IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO. 246 & 263 OF 2002

FIRST ASSURANCE COMPANY LIMITED ……..….. APPELLANT

AND

SEASCAPES LIMITED …….. RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya at Nairobi (Kasanga Mulwa J.) delivered on 21st August, 2001

in

H.C.C.C. NO. 46 OF 1999

****

JUDGMENT OF THE COURT

Two appeals were argued before us at the same time. They are **Civil Appeal No. 246 of 2002**, and **Civil Appeal No. 263 of 2002**. Although the former appeal was filed earlier in time, it arose from an order made subsequent to the judgment which gave rise to the latter appeal. That being so, we will deal with the second appeal and should the need arise we will consider the first appeal on the merits.

By its plaint dated 15th January 1999, Seascapes Limited, the respondent in this appeal, made a liquidated demand of Kshs.45,412,000/= costs and interest, for the loss of fifteen villas, squash court and bar and restaurant building with furniture and fittings therein which had been destroyed by a fire. It averred in that plaint that the destroyed property had been covered under a policy of insurance No.97/05/301893 issued by First Assurance Company Limited, the appellant in this appeal, through an agent, Mr. Mehta of Jaidip Agencies. The appellant allegedly refused to honour the policy necessitating a suit for payment of the insured amount of money.

In its written statement of defence, the appellant conceded it had agreed to insure the respondent's property, and also that the said property was burnt. It however, denied there was a contract of insurance between the parties which would entitle the respondent to recover from it compensation for loss of the property. Its main contention was that the respondent having not paid any premium for the policy no liability would attach against it. The payment of premium was a condition precedent to liability.

The respondent framed 17 issues, and the appellant 18. However, subsequently the parties agreed on

19 issues. Kasanga Mulwa J. became seised of the case. In his judgment he expressed the view that the agreed issues were repetitive, and in his view there were four broad issues which he framed as follows:

(1) Whether oral evidence of what was allegedly discussed in a meeting said to have been held in April 1997 was admissible in evidence.

(2) Whether there was a valid, and enforceable contract of insurance between the parties.

(3) Whether in the alternative, there were sufficient facts to establish estoppel, and if so, its effects in the case between parties.

(4) ***In light of allegations of under-insurance, the defendant would be liable, if at all, to a lesser sum, than a sum of Kshs.30,500,000/= agreed upon by consent.***

Before we go any further, we want to say something about a complaint raised in this appeal that the trial Judge erred in reducing the agreed issues. Order XIV of he Civil Procedure Rules deals with settlement of issues and determination of suits on issues of law or on issues agreed upon. The parties agreed on issues which they wanted the court to determine. The trial Judge after receiving evidence from both sides did not think the issues were as many as the parties had agreed between themselves. In our view the learned Judge was not bound to deal with each and every issue the parties had framed. The agreed issues are intended to enable the trial court appreciate the matters in controversy between the parties upon which they are obliged to call evidence. If at the close of the hearing he is convinced that some of those issues were unnecessary he is not precluded from saying so. Order XIV rule 1(5), places the burden on the court to ascertain upon what material propositions of fact or law the parties are at variance. And by O.XIV rule 3 the court may frame issues either from allegations made on oath by or on behalf of the parties, or from allegations made in the pleadings or from contents of documents. By Order XIV rule 5(2), the court has the power to strike out any issue that appears to it to be wrongly framed or introduced. The power is excisable at any time before passing a decree. In our view there is no merit in the appellant's complaint in that regard.

On the basis of the agreed issues the trial Judge heard the parties. Through its first witness, one Mohamed Nazir Harunani (***Harunani***) the respondent adduced evidence as to the extent of its loss to wit Kshs.36,857,860/=.Shah Ramesh (***Ramesh***), the Managing Director of the respondent, gave the background of its case. He testified that the respondent was owner of Holiday Resorts which had 16 villas of one type, 6 of a different type and 10 of yet another type. It had a swimming pool and other facilities. Previously Lion of Kenya Insurance Co. Ltd provided Insurance cover for the property. The existing arrangement with that company was that it would pay the insurance premium as and when it was able. Later, at the request of one Mehta, the manager of the agent for the insurance company in Mombasa, the respondent shifted from Lion of Kenya to Mercantile Insurance Company Ltd. The arrangement with that company was that Mr. Mehta would debit the respondent with the premiums due and the later would then settle the debt by instalments. After 3 years Mr. Mehta , again, requested the respondent to shift to the appellant company on the same terms, which it did. The shift followed a meeting between the parties held in April 1997. It however never made any payment of the due premiums for both 1997 and 1998, allegedly because of tribal clashes. The arrangement with the appellant was verbal, and no proposal form was completed.

The respondent's property was burnt on 19th April 1998 by a fire which started from a neighbouring property, two kilometers away, where a farmer set bushes on fire to kill a snake. After the fire the respondent made a cheque to meet the insurance premium, but the cheque was dishonoured. Ramesh conceded that he never had access to any policy document from the appellant nor was he aware of the terms thereof. He only relied on the insurance agent who told him that the respondent's property was covered.

David Kioko Kimuli (***Kimuli)*** was the main witness for the appellant. It was him who had a meeting with Mr. Ramesh in April 1997. He conceded he discussed with the insurance agent about payment of premiums for insurance cover for the respondent's property. He denied the agent had any credit facility

with the appellant. The appellant however, prepared a policy on the basis of the same terms as policies with previous insurance companies and he expected payment from the respondent but which was not forthcoming. It was his evidence that the validity of the policy was dependent on payment of the premium for it. He sent the policy documents to the insurance agent to facilitate payment. No payment was made until after the fire, when the appellant declined to accept the payment on the ground that it had been made too late. The cheque for that payment was not returned immediately. The explanation by Joseph Munene Murage, the Managing Director of the appellant, was that payments are received by cashiers without reference to the claims Department. By the time the Claims Department comes to know of it, there would be a long lapse of time.

The appellant conceded it had assessed the affected property before agreeing to issue cover for it. It was its case that whenever its officers visit the property, a formal proposal form is not necessary as the whole purpose of a proposal form is to establish the value of the property to be insured.

We earlier stated that Mulwa J. considered the agreed issues and thought that in truth the real issues were only four. In his judgment he generally confined his decision to those four issues. The trial Judge started by stating correctly that in certain circumstances, extrinsic evidence may be admitted to explain, vary, add to or subtract from the terms of a written contract, with a view to ascertaining the clear intention of the parties to it. Section 98 of the Evidence Act, Cap. 80, Laws of Kenya, makes provision to that effect. The learned trial Judge expressed the view and found as fact that in the contractual relationship between the parties there are certain matters which brought the respondent's case within the purview of the aforesaid section and permitted the admission of oral evidence to explain those matters. He reasoned that because the policy document was sent to the respondent after the risk had run, the transfer of the insurance cover to the appellant was after a meeting in April 1997, between representatives of the parties, the policy was issued through an agent whose account was debited by the appellant with the amounts of the premium, the policy was drafted on the same terms as a previous one with Mercantile Insurance Company, and no proposal form had been filled, there was justification admitting oral evidence to bring out the clear intention of the parties.

Whether or not oral evidence was admissible was subject to a finding on the question whether there was a valid policy of insurance between the parties. But we will revert to the issue later on in this judgment.

Mulwa J. considered at great length the alleged meeting held in April 1997, to discover what was agreed upon between the parties and whether there were special arrangements between the parties on payment of the insurance premium. He was not able to come to a clear determination on the issue.

Regarding the issue of estoppel, the trial Judge held that two letters from the appellant to the insurance agent tacitly showed an admission by it that there was cover. Consequently he held, that an estoppel could be raised against the appellant notwithstanding the clear provisions of section 156 of Insurance Act, Cap 487, Laws of Kenya which forbids insurers from taking up risks in which no premiums have been received. He came to that conclusion relying on the provisions of section 77 of the same Act. That section provides that an insurance policy shall not be invalid merely because it contravenes any of the provisions of the Insurance Act. We wish to state that the application of section 77, above, is possible in cases where the parties have a clear agreement that payment of insurance premium will not be a condition precedent; or where through their respective conduct it can be inferred that the parties did not intend to make payment of the premium a condition precedent before liability could attach.

In his judgment the learned Judge held that the appellant waived the condition in the policy for the payment of the premium as a precondition for insurance cover. In that regard the learned Judge cited Mac Gillivray on Insurance Law; 4th Edition, Paragr. 740, in which the learned author states as follows:

"***Generally any act leading the assured to believe that the contract will be effective without payment of premium amounts to waiver of the condition (see Sheldon vs. Atlantice Ivie (1863) 26 N.Y. 460……..), but unless the insurers do or omit some act whereby the assured has just ground to believe and does***

believe that the contract will be made, continued or restored without payment of premium there is neither estoppel nor waiver…"

The learned Judge based his conclusion on alleged discussions between the parties, the two letters we mentioned earlier and the fact of the appellant debiting the insurance agent's account.

Before we consider the appeal, it is important to highlight the contents of the aforesaid two letters. Mr. Kimuli addressed a letter to Mr. Mehta, dated 17th June 1997, purposely requesting for a proposal form. He conceded that he is the one who later put remarks on a file copy as follows " ***On cover w.e.f. 31/5/97".*** The second letter was dated 24th July 1997, and was addressed to Jaidip, the insurance agent. Like the earlier one it was written by Mr. Kimuli. He penned therein, in pertinent part, as follows:

" You will appreciate we have been on cover from 31st May 1997. We are therefore proceeding to issue policy documents on the basis of the information that we have and debit your account appropriately."

Ultimately the learned Judge found for the respondent and gave judgment to it and thus provoked this appeal. There are 19 grounds of appeal in the first appeal to wit ***Cit Appeal No. 263 of 2002*** and ***8*** in the second one to wit ***Civil Appeal No. 246 of 2002***. The latter one relates to the recalling of the judgment on the question of interest.

In his submissions before us Mr. Buti for the appellant argued all the grounds together. We have already dealt with the ground relating to consolidation of issues and we do not wish to repeat ourselves.

The next issue Mr. Buti submitted on relates to the meeting of April 1997. The appellant conceded that the purpose of the meeting was in effect to solicit for business. Parties were not in agreement as to what was discussed there. Mulwa J. concluded that in that meeting the respondent requested for payment of premiums by instalments. Mr. Buti submitted that in coming to that conclusion the learned Judge assumed that the meeting was to discuss terms of payment of the premiums. On the assumption that the issue was discussed we say this. Such a discussion would have led to an agreement. The respondent's case was that the agreement between the parties was that it would make payment by instalments. There is however no evidence such an agreement was reached. A policy of insurance was issued with a condition precedent that cover was issued in consideration of the insured paying to the insurer the agreed premium. Had it made some payment that would have given credence to its contention that terms of payment were discussed and agreed upon. Besides the policy document would not have made payment a condition precedent to the validity of the policy.

Jaidip Insurance Agencies were the addressees of Mr. Kimuli's letters dated 17th June and 24th July, 1997 respectively. Its accounts were debited by the appellants. Mr. Mehta of that agency was dealing with both the appellant and the respondent. Mulwa J. did not address himself to what Mr. Mehta said in those letters. In his letter to the appellant dated 14th October, 1998, he penned as follows:

"***FIRE CLAIM***

INSURED SEASCAPES LTD

We enclose herewith a letter received from our mutual client which is self explanatory.

As discussed on various occasions and as requested please consider this claim an EX GRATIA BASIS. Reference is also made to our telephone conservation of today's date. We should be grateful if you would let us have your favourable reply.

Yours faithfully

Virendra D. Mehta."

Mehta was allegedly present in the meeting of April 1997. He was the man who introduced the parties to that discussion. In none of his letters exhibited did he allude to the terms of payment, if any, discussed between the parties. Instead by its letter to the respondent dated 23rd December , 1997, copied to the appellant, Jaidip Agencies are demanding payment of the insurance premium. The body of the letter reads as follows:

"***Please let us have your premium cheques in favour of M/s First Assurance Co. Ltd in settlement of your account."***

Finally, had there been any discussion on terms of payment Mr. Kimuli would not have addressed his letter of 24th July 1997 to Jaidip Insurance Agencies the way he did. He stated, in pertinent part as follows:

"***We refer to our letter dated 17th June 1997 and subsequent discussions. We however regret to note that proposal forms have not been received to date. You will appreciate we have been on cover from 31st May 1997. We are therefore proceeding to issue policy documents on the basis of the information that we have and debit your account appropriately."***

The appellant wanted a proposal form to be filled. That is clear evidence that there was no concluded agreement between the parties as to the terms of payment. A proposal form would have set out the terms of cover.

Related to that issue is the question of estoppel. Mr. Gautama for the respondent submitted before us that the two letters in which the appellant stated that they were on cover with effect from 31st May 1997, raised an estoppel against the appellant. But for there to be an estoppel there has to be a representation which is acted upon by the opposite side to its detriment. It does not give rise to a cause of action. It may only be used as a defence. (see The Law of Contract 3rd Ed. By G.H. Treitel – P.342). If indeed the respondent acted on the appellant's representation, there was no evidence tendered before the trial court to prove it. We earlier stated that the respondent did not make any single payment before its property was damaged by a fire. It paid by cheque after the fire, but the payment was rejected by the appellant. The payment was made on the 11th month since the alleged date of the insurance cover. The cover was for twelve months and the respondent's property was damaged when the cover, if at all it was still in force, had only one more month to run. It is noteworthy that despite demand by Jaidip Agencies the respondent did not make any payment of the premium. That is prima facie evidence that the representation by the appellant in the two aforesaid letters was not acted upon as to raise an estoppel. The learned trial Judge did not address his mind to this aspect of the matter, and we think he erred when he said that an estoppel could be and was raised against the appellant.

Then there is the issue of the alleged running account Jaidip Agencies had with the appellant. The appellant conceded that Jaidip was a mutual agent with the respondent. Mr. Kimuli in one of the two letters we alluded to earlier, advised Jaidip Agencies that it would debit its account with the premium due from the respondent. Although that account was duly debited, the insurance agent did not remit any payment. Instead the evidence on record shows that the insurance agent was demanding payment from the respondent. When eventually the respondent made a claim for compensation Jaidip Agencies' response was that the respondent was only entitled to an ex gratia payment. It was of the view that there was no valid cover in favour of the respondent. The respondent had not taken any step or steps to signify it accepted the insurance cover which the appellant issued. By its conduct it cannot be said to have approved what Jaidip Agencies was negotiating on its behalf. It would appear to us that had its property not been damaged by fire, the respondent would have not made any effort to make payment. The payment it made was belated, and the appellant was entitled to reject it as it did. The fire rattled the respondent which then addressed several letters both to the appellant and Jaidip Agencies seeking compensation.

It was contended by Mr. Gautama that because the respondent had no knowledge of the contents of the insurance policy it could not be expected to pay. He submitted that Jaidip Agencies is the one which

was debited. If as learned counsel submitted, the respondent did not have knowledge of the contents of the policy, how did it know it was covered? The respondent appears to us to be blowing both hot and cold. Upon the property being damaged by fire it made a claim immediately, after an assessment as to the extent of the loss was done at its request. From the conduct of the respondent it is quite clear that it was not interested in making payment of the premium and consequently it cannot be said that there was in existence a valid insurance cover. We say this advisedly. Suppose, for instance the appellant sued the respondent for the premium?. Would it succeed in showing that the respondent had requested for and been granted insurance cover? We do not think so. The appellant would have no evidence to show that the respondent needed cover. The insurance policy it issued and sent to Jaidip was so issued without any written request.

Having come to that conclusion it is not necessary to deal with the issue of oral evidence to add to or subtract from a written agreement. By its conduct the respondent did not accept the insurance cover. There was therefore no valid contract between the parties which would be varied by oral testimony

An issue was raised regarding waiver of payment of premiums as a condition precedent for the issuance of an Insurance Policy. There cannot be a waiver unless the opposite side had expressly agreed to make payment. As the evidence on record stands, there is no basis for holding that the respondent had agreed to pay as to lead to an inference that the appellant had waived its right to payment. In absence of such evidence there would be no basis for invoking section 77 of the Insurance Act to supersede the application of section 156 of the same Act as Mr. Gautama would want us to hold. For this and other reasons we gave earlier, we hold the view that the respondent was improperly given judgment.

Before we conclude this judgment we want to say something about civil appeal No. 246 of 2002. When Mulwa, J. delivered his judgment which is the subject mater of Civil Appeal No. 263 of 2002, he did not award interest. Subsequently, on 9th May, 2002 upon application by the respondent he recalled his judgment and ordered interest to accrue at 15% from the date of the suit and 18% from the date of judgment. He considered the omission of interest from the judgment as an accidental slip which he could correct under section 99 of the Civil Procedure Act. That decision is the subject of Civil Appeal no. 246 of 2002. Mr. Buti submitted that costs are in the discretion of the court, which discretion must be exercised at the time of delivering judgment. Otherwise the court would lose that power, and interest would then only be at court rates. In his view the court becomes **functus officio**. Considering the decision we have come to concerning **Civil Appeal No. 263 of 2002**, it follows that Civil Appeal No.246 of 2002 succeeds as well.

In the circumstances we allow **Civil Appeal No. 263 of 2002,** set aside the order of the superior court dated 21st August 2001 and substitute therefor an order dismissing the respondent's suit with costs. The appellant shall also have the costs of this appeal, as well as Civil Appeal No. 246 of 2002.

Dated and delivered this 21st day of November, 2008

S.E.O BOSIRE

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

J. ALUOCH

……..

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR