



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: G.B.M. KARIUKI, MWILU & KANTAI, JJ.A.)

CIVIL APPEAL NO. 215 OF 2011

BETWEEN

DHANJI VAGHJI & COMPANY LIMITED..... APPELLANT

VERSUS

OCCIDENTAL INSURANCE COMPANY LIMITED..... RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Maraga, J.) delivered on 8th December, 2010

in

HCCA No. 41 of 2006)

JUDGMENT OF THE COURT

In a plaint filed at the Chief Magistrate's Court at Nairobi in CMCC No. 9078 of 2005 **Dhanji Vaghji and Company ("Limited"** as part of the heading found its way as the pleadings developed) the appellant herein as plaintiff filed suit against the respondent **Occidental Insurance Company Limited**. It was claimed in the material part of the plaint that the respondent insured the appellant in the year 2000 against occurrence of certain events and that in that year two separate accidents occurred. One on 7th March, 2000 which resulted in the death of the appellant's employee and the second accident occurred on 5th December, 2000 which resulted in material damage to the appellant's named motor vehicle. It was further claimed that those incidents were reported to the respondent; that some negotiations took place between the appellant and the respondent where it was agreed in respect of the first accident that payment of Kshs.500,000/= be made while in respect of the second accident payment by the respondent to the appellant was agreed at Kshs.1,324,000/=. The appellant therefore claimed a sum of Kshs.1,824,000/= although there appears to be an unsigned alteration in the prayer in the plaint.

The respondent delivered a defence which denied the appellant's claims and it was also claimed that the appellant had breached policy conditions and therefore the respondent was not liable. It was also claimed in the defence that the appellant's suit was time barred and that it had been filed without leave of court.

The appellant was unimpressed by the action taken by the respondent in the defence and filed a Notice of Motion under the then **Order XXXV rules 1, 2** and **order VI rule 13 (c) (d) Order L rule 1** of the **Civil**

Procedure Rules and **Section 3A** of the **Civil Procedure Act** the main prayer being that the defence be struck out and judgment be entered in favour of the appellant against the respondent as prayed in the plaint. That Motion was supported by grounds set out and an affidavit detailing the facts relied on. The respondent filed a replying affidavit where an attempt was made to raise triable issues.

That Motion was heard by the Acting Senior Principal Magistrate (A. EL Kindy) who in a very brief ruling dated 16th December, 2005 allowed the application in the event entering judgment in favour of the appellant against the respondent. That ruling was the subject of an appeal to the High Court of Kenya at Nairobi in Civil Appeal No. 41 of 2006. That appeal was heard and in a judgment delivered on 8th December, 2010 D.K. Maraga, J. (as he then was) allowed the appeal stating:

“..... due to the middle (sic) in both parties pleadings in this case, i allow this appeal in the hope that both parties will tidy up their pleadings and properly place before court the issues in controversy....”

This is therefore a second appeal.

As has been stated by this Court in various judicial pronouncements only matters of law may be taken on a second appeal such as this one – see **Maina v Mugiria [1983] KLR 78**. Also **Dr. Mathew A. Ajuoga & 3 Others v. Bedrock Holdings Limited (Kisumu) Civil Appeal No. 158 of 2009 (unreported)**.

What are the issues of law, if any, raised that would entitle us to entertain this appeal? Five grounds of appeal are taken in the memorandum of appeal filed by the appellant. In the first ground the learned Judge is faulted for basing his decision on what is said to be a ground which was not a ground of appeal taken before him and consequently that the appellant was denied an opportunity to contest the appeal. In the 2nd ground the learned Judge is faulted for holding that the prayer pleaded in the plaint was Kshs.1,324,000/= and that the same was incorrect when there were no bases for the court to so hold. In the third ground the appellant takes the view that the learned Judge disregarded the pleadings. In the penultimate ground the appellant faults the learned Judge because according to the appellant the learned Judge considered matters that were not raised by the parties. In the last ground the learned Judge is faulted for what the appellant says was a failure by the learned Judge to appreciate that the respondent had raised new matters in its appeal that were not part of the pleadings put forward before the magistrate's court.

We heard the appeal on 6th July, 2015 when **Mr. Francis Mutua** learned counsel appeared for the appellant and **Mr. H. Shah** with **Mr. Rimui** appeared for the respondent. Learned counsel for the appellant in submissions before us reminded us that **Order 42** of the **Civil Procedure Rules** prohibits the High Court from making a determination on a matter not within the memorandum of appeal without asking the party affected to respond. Counsel was of the view that the appellant was entitled to proceed on two different causes of action in the same suit as had been done in the plaint. Learned counsel further submitted that the learned Judge could not set aside the ruling of the subordinate court on the basis of an error resulting from the ruling as such error could be corrected as a clerical mistake. He therefore urged that the appeal be allowed.

In response learned counsel for the respondent wondered whether the claim by the appellant was for Kshs.1,324,000/= or Kshs.1,824,000/=. Counsel submitted that the learned Judge was right to order the parties to go back to the magistrate because there was misjoinder of parties and that the plaint as drawn was fatally defective because it joined two causes of action in one. Counsel submitted further that the learned Judge did not consider any irrelevant factor in reaching his decision.

We have considered the record of appeal, the memorandum of appeal submissions of counsel and the law.

As already observed this is a second appeal and we are only mandated to consider matters of law if any are raised in the appeal.

We have carefully perused the judgment of the learned Judge. The learned Judge found that the pleadings

by both sides could have been drawn in a better way than the pleadings that were on record. The learned Judge found that the final prayer in the plaint was for Kshs.1,324,000/= which was in respect of the material claim damage only.

As we have observed elsewhere in this Judgment the plaint appears to contain an unsigned alteration but it is better that we do not make any further comment on that issue.

There was an allegation in the replying affidavit that the appellant was not entitled to make a claim on behalf of a deceased employee without first obtaining letters of administration. There was also an allegation that part of the claim was based on forged documents. Also reliance was made by the appellant on what would appear on the face to have been privileged documents.

The learned Judge found that the plaint did not contain brief and precise facts as required in law. So that on the pleadings the learned Judge found that the learned magistrate was wrong to enter judgment as he did. We agree with the learned Judge that it was wrong for the defence to be struck out and judgment should not have been entered the way the magistrate did. The learned Judge was right to allow the appeal and this appeal has no merit and it is accordingly dismissed with costs.

Dated and Delivered at Nairobi this 23rd day of October, 2015

G.B.M. KARIUKI

JUDGE OF APPEAL

P.M. MWILU

JUDGE OF APPEAL

S. ole KANTAI

JUDGE OF APPEAL

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

DEPUTY REGISTRAR