Hegen Building Contractors Limited v APA Insurance Limited (Civil Appeal E836 of 2023) [2025] KEHC 2532 (KLR) (Civ) (27 February 2025) (Judgment)

Neutral citation: [2025] KEHC 2532 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E836 OF 2023

H NAMISI, J

FEBRUARY 27, 2025

BETWEEN

HEGEN BUILDING CONTRACTORS LIMITED ..... APPELLANT

AND

APA INSURANCE LIMITED ..... RESPONDENT

(Being an Appeal from Judgement of Hon. Rawlings Liluma, Senior Resident Magistrate delivered on 21 July 2023 in Nairobi CMCC No. 9192 of 2019)

JUDGMENT

1. This appeal arises from a suit filed by the Appellant against the Respondent, in which the Appellant claimed the following reliefs:
   i. Special damages of Kshs 4,610,750/=;
   ii. General damages;
   iii. Costs of the suit
   iv. Interest on (i), (ii), and (iii) above at court rates;
   v. Any other relief the Court may deem fit to grant
2. The particulars of the suit are that on 14 February 2019, one of the Directors of the Appellant company, Henry Geke Nyakango, while driving motor vehicle registration KCR 338P belonging to the Appellant company, was hijacked near Naro Moru Centre along the Nanyuki/Nairobi Road. The said motor vehicle was stolen along with the Director's personal effects. The theft was reported at the Naro Moru Police Station and booked in the Occurrence Book. Although the Police Officers followed the said motor vehicle to Maragwa in Muranga County, they were not able to trace or recover it.

3. The Appellant also reported the matter to the Respondent, who registered the claim under NO. C/10/700/0086841/SAM and commenced investigations. On 7 June 2019, the Respondent wrote to the Appellant intimating that they could not honour the claim based on the alleged investigations. This necessitated the suit filed by Appellant for breach of contract by the Respondent.

4. The Respondent entered appearance and filed a Statement of Defence in which they averred that the investigations revealed breaches of the terms of the relevant policy, the basis on which the Respondent was legally entitled to repudiate and avoid the insurance contract. The Respondent averred that despite their request for information, the Appellant remained adamant the misleading and the withholding of information on the circumstance surrounding the alleged incident of theft of the motor vehicle.

5. At the hearing, PW1, Henry Geke Nyakero adopted his witness statement and produced a bundle of documents. It was his testimony that he was hijacked by two men dressed in Traffic Police uniform while on his way to Nairobi from Nanyuki. He was handcuffed and blindfolded. The carjackers forced PW1 to take an unidentifiable drink, which caused PW1 to pass out. He woke up at about 7.30pm and found himself surrounded by people, who took him to the Police Station.

6. It was PW1's testimony that the Police tried to trace the vehicle unsuccessfully. Similarly, the care tracing company attempted to trace the car. They found the tracking device abandoned by the roadside in Maragwa.

7. On cross examination, PW1 informed the court that he did not seek medical treatment following the incident. He confirmed being questioned by an Investigator but noted that the information he gave to the investigator was not contained in the report. Further, he hired an alternative vehicle from Charles Safaris and Car Hire, which he used for the entire year.

8. PW1 produced a bundle of documents in support of the Appellant's claim. These included copies of the Certificate of Insurance, insurance policy, certificate of installation of car tracking system, accident report form, complaints form to the Insurance Regulatory Authority, Car Hire Agreement and pro forma invoice from Carmax.

9. DW1, Ruth Mbalelo, Legal Officer at the Respondent company, adopted her witness statement. It was her testimony that investigations into the incident established grossly contradicting information from the Appellant and those who were directly involved in the incident, especially those associated with the Appellant. The witness averred that there was clear collusion by the Appellant and his Associates/witnesses, in concert with the car tracking company. DW1 accused the Director, PW1, of refusing to cooperate fully with the investigator and/or availing key witnesses and persons with whom PW1 allegedly spent time with on the material afternoon, thus rendering the matter devoid of the so important utmost good faith.

10. DW1 also testified that the investigations revealed fundamental breaches of the terms of the relevant policy, that is, concealing material facts, suppressing information, giving false and conflicting information.

11. In support of the Respondent's defence, DW1 produced a bundle of documents which included the copy of Motor Accident Report Form, copy of private motor insurance policy document forming part of the terms of Policy No. 10/700/0085896, copy of clauses attached to the Policy, new business Policy schedule in respect of policy no 10/700/0085896, copy of Report by Rapid Investigations Services, copy of tracking device report and audio record of telephone conversation between the investigator and one, Patrick of M/s Trail My car.

12. DW2, Mukingi John Muchinga, a private insurance investigator prepared the report by Rapid Investigations Services, which he produced. In his testimony, DW2 highlighted the 7 issues of concern raised in the report. First, it was unusual that the carjackers reportedly did not take PW1's cell phone and only took his sim card. Secondly, PW1 was found to be in a subconscious state and, according to eye witnesses, he could not walk. Yet he did not seek any medical treatment at a hospital. Thirdly, despite his condition, at Naro Moru Police Station, PW1 was able to narrate exactly what transpired, including showing the Police the confirmation of withdrawal of Kshs 60,000/= from his mpesa account. Fourthly, the statement by PW1's brother, Kepha Mongare, contradicted the information from his call logs and his mpesa statement. Similarly, the statement by Kepha Mongare about his involvement with the tracking device installer contradicted the information from his call logs.

13. DW2 also raised concern about the reports from the tracking device. The report indicated that from 1735hrs on 14 February 2019 to 1255hrs on 15 February 2019, the vehicle was along Muranga -Kenol Road. First the vehicle was at Jambo Village Inn by the roadside and thereafter at Mbombo, just a short distance from the main road. The tracking device was on throughout the night.

14. The final concern was that on 15 February 2019 at 1255hrs, the vehicle was moved from the spent where it had spent night at Mbombo area to Maragwa Police Station, where it was parked at 1304hrs. The device was taken to Maragwa Police Station but no report was filed there.

15. In its judgement, the trial court observed that there was suspicion that the Appellant was fraudulent, in which case, the burden of proof lay on the Respondent. The trial court noted thus:

> " The report written by the DW2 has made several allegations that are grounded on suspicion and of which tints the case of the plaintiff. Throughout the case of the plaintiff, the court has been casting doubt on the whole incident as recounted. The manner in which the plaintiff got himself carjacked and the story behind the whole situation looks more of a script. It leaves everyone with a question as was also asked by the DW2, how can you tell a thief what to take and what not to take? How would you lose your sim card and not the cell phone? It is indeed not adding up."

16. Based on its findings, the trial court dismissed the claim with costs.

17. Aggrieved by the said judgement, the Appellant lodged this appeal on the following grounds:

    i. The learned Magistrate erred in law and fact in dismissing the suit without considering and taking into account all the relevant facts and law and thus making an erroneous finding;

    ii. The learned Magistrate erred both in law and fact in rendering the judgement without taking into account the Appellant's submissions and authorities relied upon thus making an erroneous finding;

    iii. The learned Magistrate erred in law and fact in finding that the Plaintiff had not proved its case on a balance of probabilities;

    iv. The learned Magistrate erred in law and fact in determining the matter based on mere suspicions this reaching an absurd finding;

    v. The learned Magistrate erred in law and fact in considering the issue of fraud which was not pleaded and/or particularised by the Defendant/Respondent herein;

    vi. The learned Magistrate erred in law and fact by shifting the burden of proof in respect to the issue of fraud to the Plaintiff;

vii. The learned Magistrate erred in law and fact in arriving at a judgment without giving ratio decidendi /reasons for this decision;

viii. The learned trial Magistrate erred in law and in fact in failing to appreciate the proper effect and purport of the evidence and in arriving at a decision which is not supported by or is against the weight of the evidence adduced.

18. The Appeal was canvassed by way of written submissions.

Analysis and Determination

19. This being the first appeal, it is this court's duty under Section 78 of the *Civil Procedure Act*, Cap 21 of the Laws of Kenya, to re-evaluate the evidence tendered before the trial court and come to its own independent conclusion, taking into account the fact that it did not have the advantage of seeing and hearing the witnesses as they testified. This principle of law was well settled in the case of Selle v Associated Motor Boat Co. Ltd (1968) EA 123.

20. According to Section 109 of the *Evidence Act*, the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. In the case of Bwire *v Wayo & Sailoki (Civil Appeal 032 of 2021*) [2022] KEHC 7 (KLR) (24 January 2022) (Judgment), Mativo, J opined thus on the issue of burden of proof:

> "Burden of Proof" is a legal term used to assign evidentiary responsibilities to parties in litigation. The party that carries the burden of proof must produce evidence to meet a threshold or "standard" in order to prove their claim. If a party fails to meet their burden of proof, their claim will fail. The general rule in civil cases is that the party who has the legal burden also has the evidential burden. If the Plaintiff does not discharge this legal burden, then the Plaintiff's claim will fail. In civil suits, the plaintiff bears the burden of proof that the defendant's action or inaction caused injury to the Plaintiff, and the defendant bears the burden of proving an affirmative defense. If the claimant fails to discharge the burden of proof to prove its case, the claim will be dismissed. If, however the claimant does adduce some evidence and discharges the burden of proof so as to prove its own case, it is for the defendant to adduce evidence to counter that evidence of proof of the alleged facts. If after weighing the evidence in respect of any particular allegation of fact, the court decides whether the (1) the claimant has proved the fact, (2) the defendant has proved the fact, or (3) neither party has proved the fact.

21. I have keenly reviewed the Record of Appeal, Supplementary Record of Appeal and the submissions by the respective parties. The issue herein is whether the Appellant proved its case to the required standard, that is, a balance of probabilities.

22. The standard of proof in civil cases is a matter of fact and the scale is to be tilted using the competing arguments and evidence in order for the court to establish this standard. In other words, the balance of probabilities is usually attained when both parties tell their stories and the court considers the weight of the evidence on other side. In Palace Investment Ltd v. Geoffrey Kariuki Mwenda & Another (2015) eKLR, it was held that:

> "Denning J. in Miller v Minister of Pensions (1947) 2 ALL ER 372 discussing the burden of proof had this to say; -"That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such

that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties... are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."

23. In Gitobu Imanyara & 2 others v Attorney General [2016] eKLR, the Court of Appeal held:

> " This being a first appeal, it is trite law, that this court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.

24. It is the duty of a first appellate court to re- appraise and re-analyse the evidence on record and arrive at its own conclusion and give reasons either way – see Sumaria & Another vs Allied Industries Limited [2007] 2 KLR. The Court has also to appreciate that in the discharge of its aforesaid mandate the Court should be slow in moving to interfere with a finding of fact by a trial court unless it was based on no evidence, it was based on a misapprehension of the evidence or the Magistrate had been shown demonstrably to have acted on wrong principle in reaching the finding he did –see Musera vs Mwechelesi & another [2007] 2 KLR 159.

25. In the instant case, the Appellant presented its case and produced its evidence. The Respondent then presented its defence and produced its evidence to controvert the Appellant's case. I have keenly examined the evidence produced before the trial court as well as the testimonies of the witnesses. Despite the evidence and testimony of the Appellant, the contradictions noted by the Respondent, through DW2, are too glaring to be overlooked. Surprisingly, the Appellant made little attempt at addressing these concerns. In the end, questions still linger in the mind of this Court as to the events on the material day.

26. Lord Nichol of the House of Lords in the case Re H and Others (minors) (sexual Abuse: Standard of Proof) (1969) stated this on balance of probability:

> " The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probability the court will have in mind as factors, to whatever extent is appropriate in the particular case, that the more serious allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability." (emphasis added)

27. In the instant case, it is difficult to picture the incident occurring as the Appellant claimed it did. Based on the evidence presented, I find that the Appellant failed to prove its case to the required standard.

28. In view of the foregoing, the appeal is unmeritorious and the same is dismissed with costs to the Respondent assessed at Kshs 50,000/=.

DATED AND DELIVERED AT NAIROBI THIS 27 DAY OF FEBRUARY 2025.

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:

N/A..... for the Appellant

N/A..... for the Respondent

Libertine Achieng .....Court Assistant