IN THE COURT OF APPEAL OF KENYA

AT NYERI
CIVIL APPEAL 66 OF 2008

CO-OPERATIVE INSURANCE COMPANY LTD .....…...…… APPELLANT

AND

DAVID WACHIRA WAMBUGU ……..……. RESPONDENT

(An appeal from the judgment and decree of the High Court of Kenya at Embu (Khaminwa, J) dated 27th September, 2007

in

H. C. Civil Suit No. 107 of 2005)
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JUDGMENT OF THE COURT

By a plaint dated 4th October, 2005 and filed in the superior court on 17th October, 2005, the respondent (plaintiff in the superior court) claimed compensation from the appellant pursuant to a contract of insurance entered into by and between the parties on 8 th April, 2002.

According to the Personal Accident Policy (the policy) issued by the appellant to the respondent, the appellant agreed to make certain payments in the event of death, bodily injury or disability of the respondent arising from any accident stipulated in the policy. Briefly, the maximum amount payable for death was agreed at Kshs.5 million, for permanent total disability Kshs.5 million, and for temporary total disability Kshs.500,000/=.

According to the plaint, on 11th November, 2003 the respondent was accosted by a gang of armed robbers who robbed him, and assaulted him in the process. They inserted a pistol in his mouth, as a result of which he lost one upper tooth, and the entire set of his lower teeth. He sought medical treatment, and claimed from the respondent the sum of Kshs.5 million being the insurance payable in respect of total permanent disability under the policy.

The appellant denied the claim. In a defence dated 15th November, 2005, and filed in the superior court on 16th November, 2005, the appellant averred that the respondent's injury was of a temporary nature, not permanent, and that the maximum insurance payable to the respondent was Kshs.500,000/=, which sum the appellant claimed had already been paid to the respondent.

The hearing of the suit commenced before the superior court (Khaminwa, J) on 24th July, 2006. On that day, the respondent's

learned counsel, Ms. Ndorongo, made an oral application to amend the defence, as per the amended defence filed in court on the same date. Mr. Muraguri, learned counsel for the respondent, did not object to the same, and the learned judge accordingly admitted the amended defence as having been properly filed and served upon the respondent.

Although titled "Amended Defence", that pleading incorporated and raised a counter-claim, to which, according to record, no reply and/or defence was filed by the respondent. The amended defence raised a significant new issue that the respondent was guilty of material non-disclosure of facts which entitled the appellant to repudiate the policy. According to the appellant, the respondent in applying for the insurance had failed to disclose that he was suffering from diabetes, and a condition known as periodontitis which is the inflammation of the gums. The appellant averred that had those facts been disclosed, it would not have agreed to underwrite the insurance, or issue the policy, and that it would not have made the payment of Kshs.619,371/= that it did, following the respondent's accident and injury on 3rd April, 2003.

After a full hearing, the learned judge found for the respondent and awarded him the sum of Kshs.5,411,429/=, thus precipitating this appeal.

The appellant has outlined 11 needlessly long grounds of appeal which we will not reproduce here. Essentially, the appellant complains of arithmetical errors made by the superior court in awarding Kshs.5,411,429/= and of ignoring the fact that the respondent had indeed been paid the sum of Kshs.619,371/= which is the maximum sum payable in the event of temporary total disability. The appellant contends in the two main grounds of appeal that the injury herein was of a temporary nature, not permanent – hence, the maximum sum payable under the policy was Kshs.500,000/-, and secondly that the appellant was entitled to repudiate the policy on account of the non-disclosure of material facts.

Indeed, Mr. Namachanja, learned counsel for the appellant in his arguments before us, focused his attention on those two issues. He submitted that the learned judge took into account erroneous facts in coming to the conclusion that the respondent's loss was of a permanent nature. He argued that the injury fell within the definition of the term "temporary total disablement" – which was defined in the policy as "total and absolute incapacity following usual employment for a longer period than one week." Accordingly, he argued, that the maximum compensation payable under the policy was Kshs.500,000/=.

With regard to the second issue, relating to non-disclosure of material facts, Mr. Namachanja argued that the respondent when applying for insurance had failed to disclose his true state of health, that he was suffering from diabetes and periodontitis. If he had done so, the appellant may not have entered into the insurance contract, and that the appellant was therefore entitled to repudiate the policy.

Mr. M. M. Nzavi, learned counsel for the respondent, defended the superior court's judgment arguing that the respondent had correctly answered in negative the question in the proposal form whether he had suffered from a disease called "Diabetes Paralysis". He said that there was no such disease, and the respondent's negative answer was therefore correct. He also submitted that according to the medical evidence before the superior court, the nature of the respondent's injuries could properly be classified as total permanent disability, and urged us to dismiss the appeal.

We have anxiously considered this matter. Having perused carefully the pleadings on record, the judgment by the superior court, and having heard argument, we are of the view that the single-most important issue before us is whether the appellant is entitled to repudiate the policy on the grounds of non-disclosure of material facts. If the answer is 'yes', then it matters not whether the superior court made arithmetical errors, or whether the injury was of a temporary nature, or permanent. Clearly, in that situation, the respondent would not be entitled to any payment at all. Let us then examine the important issue of the alleged non-disclosure of material facts.

It is not in dispute that the respondent does indeed suffer from diabetes, a condition that he has had since 1996, prior to applying for,

and being issued with, the policy. According to the medical report by Dr. Charles Mutinda Muli dated 1st November, 2006, the respondent "was a known diabetic for over 10 years." And, according to Dr. George R. Owino's medical report dated 30th April, 2004, the respondent had continued receiving treatment for periodontitis, since 1997, a condition that Dr. Owino said had been "complicated due to his (the respondent's) underlying medical condition – diabetes." The respondent does not deny that the fact that he suffered from diabetes was "material" information that should have been disclosed in the proposal form for insurance. He simply says that when he answered "No" to the question whether he suffered from "diabetes paralysis", he was correct because he had not suffered from such disease, as no such disease existed. The learned trial judge agreed with him, and rendered herself thus, in part:

> ***"The contracts of Insurance are said to be of utmost good faith. The proposal from was prepared and printed by the defendant. The question that is said not to have been answered truthfully was 6 (c) in the proposal form. "Have you ever suffered from Gouts or Diabetes paralysis or a fit of any kind or any nervous or recurring diseases?" the answer was "No".***
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> ***The counsel for defendant submits that she has searched in relevant authorities which she has exhibited and has not found any disease described as Diabetes paralysis. Therefore the answer in negative on that question is correct. The plaintiff said he has never suffered such a disease. I find no non disclosure. The plaintiff was not asked "have you suffered from diabetes?"***

The learned judge was right in saying that a contract of insurance is one of good faith. As was said in ***Joel vs Law Union & Crown Insurance Company (2) [(1908) 2 K B at page 883]*** by FLETCHER MOULTON, L.J.:

> ***"The contract of life insurance is one of uberrimae fidei. The insurer is entitled to be put in possession of all material information possessed by the insured. This is authoritatively laid down in the clearest language by Lord BLACKBURN in Brownlee vs Campbell 5 A C 925 at page 954:***
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> > ***'In policies of insurance, whether marine insurance or life insurance, there is an understanding that the contract is uberrimae fidei, that, if you know any circumstance at all that may influence the underwriter's opinion as to the risk he is incurring, and consequently as to whether he will take it, you will state what you know. There is an obligation there to disclose what you know, and the concealment of a material circumstance known to you, whether you thought it material or not, avoids the policy.'"***

The learned authors of ***Bullen & Leake, Precedent of Pleadings, 14th Edition, Vol. 2*** states at page 908:

> ***"Contracts of insurance are contracts of the utmost good faith. This gives rise to a legal obligation upon the insured, prior to the contract being made, to disclose to the insurer all material facts and circumstances known to the insured which affect the risk being run. Lord Mansfield's words in Carter vs Boehm (1766) Burr. 1905 have stood the test of time:***
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> > ***"Insurance is a contract of speculation. The special facts upon which the contingent chance is to be computed lie most commonly in the knowledge of the assured only; the underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge to mislead the underwriter into a belief that the circumstance does not exist and to induce him to estimate the risqué as if it did not exist. The keeping back such circumstance is a fraud, and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention, yet still the underwriter is deceived and the policy is void; because the risqué run is really different from the risqué understood and intended to be run at the time of the agreement… The policy would be equally void against the underwriter if he concealed… The governing principle is applicable to all contracts and dealings. Good faith forbids either party, by concealing what he privately knows to draw the other into a bargain from his ignorance of the fact and his believing the contrary…"***

Thus, it was incumbent upon the respondent to make full disclosure to the insurer, the appellant, that he had suffered from diabetes. It does not matter that he thought that the question related to a disease called *"diabetes paralysis"*, a disease which, by his own admission, is non-existent. If he had assumed, as was logical, that there ought to have been a coma between "Diabetes" and "Paralysis" perhaps this case would never have been. But he chose his own interpretation. Furthermore, if that disease was non-existent, surely the insurer could have only intended to know if he suffered from diabetes. It was his duty to disclose that fact. In any event, even if there was confusion in his mind about the existence of *"diabetes paralysis"*, he ought to have responded to the penultimate words in the question, that is whether he suffered from any **recurring disease**. His answer to the whole question was *"no"*, when in fact he suffered from both diabetes

and periodontitis. This was a special fact only known to the respondent, and it was his obligation to disclose the same, in order to enable the appellant assess its risk, and whether, indeed, it wanted to underwrite the same, and if so, at what cost. However, by reason of the concealment of this material fact, he induced the appellant to underwrite the risk, and issue the policy. The appellant is clearly entitled to avoid the policy. It was entitled to the declaration it sought to this effect in the amended defence. Having come to this conclusion, it is no longer necessary to determine the actual amount payable to the respondent.

Accordingly and for reasons outlined, we allow the appeal, set aside the judgment and decree of the superior court dated 27th September, 2007 and dismiss the suit with costs to the appellant.

We allow the counter-claim with costs to the appellant and give a declaration in terms of prayer (iii) that the appellant is entitled to avoid the policy. The appellant shall have the costs of this appeal.

Dated and delivered at Nyeri this 12th day of February, 2010.

E. M. GITHINJI

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JUDGE OF APPEAL

P. N. WAKI

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JUDGE OF APPEAL

ALNASHIR VISRAM

…….
JUDGE OF APPEAL

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

DEPUTY REGISTRAR