of the disclosure which was actually made. Yet this assumption is impossible if the actual underwriter through laziness, incompetence or simple error of judgment has made a bargain which no prudent underwiter*** *(sic)* ***would have made, full disclosure or no full disclosure."***

So strict is this burden therefore, that even a fraudulent misrepresentation cannot by itself be ground for rescission of the contract. The same must be proven to have influenced the insurer to contract to his detriment. In the instant appeal, no evidence was tendered to show that the appellant had been induced by the misrepresentation to enter into contract to its detriment. Consequently, the argument that the appellant was entitled to avoid the contract, is without merit.

[17] Turning to the second issue, the appellant faulted the learned trial Judge for failing to consider its submissions as well as the loss assessment reports that were produced in evidence. On her part, the respondent asserted that no such submissions were ever filed by the appellant. However, from the record, there appears to be submissions duly filed by the appellant on 23rd October, 2014; in which the appellant framed the issues for determination as follows:-

> ***"(a) Is*** *(sic)* ***the agent from Mustard Insurance agency an agent of the Plaintiff or the Defendant at the time of filling in the proposal form on behalf of the Plaintiff?***
>
> ***(b) Is the property on the ground the same as that in the proposal form, claim form?***
>
> ***(c) Is the claim a valid claim under the law?***
>
> ***(d) Has the Plaintiff proved their case on a balance of probabilities?"***

Looking at the judgment, it is clear to us the learned trial Judge properly framed two broad issues for determination which in our view are

germane as per the pleadings, documents filed and the evidence adduced. These were:-

> ***‘Whether or not there is mis-description of the insured property amounting to material non-disclosure as to render the contract avoidable and;***
>
> ***Whether the insured in entitled to the compensation sought’***

[18] In answering these questions, the learned trial Judge analyzed the law on material non-disclosure in insurance contracts and applying it to the facts before her, stated in part as follows:-

> ***“In the issued cover note (Exh 3b, D. Exh. 4), the insurer captured the detail accurately as “makuti roofing and concrete ceiling.” Where is the non-disclosure? The cover note indicates clearly that the insurer was keenly aware of the kind of risk it was underwriting. The present assertion by the insurer that it only discovered later that the roofing was “all makuti atop a concrete ceiling” appears to be an insincere and belated attempt to undo what it had already committed to under the contract. I find no merit in this ground of alleged mis-description and/ or non-disclosure. It has not been borne out.”***

[19] With regard to the misrepresentation of the number of storeys the house had, the Judge found that:-

> ***“Reports by both loss assessors namely Universal Loss Adjustors Kenya and Safety Surveyors Limited clearly describe a double storeyed house.”***

Consequently, the appellant’s contention that its submissions were ignored or that the learned Judge turned a blind eye to the assessors’ reports is without merit. To reiterate what was stated earlier, the legal position is that where an insurer feels that there was material misrepresentation and/or non-disclosure by the insured, the duty is upon the insurer to prove not just the misrepresentation or non-disclosure, but also that the same induced him to enter into the contract to his detriment. Having failed to prove that it was so induced, the appellant remained liable under the contract and this Court has no reason to set aside the judgment of the trial court.

[20] We think we have said enough to demonstrate this appeal lacks merit. We hereby order it dismissed with costs to the respondent.

Dated and delivered at Mombasa this 25th day of January, 2018.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR