REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
Civil Appeal 120 of 1999

LION OF KENYA INSURANCE COMPANY LTD ..... APPELLANT

AND

TRINITY PRIME INVESTMENTS LTD ..... RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Nairobi (Mr Justice Mitey)

dated the 24th day of March, 1999

in

H.C.C.C. No.2134 of 1997)

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JUDGMENT OF THE COURT

This is an appeal from the decision of the superior court (Mitey, J.) given on 24th March, 1999, in its **Civil Case No.2134 of 1997**, in which he gave judgment for Trinity Prime Investments Ltd (hereafter referred to as the respondent), as Plaintiff in the suit, against Lion of Kenya Insurance Company Limited (hereafter referred to as the appellant) for Kshs.6,776,471/= plus interest thereon at court rates. The judgment was given pursuant to an application for summary judgment under the provision of **O.XXXV rules 1 and 2 of the Civil Procedure Rules.** The appellant was aggrieved and hence this appeal.

The facts upon which the respondent's action is based are short and simple. Stone Crest Ltd, as owner of the property known as plot No.l884/lll/M.N; Jimba Ruins, Mtwapa, Kilifi District, borrowed money from Standard Chartered Bank of Kenya Limited (hereinafter referred to as the Bank) on the security of the property. Stone Crest Limited and the Bank jointly took an insurance policy with Madison Insurance Company Limited (hereinafter referred to as Madison), to cover liability arising from damage or loss by fire, which policy had a clause for a rateable proportion payment of indemnity in the event of liability attaching during the subsistence of the policy concurrently with any other insurance policy over the same property.

On 4th July, 1996, during the subsistence of that policy the Bank, in exercise of its statutory right of sale, sold by public auction the said property on which stood beach cottages. The respondent was the highest bidder at kshs.9,000,000 and the property was knocked down for it, the necessary sale agreement was drawn and duly executed. As purchaser, the respondent was entitled to the income from the said property from the date of sale. The completion date of the transaction having been extended, the respondent asked for and obtained a domestic package insurance cover from the appellant to protect the property against loss or damage by fire for the period 1st August 1996, to 31st July, 1997; and also, any resultant loss of

rent by the insured during the period necessary to reinstate the buildings on the property in the event of the same being rendered unsuitable for occupation. That policy, too, had a rateable proportion indemnity clause which was to apply, if at the date of any loss covered, there was in existence another policy covering the property.

On 21st August, 1996, during the subsistence of both of the insurance policies, aforementioned, fire gutted down the property before the aforesaid sale transaction was completed but after the respondent had been put in possession. It was common ground that Stone Crest with the Bank, and the respondent had some interest over the said property, but there was debate whether their respective interests over the property was the same. The appellant contends that the interests were the same, while the respondent contends otherwise. Be that as it may, the value of the loss was assessed at the request of the Bank and a value of Kshs.12,800,000 was arrived at which was accepted by both parties in this appeal as appropriate for indemnity purposes only.

On the basis of the said valuation, the respondent later made a claim for indemnity from the appellant as its insurers, and it would appear to us that the parties discussed the claim inter se following which the appellant paid the respondent half of the assessed value and caused the respondent to execute a discharge document in the following terms:

"Subject to the approval of the Lion of Kenya Insurance Company Limited, we agree to accept the sum of Kenya shillings Six Million and Twenty Three Thousand Five Hundred and Twenty Nine only (Kshs.6,023,529/=) being full and final settlement of our claim on an indemnity settlement basis, under policy No.HH.02/960022 arising out of fire which occurred on Wednesday 21st August, 1996.

The above figure represents our Insurers rateable share of a total loss of Shs.12,800,000 on the understanding that there is a subsisting insurance policy issued on the same buildings by Madison Insurance Company Limited.

This offer to settle relates only to our claim in respect of damage to the building. A further claim in respect of loss of Rent is under consideration."

There was a dispute whether the discharge was conditional or absolute. It was contended on behalf of the appellant that the discharge was absolute and, therefore, a complete defence to the respondent's claim against it for the balance of the assessed value of the loss. On the other hand it was contended on behalf of the respondent that the discharge was conditional on Madison making payment of the balance of the indemnity sum; that a release of the appellant from liability was dependent on the intention of the parties to the contract of insurance which intention can only be discerned from the circumstances of each case; and that in all the circumstances, the appellant should not be discharged from liability unless there is full indemnity to the respondent.

The discharge voucher is not happily worded more so, because of the opening sentence. The appellant is the one which wanted to be released from liability and yet the payment was made subject to its approval. Whether or not the discharge was absolute or conditional will largely depend on what construction should be given to the contents of the voucher. The respondent which was the party to be bound signed the voucher. We do not know as yet who drew the document and in view of the vagueness of the first paragraph thereof, it might become necessary for oral testimony to be called in order that its full import may be discerned.

Besides, the respondent after executing the discharge voucher, still demanded the balance of the assessed value from the appellant. Two possible reasons may be surmised for doing so. Firstly, it might have done so because it did not regard the discharge as absolute. Secondly, and in the alternative, it might have had a change of mind on realizing that Madison was not readily or at all remitting the remaining half of its claim. Whatever, the reason was, the appellant refused to pay and thereby provoked the aforementioned suit.

The respondent's plaint made what, prima facie, is a liquidated demand. In the first prayer, it claims

Kshs.6,023,529 described as the balance of the total loss of the property and , in the second prayer, it claims Kshs.2,400,000 as indemnity for loss of rent. We earlier alluded to the fact that the respondent's insurance policy with the appellant over the subject property also covered loss of rent during the period necessary for the reinstatement of the buildings after loss or damage. The second prayer, according to the plaint, is based on that aspect. The respondent has averred in the plaint that on the date the suit property was gutted down by fire there was in existence a concluded and executed lease between it and a company known as Tete Travel Services Limited for a period of two years which was to commence on 1st September, 1996, at a monthly rent of Kshs.360,000/=, but which was rescinded when the buildings on the property were destroyed by fire.

In its written statement of defence the appellant denies the claim in its entirety and avers, inter alia, that the respondent by executing the discharge voucher completely released the appellant from liability under the insurance policy with it and also, that the respondent having filled and signed a proposal form and thereafter obtained an insurance policy with a rateable proportion indemnity clause from it, thereby brought itself within the purview of section 49 of the Transfer of Property Act (TPA), with the result that the respondent's claim lay against Madison as the insurance company which had issued the other insurance policy over the property.

0.35 rule 2(1) of the Civil Procedure Rules enacts that in an application for summary judgment under rule (1) of the same order, a defendant may show either by affidavit, or by oral evidence, "or otherwise" that he should have leave to defend the suit. To succeed the applicant has to show that a defendant who has appeared has no defence or whatever defence he has or may have is merely a sham defence. If, however, a defence put forward by a defendant raises some issue or issues which require investigation then the court is obliged to grant leave to defend, and depending on the facts and circumstances of the case, the leave may be either conditional or unconditional (see Trikam Maqanlal Gohil v. John Waweru Wamai [1983]1 KAR 116. A sham defence is one in which pleas are proffered merely for the purpose of delay (see Jacob v. Booths Distillery Co. 85 LTR. at P.262).

Issues in a suit may be of fact or law or a mixture of fact and law, and by dint of the provisions of O.XIV rule 1. of the Civil Procedure Rules, they arise when a material proposition of fact or law is affirmed by one party and denied by the other. Rule (3) thereof, enacts how the courts may frame the issues. We have already alluded to the various contentions by the parties, and it is quite clear to us that as at the time the respondent was taking out a policy of insurance from the appellant, it was unaware of the existence of the policy the Bank had taken with Madison. It was common ground that the rateable proportion indemnity clause would only apply where the interest insured by the two or more insurance companies concerned is the same. To establish the interest insured by each such company, it may be necessary to adduce oral evidence. There was debate in this case whether the interest the appellant insured was the same as that which was insured by Madison. It was contended on behalf of the respondent that its interest in the property was ownership while that covered by Madison was limited to Stone Crest's indebtedness to it. The parties not being in agreement on the matter, oral evidence is necessary for the parties to show the distinction, if any, between the alleged two interests.

Besides, if the benefit of the insurance cover over the property by the vendor passes with the proprietary interest in it to the purchaser, by dint of the provisions of section 49 of the TPA, aforementioned, then by the terms of the section, certain specified matters should first be established in order to obviate the purchaser getting a windfall if it were to be indemnified for

loss or damage by fire, by both its insurers as well as by Madison.

The section provides that:

"Where immovable property is transferred for consideration, and such property or any part thereof is at the date of the transfer insured against loss or damage by fire, the transferee, in case of such loss or damage, may, in the absence of a contract to the contrary, require any money which the transferor actually receives under the policy, or so much thereof as may be necessary, to be applied in reinstating the property."

As yet, we do not know whether the respondent has had the property transferred to it. Besides, the above provision requires the purchaser to make a demand of any money which the transferor "actually receives under the policy" for loss or damage. Mr. Gatonye for the respondent conceded this fact. Whether or not such demand has been made, is a matter which, too, requires investigation so that the extent, if at all, of the appellant's liability to the respondent may be established as it appears to us that the appellant does not dispute it was obliged to indemnify the respondent but only disputes the extent thereof.

Neither the Bank nor Madison was made a party in the suit as we think they should have been, and neither party herein, having explained whether or not the two dispute liability on the part of Madison to pay a rateable proportion of the assessed loss, an investigation is clearly necessary to establish that fact. Moreover, in view of the fact that there was payment of only part of the total assessed loss, it is not clear, as of now, whether or not the payment was on the understanding that there was another subsisting insurance policy on the same property by Madison.

Mr Gatonye submitted that his client has no locus standi in enforcing the contract of insurance between the vendor and Madison not having been privy to the contract of insurance with Madison, and it should not therefore, be required to look to the parties to it, for the payment of the balance of the assessed loss. True, there is no privity of contract between the respondent and Madison. But in view of the provisions of section 49 of the PTA, an issue arises as to whether the section confers a statutory right to enforce the terms of that policy.

We were addressed at great length by counsel on the meaning and application of the rateable proportion clause, but we do not wish to make reference to the authorities and submissions in that regard, not because any disrespect is meant, but because we think that doing so will encroach on the jurisdiction of the trial court to which, as we think it has already become obvious, we intend to refer this matter back for hearing on the issues above, and any others which we have not highlighted. Besides, there is the outstanding claim of Kshs.2,400,000, for alleged loss of rent. This claim is in our view, intertwined with the claim herein, so that if the rateable proportion indemnity clause applies, it will also affect the liability on loss of rent.

We need not say any more, as we think that had the learned trial Judge considered the issues we have addressed above, he would have granted unconditional leave to the appellant to defend the suit. In the result, we allow the appeal, set aside the order dated 24th March, 1999, granting the respondent summary judgment for Kshs.6,776,471 and substitute it with an order granting the appellant unconditional leave to defend the suit.

As regards costs, we have agonized over the issue. Ordinarily, costs follow the event, but on the facts and circumstances of this case, and in view of the decision in the case of Continental Butchery Ltd v. Samson Musila Nthiwa, Civil Appeal No. 35 of 1977 (CA) (unreported) we order that the costs of the appeal and of the summary judgment application abide the outcome of the suit in the superior court.

Dated and delivered at Nairobi this 7th day of April, 2000.

A.M. AKIWUMI

JUDGE OF APPEAL

S.E.O. BOSIRE

JUDGE OF APPEAL

E. OWUOR

JUDGE OF APPEAL

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

DEPUTY REGISTRAR