REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT KISUMU

Civil Appeal 75 of 2004

BENJAMIN ONKOBA NYAACHI
ALICE NYAMASEGE ONKOBA
T/A KEMERA GENERAL STORES ……APPELLANTS

AND

VICTORIA INSURANCE BROKERS……RESPONDENT

(Appeal from judgment and decree of the High Court of Kenya at Kisii (Wambilyangah, J) dated 9th February, 2004

in

H.C.C.C. NO. 20 OF 1998)
****
JUDGMENT OF THE COURT

This is an appeal from the judgment and decree of Wambilyangah, J. dated 9th February, 2004.

The story of the appellants concerning the facts giving rise to this appeal was that the appellants who traded under the business name of Kemera General Stores while admitting that vehicles KAC 135Y, KAC 842B, KAC 070Z, KAC 084Y, KAC 069Z and KAC 535Z belonged to them deny that they took insurance policies in respect of the vehicles using the respondent company as the broker whose assignment was to procure the policies from the insurers.

On the other hand, the respondent company's version of the story was that on various dates in 1994, the appellants instructed the respondent company to obtain for them certificates of insurance to cover the motor vehicles described above, and acting on the appellants' instructions and on further condition that the appellants would pay requisite premiums and commission to the respondent company, the respondent procured on behalf of the appellants certificates of insurance to cover the vehicles as described above. As a result, the respondent procured six insurance policies for the vehicles with a premium value of Ksh.1,390,980 and the vehicles were covered for one year (12 months) and certificates of insurance were issued by two separate insurance companies and released to the appellants.

However, the appellants made a part payment of Kshs. 267,821 leaving a balance of Kshs.1,123,156.80 which in turn attracted a penalty of 5% per month for non-payment after 60 days as per the Insurance Act Cap 487. The appellants refused to pay the balance including the penalty hence the filing of the suit.

After a full trial Wambilyangah, J. in a judgment read on his behalf by the late Bauni, J. and dated 9th February, 2004, found in favour of the respondent company in the sum of Ksh.1,123,159/80. Dissatisfied by the judgment the appellants filed Civil Appeal No. 75 of 2004 on 31st March 2004. Dissatisfied by the same judgment the respondent company also filed Civil Appeal No. 80 of 2004 nineteen (19) days later, on 19th April, 2004.

The two appeals came before us on 3rd December, 2009 and with the consent of counsel for both parties, we ordered that the two appeals be consolidated and the appellant company be regarded as the respondent in Civil Appeal No. 80 of 2004 and the grounds of appeal in Civil Appeal No. 80 of 2004 be deemed to be a cross appeal in Civil Appeal No. 75 of 2004.

The appellants relied on the following grounds of appeal:-

> ***"1. The learned trial Judge erred in law and in fact in rejecting the evidence of the appellant wholesome.***
>
> ***2. The learned trial Judge misdirected himself in not making finding that the cheques which were dishonoured were actually replaced with cash and that is why the respondent continued to trade with (sic) appellant even after the cheques bounced.***
>
> ***3. The learned trial Judge erred in law in not delivering the judgment at once or in any event within 42 days.***
>
> ***4. The learned Judge who read the judgment grossly misdirected himself by signing a judgment which was not written by him.***
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> ***5. The learned trial Judge erred both in law and fact by making a finding (sic) the plaintiff's case was predicated on dishonoured cheques when other cheques were not even presented for payment.***
>
> ***6. The learned trial Judge clearly misdirected himself in law and in fact when he entered judgment for the respondent, notwithstanding the material discrepancies from the evidence on record.***
>
> ***7. The judgment and/or decision of the learned trial Judge herein is contrary to the weight of evidence on record and hence (sic) manifested unsafe."***

The respondent's cross appeal grounds were:-

1. ***That the learned Judge erred in law in fact by delaying delivery of the judgment for 461 days there by rendering the same null and void.***
2. ***The learned Judge erred in law and in fact in basing his judgment or mere opinions rather than then evidence adduced before him.***
3. ***The learned Judge erred in failing to hold that the appellant had proved its case on a balance of probabilities.***
4. ***The learned Judge erred in law and in fact by finding that the appellant did not deserve the mandatory provisions of 5% penalty per month upon the expiry of sixty (60) days on default of payment totaling over Ksh.3,000,000.00 and the interest continues to accrue until payment is made.***
5. ***The learned Judge erred in law and in fact by finding that the appellant did continue to give certificate covers to the respondent after bouncing cheques, while the appellant took all possible (sic) prior promptly, practicable consecutive and reasonable steps to recover the 5% penalty.***
6. ***The learned Judge erred in not awarding over 3,000,000.00 that would be otherwise be payable to the appellant in view of Kshs.3,000,000.00 that the appellant claims as prayed on a balance of probability.***
7. ***The learned Judge erred in law and in fact by not relying on the evidence of the appellant as he found the evidence of the respondent wholly incredible.***
8. ***The learned Judge erred in law and in fact by blaming the appellant that was it negligent in the performance of its side of the contract and that non penalty was entitled to it.***
9. ***The learned Judge erred in law and in fact by finding that the respondent was entitled to repudiate liability after the peril insured against had occurred.***
10. ***The learned Judge erred in law and in fact by being guided by the respondent's evidence with no value at all.***

During the hearing the appellants who were represented by the learned counsel Mr. Kerosi Ondieki submitted that the court appears to have plucked the decretal amount from nowhere since the judgment was based on the unpaid cheque yet the

court did not do any analysis of the cheques dishonoured and those paid notwithstanding that the appellants' defence was that the cheques which were returned had been replaced and cash payments made in lieu thereof. In addition some of the cheques were never presented for payment. He contended that the appellants paid for temporary insurance certificates and made payments in respect of those certificates. The learned counsel submitted that the superior court erred in not ascertaining the relationship between the appellants and the respondent company which was that of the insured and their broker. The broker was the agent of the appellants and the respondent company had not demonstrated that they had paid over to the insurers the premium they were now claiming from the appellants. It is the appellant's counsel's submission that the judgment given in favour of the respondent was as a result of the superior court taking into account extraneous matters in that in the circumstances there was no nexus between the appellants and the respondent on the payment of premiums at all.

Mr. Kerosi illustrated the point by stating that if premium had not been paid the remedy for failure to pay would have been to cancel the policy and the respondent had not proved any cancellation. The appellants' counsel final submission was that the penalty of 5% claimed by the respondent on unpaid premium in the cross appeal could not legally be passed on to the insured in view of the provision of ***section 28 (6)*** of the Insurance Act Cap 487, which places the responsibility on the broker.

The learned counsel for the respondent Mr. Nyachoti stated that as at the date of trial the appellants whose liability was joint and several had no defence since it had been expunged and further that the respondent did not even give evidence in the matter; that the judgment given was not only based on the unpaid cheques but on 39 other documents produced by the witnesses including DW2 who gave evidence in favour of the respondent, and that the claim was for services rendered but not paid for; that all the two parties including the banks involved had signed undertakings concerning the services and one of the conditions in the undertakings was that the policies could not be cancelled for no-payment and had in fact been issued to cover the vehicles for a period of one year (12 months) and the necessary certificates of insurance released to the appellants; that relevant policies were produced in court; that the appellants did not produce any evidence of payment and as a matter of fact DW2 a witness called by the appellants denied that any payment were made to replace the returned cheques; and finally as regards the cross appeal, Mr. Nyachoti contended that the penalty of 5% was payable by the broker pursuant to the Insurance Amendment Act No. 12 of 1994 and that because the superior court had found as a matter of fact that Kshs.1.5 million was in default, it should have ordered the appellants to pay the penalty to the respondent.

This being the first appeal this Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions always bearing in mind, and giving due allowance for it, that the trial Judge had the advantage of seeing and hearing the witnesses testify before him. See ***VIRAN t/a KISUMU BEACH RESORT V. PHOENIX OF EAST AFRICA ASSURANCE CO. LTD [2004] 2 KLR 269.***

In this matter it is clear to us there was documentary evidence of the proposal forms duly signed by the appellants as proposers/insured. In addition the appellants duly signed the hirer's confirmation, acceptance and awareness forms in respect of each vehicle as exhibited. These forms set out the sum insured, the premium payable and the period covered which in all the cases was for a period of 12 months. It was also in evidence that policies in respect of all the vehicles including the supporting insurance certificates were issued to the appellants who in turn exhibited the certificate on the windscreens of vehicles for use on the roads as is the practice. A perusal of the documentary evidence does not demonstrate any payments in respect of the premiums relating to the certificates of insurance described above and duly signed by the appellants. It was common ground that the appellants did use the certificates whose value is as claimed in the suit.

An evaluation of the evidence concerning the retrieved cheque shows that those payments were in respect of the unpaid premiums and therefore the superior court cannot be faulted, in our view, in concluding that the claim was also based on unpaid cheques because the respondents' claim was very well supported by the above documents together with the retrieved cheques. In our view the fact that the superior court focused its calculation on the returned cheques is not indicative of any error on the part of the court. As the appellants did not deny having received the services through the brokerage of the respondent, we find it unacceptable for the appellants to refuse to pay for the services rendered, allegedly because the brokers were their agents. The fact that the policies were never cancelled during the twelve months period did indicate that the insurer company had in turn received payment from the brokers or that the brokers had made satisfactory arrangements on behalf of the appellants during that period.

In law the respondent broker company remains the agent of the insured appellants. There is no law which prevents an agent from recovering anything unjustly retained by an insured where the broker has incurred such an expense on behalf of an insured. In the matter before us, the benefit derived from the broker by the insured are the certificates procured on their behalf. Retaining the benefit would be unjust enrichment.

Turning to the cross appeal in respect of the 5% penalty payable to the Commissioner of Insurance, an evaluation of the evidence indicates that there is no proof that the respondent did either pay the penalty or a demand of the payment of the penalty made by the Commissioner of Insurance. On this we agree with the appellant that the cross appeal is not supported by evidence.

In the result we dismiss the appeal with costs to the respondent and further dismiss the cross appeal also with costs to the appellant.

Dated at Kisumu the 5th day of February, 2010.

R. S. C. OMOLO
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JUDGE OF APPEAL

E. O. O'KUBASU
…….
JUDGE OF APPEAL

J. G. NYAMU
……
JUDGE OF APPEAL

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

DEPUTY REGISTRAR