Ojwang v CIC Insurance Limited (Civil Appeal 31 of 2020) [2024] KEHC 904 (KLR) (31 January 2024) (Judgment)

Neutral citation: [2024] KEHC 904 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL 31 OF 2020

MS SHARIFF, J

JANUARY 31, 2024

BETWEEN

PETER ODUOR OJWANG OJWANG .... APPELLANT

AND

CIC INSURANCE LIMITED .... RESPONDENT

(Being an appeal from the judgement and deceree of Hon S.N. Telewa SRM delivered in Kisumu CMCC 611 of 2017 on 19/05/2020)

JUDGMENT

A. Case backdrop

1. This appeal emanates from a dismissal of the appellant's case by the trial court. Before the trial court, the appellant had sued the respondent claiming a liquidated sum of ksh 246,009, general damages for breach of contract and costs of the suit due to a repudiation of a life insurance policy of one Phelgonah Ogutu Oyugi(deceased).

2. After hearing the matter, the trial court found the respondent was justified in avoiding the contract and thus dismissed the appellant's suit with costs to the respondent.

B. Appeal

3. The appellant, being aggrieved by the said judgment moved this court by way of appeal and premised it on the following grounds;

    1. That the learned trial magistrate erred in law and in fact by failing to appreciate that the appellant had proved his case on a balance of probability as required by law.

    2. The learned trial magistrate erred in law and in fact by failing to appreciate the evidence on record adduced by the appellant.

3. The learned trial magistrate erred in law and in fact by failing to appreciate that the respondent's defence was not a good defence as the respondent failed to substantiate the issues raised therein.

4. The learned trial magistrate erred in law and in fact by failing to appreciate the fact that the failure to adduce documents in support of the issues raised in the respondent's statement, rendered the same mere allegations.

5. The learned trial magistrate erred in law and in fact by relying on issues that were not substantiated by way of evidence.

6. The learned trial magistrate erred in law and in fact by making a finding that the appellant did not disclose the health status of the deceased herein to the respondent at the time of taking out the policy and failed to appreciate that the respondent had a duty to cause the deceased herein to be examined by a doctor of their own before issuing the policy.

7. The learned trial magistrate erred in law and in fact by failing to appreciate that it was the responsibility of the respondent to prove that the deceased herein did not disclose to the respondent her health status before the policy was issued, a fact that ought to have been done by producing the forms filled by the deceased and the policy document as exhibit.

8. The learned trial magistrate erred in law and in fact by failing to appreciate that the deceased herein could have been diagnosed with cancer after the policy had been issued, a fact that she could not have known.

C. Evidence

4. The appellant's case before the trial court was comprised in his own testimony. The appellant stated that sometimes in the month of May 2016 the deceased Phelgona Ogutu Oyugi took out a life insurance policy christened "Last Expenses Plan" with the respondent under a cover No FE003180. The respondent was obligated under the said cover to pay the beneficiary a sum of Ksh 200,000 within 48 hours upon notice of the demise of the insured. The said payment was intended to defray the funeral costs of the insured.

5. The appellant testified that subsequent to the death of the insured on 6th August 2016, he communicated that fact to the respondent and at the instance of the respondent, he duly filled in all the requisite forms and supplied the respondent with all the necessary documents demanded of him, yet, the respondent failed to remit the last expenses within the requisite 48 hours whereafter a demand was made through his advocates. The respondent then responded and stated that it had repudiated the cover and that it would refund the premiums that had so far been paid.

6. It was the appellant's testimony that he eventually expended a sum of Ksh.246,009 as funeral costs and he thus sought payment of the same, general damages for breach of contract and costs of the suit.

7. The respondent failed a defence and called one witness. Calvince Onduru testified that the deceased had undertaken a last expense plan policy with the respondent whose annual premium was Ksh.2,000 and had dully paid the same, save that upon her death, the investigations conducted by the latter revealed that the insured had a pre- existing health condition that she had failed to disclose prior to the issuance of the policy. Further that the appellant, who was the sole beneficiary, was the one who that signed the proposal forms and paid for the premiums through his mpesa using his own safaricom line hence the decision by the respondent to repudiate the cover. This witness admitted that no refund of premium had so far been made.

8. By directions of this court, the appeal was disposed of by way of written submissions. Only the appellant complied. The same is on record and due consideration has been given thereto.

D. Analysis and determination.

9. This being a first appeal, the duty of this court is as was stated in *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, thus;

> "This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way"

10. The facts in this case are as summarized in the preceding paragraphs and the only issue for determination at this stage is whether the trial court erred in dismissing the appellant's case. The trial magistrate in declining the suit found that the respondent was justified in repudiating the cover. The court queried why the appellant had signed the proposal forms and paid the premium via mpesa through his own line. Due to the fact that the deceased had died of cancer, the trial court wondered whether that condition had been disclosed prior to the issuance of the policy.

11. In light of the finding by the trial court, I have carefully re-evaluated, re-analyzed and scrutinized the evidence tendered by both parties before the trial court and I am at a loss as to what formed the basis of the trial court's finding that the appellant had signed the proposal forms. Further the fact that the trial court wondered as to whether disclosure of a pre-existing medical condition had been made presupposes that no evidence had been laid before the court to prove that part of the defence. The trial magistrate is duty bound to making findings based on the evidence adduced and not on the basis of assumptions and conjecture; the trial court thus erred in law and in fact in allowing itself to wonder in the wilderness of thought, an endeavor that was not within it's mandate.

12. Save for making general allegations in the defence, fraud was never pleaded, nor was it specifically particularized in the defence. No iota of evidence was led to prove the respondent's defence yet the latter is the custodian of the proposal form and the policy documents. The failure by the respondent to produce the requisite documents in support of it's defence must attract an adverse inference. (See the cases of *Bukenya & Others v Uganda* (1972) EA 549.

13. It is trite law that he who alleges must prove. This court finds that the respondent failed to discharge it's burden of proof in respect of the allegations made in it's pleadings as was required of it pursuant to the provisions of sections 107 and 109 of the *Evidence Act* Chapter 15 of the laws of Kenya. Section 107 (1) of the *Evidence Act* reads as follows:

> "Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."

14. The provision of section 109 of the aforesaid *Act* are a follows:

> "The burden of proof as to any particular fact lies on the person who wishes the court to believe in it's existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

15. The record of appeal reveals that vide an unqualified letter dated 28th September 2018, the respondent had requested the appellant to submit to it an out of court settlement proposal but it latter renegaded

from that position. Further, whereas the respondent had intimated to the appellant's advocates that it was going to do a refund of the premium given it's stand that it had repudiated the insurance cover, non was made.

16. Premised upon the analysis made hereinabove this court finds that the trial court's judgment was not based on evidence and further that the said court disregarded the evidence tendered by the appellant and it never made any determination on the appellant's prayer for an award of general damages for breach of contract.

17. On the balance I do find that this appeal is well merited and I do hereby set aside the judgment of the trial court and I proceed to make the following orders:

    i. Judgment is entered for the appellant against the respondent for a liquidated sum of Ksh 200,000 as per the Insurance Policy Cover No FE003180, which sum shall attract interest at court rates from 8th August 2016 until payment in full.

    ii. The appellant is awarded general damages of Ksh 100,000 for breach of contract, which sum shall attract interest at court rates from 19th May 2020 until payment in full.

    iii. The appellant is awarded cost of this appeal and of the original suit.

    Orders accordingly.

DELIVERED, DATED AND SIGNED AT KISUMU THIS 31ST DAY OF JANUARY, 2024.

MWANAISHA S. SHARIFF

....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR