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

Civil Appeal 23 of 2005

PRUDENTIAL ASSURANCE COMPANY OF KENYA LIMITED....APPELLANT

AND

SUKHWINDER SINGH JUTLEY…….……...RESPONDENT

AND

FALCON INSURANCE AGENCIES LIMITED.....THIRD PARTY RESPONDENT

(An appeal from the original judgment of the High Court of Kenya at Nairobi (O'Kubasu, J) dated 31st March, 2002

In

H.C.C.C. NO. 589 OF 1994)

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JUDGMENT OF THE COURT

This is an appeal by *PRUDENTIAL ASSURANCE COMPANY OF KENYA LIMITED*, the appellant, against the judgment of the High Court of Kenya delivered on 31st May, 2002, whereby the appellant was ordered to pay *SUKHWINDER SINGH JUTLEY*, the respondent, the sum of Shs.2,142, 857/= together with interest thereon from the date of filing suit until payment in full. The respondent who was the plaintiff in the suit had claimed some Shs.10.5 million on the basis of a Personal Accident Insurance Policy issued by the appellant whose Proposal Form had been issued and completed in the offices of insurance brokers, *FALCON INSURANCE AGENCIES LIMITED*, the Third Party respondent herein, who was joined in the suit as a Third Party. The indemnity claim by the appellant against the Third Party respondent was, however, dismissed. The final decree was less the sum of Shs.215,415/70 which the appellant had already paid to the respondent after the suit had been filed but before its determination.

The brief facts giving rise to the suit as discernible from the record of appeal appear to be the following. The appellant is a leading insurance company in the country and deals in all aspects of insurance. The respondent, on the other hand, is a building contractor and was at the time material to the suit resident in Nakuru. On 17th April, 1993, the respondent filled a Proposal Form for Personal Accident Insurance Claim at the local offices of the Third Party respondent which accordingly forwarded it to the appellant. Upon receipt of the Proposal Form the appellant issued a policy of insurance to the respondent on 26th May, 1993. The Policy covered the respondent from 17th April, 1993 to 16th April, 1994. Under the Policy the benefits were as follows:-

"A. On Death ---------- 200,000/=

B. On Permanent Partial Disablement---------- 100,000/=

C. On Temporary Total Disablement---------- 100,000/= per week not exceeding 104 weeks

D. Medical Expenses---------- 100,000/="

It is the respondent's case that whist the policy was in force he was involved in a road accident on 18th May, 1993 and as a result his car was written off and he also sustained injuries. According to his doctors *Prof. Mulimba (PW3)* and *Dr. Ombito (PW4)*, the respondent suffered what was described as "Temporary Total Disablement" and hence his claim fell under "C" of the Policy which indicated that he would be entitled to Shs.100,000/= per week for a period not exceeding 104 weeks. According to the respondent's calculations the total claim came to Shs.10,400,000/= and this is the amount the respondent claimed from the appellant.

The appellant raised several defences to the claim. In the main, it denied that the respondent was involved in the accident as alleged and it averred that the claim was fraudulent and contended that the Third Party respondent had acted negligently without due care and attention in accepting and filling in the Proposal Form the sum of Shs.100,000/= instead of Shs.10,000/=.

After hearing the evidence adduced by the parties and their witnesses together with the submissions made by the respective parties' advocates, the learned trial Judge, *O'Kubasu, J.A.* acting in accordance with *Section 64(4)* of the Constitution of Kenya, in a reserved judgment, made five findings, *inter alia*, that the respondent was involved in a road traffic accident and suffered an injury within the definition of temporary total disablement; that although the appellant had amended its records showing weekly indemnity as Sh.10,000 (and not Shs.100,000) the respondent was not aware of that alteration and that the policy in his possession had not been amended and that the respondent had proved that he was entitled to Shs.100,000/= indemnity per week. However, the learned Judge only allowed indemnity for a period of 150 days and not for 104 weeks as claimed and thus awarded the respondent Shs.2,142,852/= only and dismissed the Third Party Notice and the claim thereunder.

The appellant being aggrieved by the decision of the learned Judge, has preferred this appeal, which although is based on six grounds of appeal, raises really one point for decision, that is to say whether or not the alleged accident did occur or happen at the time, date and in the manner described by the respondent. This is the main issue in ground 2 of the grounds of appeal which states:-

"*2. The learned Judge erred in law and in fact in failing to consider or to deal with the appellant's evidence suggesting that no accident took place at all, notwithstanding that this was a central issue by the appellant.*"

For its part, the respondent availed himself of the procedural latitude conferred by *rule 90 of the Court's Rules* and filed a Notice of Cross-Appeal contending that the decision of the learned Judge ought to be varied or reversed on the ground that as he had suffered serious injuries as shown by the medical reports he ought to have been awarded compensation for 104 weeks which would have resulted in an award of Shs.10.4 million and Shs.100,000/= expenses. He averred that the learned Judge had gravely erred in his evaluation of the medical evidence tendered before the trial court.

Mr. Gross who represented the appellant in this appeal, as he did in the superior court argued that the findings by the learned trial judge were against the weight of the evidence for the reason that he accepted the evidence of two witnesses whose evidence was shown to be both biased and subjective and therefore suspect instead of that of three witnesses called by the appellant and also the investigation report all of which raised significant assertions of fraud in the allegations as to the time, place and occurrence of the accident.

As a first appellate court, it is our duty to treat the evidence and material tendered before the superior

court to a fresh and exhaustive scrutiny and draw our own conclusions bearing in mind that we have not seen or heard the witnesses and giving due allowance for this - *SELLE V ASSOCIATED MOTOR BOAT COMPANY LIMITED [1968] EA 123.* Applying this principle we will now analyse the evidence tendered before the superior court.

The respondent was driving his motor vehicle registration number KXP 184 on 18th May, 1993 between 5.30 p.m. to 6.00 p.m. from Nairobi to Nakuru. With him was his mother, wife and three young children. It is his testimony that somewhere between Gilgil Toll Station and the railway flyover bridge he hit an animal, which he said was a buffalo that had suddenly emerged from his left side of the road and was sauntering across it. The car was extensively damaged and rendered a write-off. The next day, he realized that he had pain in the right wrist and the back and he went to see *Dr. Ombito* who attended to him and prescribed treatment. His family did not have any serious injuries and none needed to seek treatment. *George Mwangi (PW2)* was the officer in charge of Gilgil Toll Station. He testified that at about 7 pm of the material day he saw a red car about 200 metres from the station and then heard a noise. Then he saw a buffalo lying on the left side of the road. He rushed to the scene to assist to push the car off the road. He saw that the car was extensively damaged. However, in cross-examination he admitted that he never saw the accident happening nor did he see the buffalo. It was not there after the accident.

Dr. Ombito (PW4) saw the respondent one day after the accident. He treated him for minor injuries. On clinical evaluation he noted that the respondent had tenderness at the region of the wrist with inability to hold things firmly in the right hand. On further examination of the back at the time revealed that the injury was unremarkable save for some tenderness over the lumbar spine. On the basis of these preliminary findings, PW4 resolved to have the respondent put on Feldene gel and crepe bandage as treatment for the hand injuries. PW4 concluded that though the fractures had healed well, the pain at the wrist persisted and required routine medication. He thought that the respondent's ability to perform as a contractor had been impaired. *Professor Mulimba (PW3)* in his report dated 18th May, 1994, noted that the respondent had continued getting low back pain in spite of treatment and was almost totally dependent on drugs yet features are all of a prolapsed disc.

At this stage of the respondent's evidence it is significant to note that the buffalo, though said by the respondent to have been lying on the road after being hit by the car, immediately thereafter vanished into thin air and was never seen again by any other witness and it is further interesting that nobody saw its carcass. It is reasonable to expect the buffalo to either have suffered a broken leg and/or other serious injuries and to have died at the scene or at least near there. Also, as far as the credibility of the testimony of the respondent is concerned is that none of his family members came to testify on his behalf, and neither did his driver who drove to the scene after being notified of the accident. Further, there was no reason for the respondent not to call the police officer who visited the scene of the accident to testify.

For the appellant, five witnesses testified. *Professor Bencivenga (DW1)* examined the respondent and produced two reports. He concluded that if the accident had happened as alleged then the respondent would have suffered a whiplash and injury to the face and not only a lumber spine. Moreover, the subsequent X-Ray showed no sign of scaphoid fracture which would have been expected in such an accident. *Mrs. Jocelyn (DW4),* a Nakuru Hospital Board member and a cashier of the hospital on a voluntary basis, testified that on 3rd May, 1993, 15 days before the accident the subject matter of the suit, four members of the respondent's family had sought outpatient treatment at the hospital for deep cut injuries on their temples, elbows, legs, hands and jaws which injuries appeared to have been occasioned by a broken windscreen glass.

In his reserved judgment the learned Judge held that the policy document constituted a valid contract between the appellant and the respondent and that the court could not re-write it for them. He further held that the alteration to the policy document was only affected after the alleged accident and when the respondent presented the claim. The learned Judge found that the accident occurred as described by the respondent before the trial court and that the respondent had sustained injuries as described in the medical reports by *Professor Mulimba* and *Dr. Ombito.*

In the course of his judgment, the learned Judge also dealt at length on the position of the Third Party

respondent in the contract. He held that it was the respondent as the proposer who filled and signed the proposal form. The Third Party respondent merely forwarded the form to the appellant and hence the Third Party respondent could not be faulted for any mistake or false answers in the proposal form. In the result he dismissed the Third Party Notice and the claim thereunder.

It is apparent that in reaching those conclusions, the learned Judge placed much reliance on the following passage in *ODGERS CONSTRUCTION OF DEEDS AND STATUTES* and statutes (5th Edition) at p. 106:

"*Parol Evidence and written documents. It is a familiar rule of law that no parol evidence is admissible to contradict, vary or alter the terms of a deed or any written instrument. The rule applies as well as deeds as to contracts in writing. Although the rule is expressed to relate to parol evidence, it does in fact apply to all forms of extrinsic evidence.*

As it stands this is not a rule of interpretation but of law, and means that the interpretation of the document must be found in the document itself with the addition if necessary of such evidence as we have previously seen is admissible for explaining or translating words and expressions used therein"

From our own independent analysis of the evidence it is apparent that the accident of crashing into a buffalo by the respondent in his car during the evening of 18th May, 1993 did not happen at all and is a mere concoction by him. It is more likely that the respondent and his family were involved in an accident on 3rd May, 1993, which accident involved the hitting of some stone or rigid object as a result of which they were mildly injured. The medical testimony also shows that the injuries suffered by the respondent, are to say the least, inconsistent with those consonant to an animal impact accident. Again, there are no medical reports that the respondent was treated at Nakuru Hospital on the material night, i.e. 18th May, 1993. In the circumstances therefore, we have no hesitation in holding that the alleged accident never occurred on the date in question and the injuries, if any, to the respondent were not as a result of any accident on the material date. In reaching this decision, we have regretfully differed with the learned trial Judge, who is a Judge of great experience. It is of course well established that an appellate court should not lightly differ from a finding of fact by a court of first instance and as a general rule should not interfere with such a finding unless it can be shown that the judge has drawn a wrong inference from the proved facts, or has misdirected himself on the facts, or has failed to take into account some material fact.

It does not appear from the judgment that the learned trial Judge considered the effect of the lack of medical reports of the respondent at the Nakuru Hospital relating to the injuries suffered by him on 18th May, 1993. Further, the learned Judge appeared not to have realized the significance of the alleged superficial injuries suffered by the respondent and the fact that the alleged beast could not be seen after the accident. The question is whether, if he had considered this evidence the learned Judge could have reached a conclusion that the accident did indeed happen. With great respect to him, we do not think that the learned Judge sufficiently considered these pertinent issues.

We have no doubt whatsoever in our mind that had the learned Judge considered this aspect of the matter and taken into account the appellant's submission, he could have reached a different conclusion.

Having concluded that the alleged accident was fake and did not in fact happen as alleged, what is the position in law? An insured who makes a fraudulent claim forfeits all benefits under the policy, whether it contains an express condition to that effect or not and the insurer has a right to refuse to pay the particular claim tainted by the fraud - See *HALSBURY'S LAWS OF ENGLAND* 4th Edition 2003 Reissue para 181. In the result we find that the claim lodged by the respondent and was fraudulent and should fail. We so hold. Having reached this conclusion, we do not think that there is really any need for us to consider in detail the other grounds of appeal. However, as far as grounds 3 and 4 thereof are concerned we would agree with Mr. Gross that even if the accident had been proved to have occurred the injuries, the subject of the claim, were according to the medical reports superficial and were in no way capable of sustaining Temporary Total Disablement Incapacity for 150 (21 weeks). Further, we think that the claim for indemnity under the Personal Accident Policy should not have been upheld since no evidence was led

to prove loss of earnings or personal income.

Mr. Gross also submitted that the learned Judge erred in finding that contrary to the evidence available the Third Party respondent was not liable to indemnify the appellant in respect of the Third Party role in the completion of the proposal forms and instructions to amend the policy limits. Of course, this ground of appeal is merely of academic exercise in view of what we have already concluded above. However, it is not in dispute that the respondent as the proposer filled and signed the proposal form. The Third Party respondent merely forwarded the form to the appellant and hence the Third Party respondent could not be faulted for any mistakes or false answers in the proposal form. However, it was generally agreed that there were no mistakes or false answers in the proposal form. The author of *CHARLESWORTH'S MERCHANTILE LAW 13TH EDN at p. 410 states:*

"Role of agents and brokers.

The general rule is that the "agent" is not the agent of the insurance company. He is paid a commission on the business he introduces and is supplied with information about the company's terms of business and rates of premiums and also given a supply of insurance forms but the acceptance or rejection of business he introduces rests with the company. If as a matter of convenience, he fills up the proposal form he is acting as agent for the proposer. The result is that if he fills in false answers and the proposal form is signed by the proposer without reading the answers, the policy is voidable at the option of the insurer".

Drawing support from the above author, we would, agree with the learned Judge that the Third Party Notice and the claim thereunder ought to fail. We dismiss this ground of appeal.

In the upshot, we would allow this appeal, set aside the judgment and decree of the superior court and substitute therefor an order dismissing the plaintiff's suit in the High Court with costs. The Notice of Cross-Appeal is also dismissed. We award the costs of the appeal to the appellant and the Third Party respondent against the respondent.

DATED AND DELIVERED AT NAIROBI this 9TH day of February, 2007.

R.S.C. OMOLO

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JUDGE OF APPEAL

P.K. TUNOI

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR