First Assurance Company Ltd v Bekko (Civil Appeal E332 of 2021)
[2024] KEHC 1636 (KLR) (Civ) (23 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1636 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E332 OF 2021

AN ONGERI, J

FEBRUARY 23, 2024

BETWEEN

FIRST ASSURANCE COMPANY LTD ..... APPELLANT

AND

SHOKO MOLU BEKKO ..... RESPONDENT

(Being an appeal from the judgment and decree of Hon. D. W. Mburu (SPM) in Milimani CMCC No. 6039 of 2019 delivered on 12/5/2021)

JUDGMENT

1. The respondent in this case was the plaintiff in Milimani CMCC No. 6039 of 2019 where he was seeking declaration that the appellant indemnify him under policy no. 12/20/0023518/02 and a further order that the appellant was in breach of the said policy.

2. The respondent was also seeking kshs.13,960,000 together with general damages for breach of contract and also costs of the suit and interest.

3. The plaintiff's evidence was that she was involved in an accident on 21/6/2018 along Thika Super highway and her motor vehicle registration no. KCH 888F Toyota land cruiser had an insurance policy with the appellant whereby the appellant agreed to indemnify her.

4. The appellant confirmed the motor vehicle was comprehensively insured by them but found that some damages for which the respondent lodged a claim were not as a result of the accident that occurred on 21/6/2018.

5. Further that some of the damages were exaggerated and declined to cater for all the damages especially those to the engine.

6. The trial court gave judgment as follows

   i. A declaration be and is hereby issued that the plaintiff is entitled to indemnification by the defendant under policy number 12/20/0022518/02;

   ii. A declaration be and is hereby issued that the defendant is in breach of the contract of insurance under policy number 12/20/0022518/02 and is liable to compensate the plaintiff;

   iii. An indemnity in the sum of kssh.5,000,0000/= being the pre-accident value of the insured motor vehicle.

   iv. Kshs.5,950,000 for loss of user and/or cost hire of alternative motor vehicle;

   v. Costs of the suit;

   vi. Interest at court rates on the above amounts from the date of filing suit until payment in full.

7. The appellant has appealed on the following grounds;

   i. That the honourable magistrate erred in not appreciating that an award for loss of user cannot be granted where an award for indemnity for pre-accident value has been granted.

   ii. That the honourable magistrate erred by failing to appreciate the fact that an award of loss of user to the plaintiff (respondent herein) amounts to double compensation.

   iii. That the honourable magistrate erred in not appreciating that the respondent had not proved his case on a balance of probability as required by law.

   iv. That the honourable magistrate erred in law and in fact by not taking into consideration the evidence produced by the appellant during trial so as to consider the same when awarding damages to the respondent.

   v. That the honourable magistrate erred in law and in fact by failing to appreciate the doctrine of indemnity as a principle under the law of insurance.

8. The parties filed written submissions as follows; the appellant submitted that the award on loss of use was inordinately high and unwarranted ab initio. There was a total misapprehension of facts and a total disregard of what the law envisages in this instance consequently unjustly enriching the Respondent.

9. The trial Court observed that the Respondent's vehicle at the time the Hearing at the Lower Court proceeded, had been declared a write off. This was the testimony of the Respondent's Assessor, who went on to confirm this position. The respondent was therefore compensated twice to the appellants detriment.

10. The appellant argued that PW3 Daniel Muchiri testified and indicated that the pre-accident value of the motor vehicle was Kshs. 6,000,000 and that the repair costs were 53% of the pre-accident value. That further the loss of user was not properly evidenced as the receipts that were presented did not garner the threshold of evidence.

11. The respondent only signed the agreement for car hire as the car hire company did not attest. The appellant contended that the courts have frowned upon awarding both loss of user and for the pre-accident value as this would be double compensation, in support it cited Nakuru Civil Appeal No. 288

of 2010 *Permuga Auto Spares & Anor v Margaret Korir Tagi* [2015] eKLR where the Court observed that;

> "I agree that when the court is awarding damages for loss of user, the court ought to consider that a commercial vehicle cannot be kept on the road when it does not make any profits, the special damage must however be subject to proof. The circumstances of this matter are different. It is the court's view that once a vehicle has been written off, the only compensation is the per-accident value, less salvage value as assessed and other reasonable consequential expenses that are subject to prove. There would ordinarily be assessment charges, towing charges, excess but not loss of user. The payment of the pre-accident value is made to bring the owner to as near as possible to the state he would have been if not for the accident and loss. In the court's view, to award damages for loss of user as well as the pre-accident value and other consequential losses would be to award double compensation. The claim for loss of user is disallowed."

12. The respondent on the other hand submitted that he presented evidence in the trial which was uncontroverted. The appellant has alleged that the level of damage on the vehicle was exaggerated but failed to prove the same. It was the appellants case that the damages were manipulated but failed to provide a witness that testified the same.

13. The respondent submitted that he proved his case that the appellants breached the contract of insurance under policy No. 12/20/0022518/02. As a consequence of the breach the plaintiff was compelled to hire a car. The respondent proved that he spent Kshs. 5,940,000 as a consequence of the accident. All the receipts were adduced as proof of the same. It is a settled custom in matters of insuring motor vehicle that if repair costs are more than 50% value of the vehicle, then it ought to be written off and deemed constructive loss.

14. This was upheld in the case of *British American Insurance Company Limited v George Mokaya Ondieki* [2019] eKLR. In this case the trial court agreed with the insured's assessor that if the repair costs are more that 50% of the pre-accident value then the vehicle should not be repaired but should be considered a write-off and the insured compensates to the tune of the insured value plus other costs.

15. On the appellant's argument that to award the pre-accident value as well as damages for loss of user would amount to double compensation, the respondent cited *Samuel Kariuki Nyangoti v Johaan Distelberger* [2017] eKLR and *David Maina v Mary Wanjiku Wanjie & Another* [2020] where awards under the two heads were granted.

16. This being a first appeal, it is the duty of the first appellate court to re-evaluate the evidence adduced before the trial court and to arrive at its own conclusion whether to support the finding of the appellate court while bearing in mind that the trial court had the opportunity to see the witnesses.

17. The issues for determination in this appeal are as follows;

    i. Whether the respondent proved his case to the required standard in civil cases.

    ii. Whether the award of loss of user amounted to double compensation where an award of indemnity for pre-accident value had been granted.

    iii. Whether the trial court misapprehended the doctrine of indemnity under law of insurance.

18. On the issue as to whether the respondent proved her case to the required standard, I find that there was no dispute that the appellant had insured the respondent's motor vehicle.

19. I find that the Trial court was right in issuing declaration that the respondent was entitled to indemnification by the Appellant under policy number 12/20/0022518/02.

20. On the issue as to whether the award of loss of user amounted to double compensation, the appellant submitted that the same ought not to have been awarded because the respondent was granted an award of indemnity.

21. In the case of *Concord Insurance Company Limited v David Otieno Alinyo & Another* [2005] eKLR the Court of Appeal while discussing the measure of damage to chattels agreed with the principles laid down by *Herman LJ in Darbishire v Warran* [1963] 1 WLR 1067 at page 1070 thus:

> " The principle is that of restitution integrum, that is to say, to put the plaintiff in the same position as though the damage never happened. It has come to be settled that in general the measure of damages is the cost of repairing the damaged article, but there is an exception if it can be proved that the cost of repairs greatly exceeds the value in the market of the damaged article. This arises out of the plaintiff's duty to minimise his damages ...".
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> More recently in *Burdis v Livey* [2002] 3 WLR 702, the English Court of Appeal stated at page 792 paragraph 84:
>
> > " When a vehicle is damaged by the negligence of a third party, the owner suffers an immediate loss representing the diminution in value of the vehicle. As a general rule, the measure of that damage is the cost of carrying out the repairs necessary to restore the vehicle to its pre–accident condition".

22. I find that the award of loss of user amounted to double compensation because the respondent was granted an award of indemnity.

23. An insurance contract is a contract of indemnity and the insured is entitled to full indemnity and no less or more.

24. On the issue as to whether the trial court misapprehended the doctrine of indemnity, I find that indemnity has several interlinked meanings in the insurance contract context inherent in the notion that an insurance contract should provide no more and no less than a full indemnity and the goal is to prevent windfalls to either party.

25. This aspect is emphasized in *Castellain v Preston*. Brett LJ declared as follows;

> " The very foundation.....of every rule which has been applied to insurance law is this, namely, that the contract of insurance contained in a marine or fire policy is a contract of indemnity, an of indemnity only, and that this contract means the assure, in case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified. That is the fundamental principle of insurance, and if ever a proposition is brought forward which is at variance with it.....that proposition must certainly be wrong."

26. Further in the case of *Crisp v Security Nat'l Ins. Co*, 369 S.W. 2d 326 [1963], the court stated as follows;

> " Indemnity is the basis and foundation of insurance coverage not to exceed the amount of the policy, the objective being that the insured should neither reap economic gain or incur a loss is adequately insured.

> ....The measure of damage that should be applied in case of destruction of this kind of property is the actual worth of value of the articles to the owner for use in the condition in which they were at the time of the fire excluding any fanciful or sentimental considerations"

27. In view of the above, I find that to award damages for loss of user as well as the pre-accident value would be to award double compensation. The claim for loss of user ought to have been disallowed.

28. I strike off the award of Kshs.5,950,000 for loss of user and/or cost hire of alternative motor vehicle since the same amounts to double compensation.

29. The respondent was only entitled to the pre-accident value of the motor vehicle and for that reason I find that the trial court misapprehended the doctrine of indemnity under law of insurance.

30. The judgment of the Trial court is set aside and replaced with judgment in favor of the respondent in the sum of Ksh. 5,000,000 being the pre-accident value of the insured motor vehicle.

31. As the appeal succeeds in part, each party shall bear its own costs of the appeal but the Respondent shall have costs in the lower court.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 23RD DAY OF FEBRUARY, 2024.

A. N. ONGERI

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of:

..... for the Appellant

..... for the Respondent