IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WARSAME, OUKO & MURGOR, JJ,A)

CIVIL APPEAL NO. 124 OF 2009

BETWEEN

KIMWA HOLDINGS LIMITED.....APPELLANT

AND

OCCIDENTAL INSURANCE COMPANY LIMITED.....RESPONDENT

(Appeal from the judgment and order of the High Court Milimani at Nairobi (Emukule, J.) delivered 30th January 2008

in

Nairobi HCCC No. 1454 of 2000)

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JUDGMENT OF THE COURT

On 18th May 1999, ***the appellant, Kimwa Holdings Limited*** entered into a Hire Purchase agreement with CFC Bank Limited for the purchase of motor vehicle registration number KAL 922M. As security, the appellant provided its motor vehicle registration number KAE 299D which it stated was being utilized for the transportation of goods from Orbit Chemicals Limited in Kenya to Kasese Cobalt Company Limited in Uganda, while KAL 922M was to be utilized for transportation of the appellant's goods.

It was a condition of the hire purchase agreement that the appellant would insure the motor vehicle with a reputable insurer and ***Occidental Insurance Company Limited, the respondent*** agreed to insure the two motor vehicles comprehensively under insurance policy number CON/08/19870/3 in the sum of Kshs. 8,800,000 for KAL 922M and Kshs. 4,000,000 for KAE 299D, respectively.

On 15th January 2000, whilst the policy was in place, armed robbers stole motor vehicle KAL 922M in the Ngara area of Nairobi. The appellant reported the theft to the police and was issued with a police abstract.

The appellant informed the respondent of the loss, who instead repudiated the insurance contract and refused to settle the appellant's claim for reasons that the motor vehicle was being utilized for hire and reward at the time of the theft; an assertion that the appellant contended was without basis. As a consequence the appellant suffered loss and damage, and on account of its inability to pay the loan at CFC Bank, together with interest, the bank sold KAE 229D, for recovery of its money. The appellant then instituted the action from which this appeal has been brought.

The appellant claimed from the respondent:

i) Compensation of the loss of KAL 922M

ii) Payment of Kshs. 8,800,000

iii) The outstanding amount as principal accrued and penalty interest

iv) Damages for breach of contract together with interest at court rates

v) General damages for the loss of KAL 922M at the rate of Kshs. 50,000 per day from 6th April 2000.

In an amended defence, the respondent denied that theft was one of the risks covered by the appellant's insurance policy, and contended that on 19th July 2000, it wrote to the appellant's financiers repudiating liability on the basis that KAL 922M was being utilised for hire and reward at the time of the theft which was not permitted under the insurance policy. More particularly, liability was denied because the appellant had not disclosed the true intended use of KAL 922M for the purposes of the policy; that the appellant had entered into contracts for reward with third parties; that the appellant failed to disclose that KAL 922M was being utilized for hire or reward at the time of theft; that the appellant failed to report the incident immediately after the alleged theft and in the alternative that the appellant failed to notify the respondent of the change of user of the motor vehicles and to negotiate the appropriate policy premium.

In a reply to defence, the appellant denied the existence of a limitation clause in the insurance policy, and stated that it did not mislead or misrepresent itself or withhold information from the respondent.

In the judgment of the High Court, Emukule, J. found that the appellant's motor vehicle was being used in breach of the conditions of the policy of insurance, and therefore the respondent was entitled to repudiate the policy. As a result, the claim for the appellant was found to be without merit and dismissed. The learned judge also concluded that;

> ***"Even though there was no direct evidence (other than the letter of R.K Kombo that the vehicle (KAL 922M was being used for hire and reward at the time of the hijacking and theft, the fact that another vehicle within the vehicles covered by the single policy were (sic) being used for hire and reward constituted a cross – default in respect of all the vehicles covered under the policy of insurance. The breach by the plaintiff admitted the defendant to repudiate liability under the policy."***

The appellant was aggrieved by the decision of the High Court and filed this appeal specifying eight grounds, which were that, the learned judge wrongly found that KAL 922M was being used in breach of conditions of the insurance policy; that it was being used for hire and reward whereas there was no evidence to this effect; that the decision was based on speculation; for wrongly finding that the respondent was not liable to the financier for the principal sum of Kshs. 8,800,000; for finding that the appellant had breached the insurance contract thereby entitling the respondent to repudiate it; for dismissing the appellant's claim against the weight of the evidence; and in finding that the financier's interest in the insurance policy did not constitute a guarantee for the borrower's liability to the financier and result in the insurer becoming liable to the financier under the hire purchase agreement or another financial agreement.

On its part, the respondent filed a notice to affirm the decision on grounds that the appellant's plaint did not disclose the time, year or place that the alleged robbery or theft occurred, that the appellant's evidence revealed material discrepancies and contradictions, and requested that a finding be made on the particulars of the alleged robbery.

Both the appellant and the respondent filed their written submissions which they adopted in their entirety, and when learned counsel for the appellant, ***Mr. D. Maina*** and learned counsel for the respondent ***Mr. G. Ombati*** appeared before us, both counsel requested us to render a decision.

In the appellant's submissions, it was contended that the appeal was based on two main issues which were whether, the learned judge erred in finding that KAL 922M was being used in breach of the insurance policy whereas no evidence was adduced to that effect, and whether the terms of the insurance contract entitled the respondent to repudiate the contract.

Counsel faulted the learned judge for concluding that KAL 922M was being used for hire and reward on the basis of assumptions; that though KAL 922M was insured together with other vehicle in the policy, this did not mean that it was being used for hire and reward; that the learned judge's conclusion was against the weight of the evidence which showed that at the time of the theft the motor vehicle was not being used for hire or reward.

The appellant also submitted that the grounds for affirming the decision were without any bearing as, the time place and date of the theft were not among the main issues for consideration by the trial court, and did not form the basis of this appeal. The appellant relied on the cases of ***Moses Odhiambo vs Apollo Insurance Company, HCCC No. 124 of 2001*** and ***Johnson M. Mburugu vs Fidelity Insurance Company Limited, Civil Appeal No 105 of 2003*** based on similar facts, and where the court held that though the motor vehicle had been previously utilized as a taxi, the claimant was entitled to compensation even though at the time of the accident it was engaged in private use.

The respondent's submissions in response were that on the issue of Limitation of Use, the evidence showed that the appellant utilised KAL 922M for hire and reward, which was contrary to the Limitation as to Use provisions of the policy, and that it had been utilized for transporting beer for Kenya Breweries Limited and the delivery of various goods to Kasese in Uganda.

The respondent also submitted that, the appellant's appeal should be dismissed for reasons that the plaint did not disclose the year when the theft of robbery occurred, rendering the claim incapable of being proved; that there were contradictions between that report made to the Ruai Police Station and the Pangani Police Station; that the inconsistencies in the date and the time of the robbery, and the number of robbers involved led the respondent to conclude that the appellant was intent on misleading the respondent. Finally it was submitted that there was justification for repudiating the insurance contract as the investigations concluded that no theft had occurred, that the appellant's motor vehicle was used for hire and reward, and that the appellant had failed to disclose that the motor vehicle was utilized for commercial purposes not covered under the premium, in which case the premium ought to have been higher.

Since this is a first appeal, the guidelines as set out in ***Kenya Ports Authority vs Kuston (Kenya) Limited (2009) 2 EA 212*** are pertinent. They are that;

> ***"On a first appeal from the High Court, the Court of Appeal shall reconsider the evidence, evaluate it itself and draw its own***

conclusions though it should always bear in mind that it has never seen or heard the witnesses and should make due allowance in that respect. Secondly, that the responsibility of the court is to rule on the evidence on the record and not to introduce extraneous matters not dealt with by the parties in evidence."

We have considered the pleadings, submissions, judgment and relevant law and are of the view that the issues for our consideration are;

a) Whether the appellant proved that the motor vehicle was stolen;

b) Whether the learned judge erred in finding that the motor vehicle was used in breach of the conditions of the policy and

c) Whether the judge erred in finding that the respondent was under the terms of the insurance contract entitled to repudiate the insurance contract.

On the first issue of whether theft was proved, the learned judge took the view that;

"…although there was not even circumstantial evidence of any investigation by the plaintiff as to the loss of the vehicle any letter or certificates from the police, (flying squad) of any investigations carried out as to the report of hijacking and stealing of the Motor Vehicle, the defendant insurance Company was (sic) from the evidence of PW2, it's principal officer, did not appeal (sic) to dispute the claim that the vehicle had indeed been hijacked and stolen, and that it could not be traced. Coupled with the late report to the defendant insurance Company adequate time and opportunity to meet its own investigations and not merely (sic) as to the claim of hijacking and theft but also efforts to trace the vehicle legitimate doubt may…be created the (sic) of the Court as to the vanity (sic) of the claims of hijacking."

The court went on to state, that the decision was not dependent upon proof of hijacking or theft, but entirely upon the terms of the policy, and whether KAL 922M was used for the appellant's own business or for hire and reward.

Our re-evaluation of the pleadings shows that the respondent's defence turned, in its entirety, on the insurance policy, that is, whether the appellant had breached the terms of the policy, and if so whether the respondent was entitled to repudiate it. The question of whether or not theft was proved was not an issue for the determination by the trial court. A party is bound by their pleadings. See ***Galaxy Paints Company vs Falcon Guards Limited (2000) EA 885***. As a consequence, for the respondent to seek to raise the issue this late in the day is in our view, an afterthought. We therefore find that the affirmation of the judgment sought by the respondent is not merited.

The next issue is whether the learned judge rightly found that the motor vehicle KAL 922M was used for hire and reward. In addressing this issue the learned judge had this to say;

"That is also clear from Exhibit 14 produced by PW3, being of a letter dated 19th June 2000 from the defendant's senior claims officer (Mr. R.K Kombo) where sued (sic) that the defendant's investigations had shown that the vehicle was being used for hire and reward at the time of theft and that was a breach of the policy co-ordination (sic) and therefore – repudiated".

The appellant's argument is that, despite the respondent's assertion that during the substance of the policy, the appellant used KAL 922M for hire and reward, there was no evidence supporting this contention.

On our consideration, of the evidence on record, we find that the simple answer to this question is that there was no evidence proving that KAL 922M was being utilized for hire or reward when it was stolen. We say this because, on the night in question, KAL 922M had completed the delivery of a consignment of the appellant's maize to Chuka in Meru, and had just returned to Nairobi to await instructions on further deployment. Nothing supports the allegation that at the time, that it was stolen, a third party had hired it, and the respondent did not produce any evidence in support of this assertion. As such, we find that the learned judge arrived at the wrong conclusion when he found that KAL 922M was being used for hire on the night it was stolen.

Having so found, the next issue for consideration is whether the respondent rightly repudiated the insurance contract and whether she was entitled to do so.

The insurance policy specified that the period of insurance cover was 12 months from 28th April 1999 to 31st March 2000. The theft of KAL 922M occurred on 15th January 2000. The appellant contends that it reported the theft of the motor vehicle to the police and duly notified the appellant.

Following investigations, by way of a letter dated 19th July 2000 addressed to CFC Bank, the respondent informed the bank that it had repudiated the policy for reasons that the motor vehicle had been used for hire and reward.

The letter read;

"*CFC Ltd*

P.O. Box 84418

MOMBASA

Dear Sirs

OUR CLAIM NO CL/CV1/99/9894

INSURED: KIMWA HOLDINGS LTD

VEHICLE NO KAL 922M

THEFT ON 15.01.2000

We refer to the above claim and your letter of 20.5.2000.

We have investigated this matter and the investigation report reveals that the vehicle was being used for hire and reward at the time of this.

This is a breach of policy condition. We are therefore repudiating liability. The same has been communicated to the insured through the insurance broker.

Yours faithfully

R.K. MOMBO

SENIOR CLAIMS OFFICER"

The letter is clear that the reason for repudiation was the use specifically of KAL 922M for hire or reward. Despite this, the respondent advanced other reasons for its refusal to settle the claim such as, the failure to report the theft immediately after its occurrence, the failure to pay the insurance premium, and the usage of motor vehicle KAE 299D which was also covered under the same policy, for hire and reward. The assertions notwithstanding, there was no evidence showing that the policy was repudiated, or cancelled for the aforestated reasons. Hence the repudiation was not done in accordance with the terms of the policy. Again, no import was sought from the appellant before the cover was repudiated and/or cancelled. The law as we understand is that is that a party is entitled to be given an opportunity to answer or rebut allegations against him before a decision against him is arrived at. That was not done, which in our view was violation of the rules of natural justice. In the premises we are not satisfied with the reasons advanced for the repudiation of the substance cover. We also conside the process to have been violation of the rights of the appellant.

As a consequence, since the reason for repudiation of the policy was for the alleged utilization of KAL 922M for hire and reward, and having found as we have that the motor vehicle was not so utilized at the time of its theft, we find that the respondent was not entitled to repudiate the policy on this basis.

We would add that the learned judge did not appreciate that, for the respondent to rely on the repudiation of the policy as the reason for non-payment of the claim, it ought to have done so prior to the theft, and certainly prior to the expiry of the policy; that such repudiation coming after the appellant's claim, and following the expiry of the policy meant that it remained in full force and effect upto and until such repudiation. Consequently, the theft of KAL 922M having occurred during the currency of the policy meant that the respondent was liable to pay all and any claims arising therefrom, subject to compliance by the appellant with its terms and condition.

That said, the appellant claims a sum of Kshs. 8,800,000 being compensation under the policy for the loss of KAL 922D. The respondent argues on the other hand that, given that the motor vehicle's year of manufacture of 1998, and registration in 1999, the value of the new vehicle was Kshs. 8,500,000 at the commencement of the policy. When the motor vehicle value is depreciated by 20 percent, and a policy excess value of 5 percent that being Kshs. 880,000 is deducted, the value of the motor vehicle at the time of theft comes to Kshs. 5,620,000.

Taking into account the computation provided by the respondent, and the rationale behind it, we would agree that the value of the motor vehicle as at the date of the theft would be Kshs. 5,620,000. Accordingly the appellant is entitled to compensation of Kshs. 5,620,000 for theft of the motor vehicle KAL 922M.

As concerns the other sums claimed under items (c), (d) and (e) in the plaint, we find these to be unsubstantiated, since they were not canvassed before the trial court, and no evidence was led in support. In any event, the policy expressly stated that the consequential loss was not covered.

Accordingly, we find it necessary to interfere with the decision of the High Court. We allow the appeal, set aside the decree dated 28th May 2009 and substitute the following orders:

1. That the appellant is awarded compensation for the theft of motor vehicle KAL 922M in the sum of Kshs. 5,620,000;

2. Interest at court rates; and

3. The costs of this appeal as well as those of the suit in the High Court.

It is so ordered.

Dated and Delivered at Nairobi this 27th day of April, 2018.

M. WARSAME

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR