Britam General Insurance (K) Limited v Odinga & another (Appeal E305 of 2022) [2024] KEHC 8253 (KLR) (26 June 2024) (Judgment)

Neutral citation: [2024] KEHC 8253 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

APPEAL E305 OF 2022

JK NG'ARNG'AR, J

JUNE 26, 2024

BETWEEN

BRITAM GENERAL INSURANCE (K) LIMITED ..... APPELLANT

AND

GEORGE OTIENO ODINGA ..... 1ST RESPONDENT

INSURANCE REGULATORY AUTHORITY ..... 2ND RESPONDENT

(Being an Appeal from the Judgment and Orders of the Insurance Appeals Tribunal at Nairobi dated 4/5/2022 in IAT No. 4 of 2022)

JUDGMENT

1. The 1st respondent herein filed an appeal before the Insurance Appels Tribunal (the tribunal) challenging the decision of the 2nd respondent (IRA) dated 28/1/2022 which informed the 1st respondent that his complaint dated 21/2/2019 against the appellant had been found without any valid reasons to direct the appellant to settle his claim. The 1st respondent was the registered owner of motor vehicle registration number KCL 512M (the vehicle) which had a comprehensive insurance cover with the appellant for a pre-accident value of Kshs. 7,050,000/=. The vehicle was involved in an accident on 7/10/2018 along Thika Road and the same was reported with the police and with the appellant wherein the 1st respondent registered his claim and was issued with a discharge voucher dated 29/10/2018 which he executed and returned to the appellant. The appellant however failed to settle the claim as per the discharge voucher and appointed an investigator and upon conclusion of investigations, the appellant declined to settle the claim due to alleged inconsistencies in the evidence provided by the 1st respondent.

2. The 1st respondent thus lodged a complaint with IRA vide letter dated 21/2/2019 and IRA referred the matter to the Insurance Fraud Investigation Unit (IFIU) who returned a report dated 7/7/2020 and established the existence of the accident and ownership of the subject motor vehicle and the other

involved vehicles. The report also noted inconsistencies in the witness statements but recommended that the claim be settled by the appellant as per the policy and conditions. IRA shared the report with the appellant on 9/7/2020 but the appellant disagreed with its findings prompting IRA to write a letter addressed to the appellant and advised the appellant to review the matter with a view to indemnify the 1st respondent for the loss occurred noting that the appellant still held subrogation rights over any negligent third parties. IRA also gave a deadline of 247/2020 time by which the appellant was to respond.

3. The appellant then referred the matter to the Directorate Criminal Investigation (DCI) *vide* letter dated 24/7/2020 and requested IRA to review the matter as the appellant had found that the claim was inadmissible under the policy. The parties then engaged in various meetings and reviewed various reports and documents. Vide letter dated 31/5/2021 and 8/11/2021, the IRA sought to know from the appellant the status of the matter before the DCI to enable it conclude the matter and on both occasions the appellant updated the investigations were still ongoing. The 1st respondent thus filed Appeal No. 3 of 2021 before the tribunal due to the delay and by order dated 16/12/2021, the tribunal ordered IRA to issue a written undertaking on when a decision of the 1st respondent's complaint would be rendered. IRA them reviewed the 1st respondent's complaint and vide letter dated 28/1/2022, it gave its verdict that it had received both the appellant's and 1st respondent's submissions and it had found no valid reasons to direct the appellant to settle the claim and the file was thus closed.

4. This triggered the 1st respondent to file an appeal before the tribunal after withdrawing appeal no. 3 of 2021. The tribunal found that the 1st respondent had been given a fair hearing by IRA, that IRA had not made two contradicting decisions as its initial letter did not encompass a directive issued towards the appellant, that IRA did not make a right decision as the discharge voucher issued by the appellant created a binding contract and it ought to have been settled without further investigations, that the 1st respondent was not entitled to the damages pleaded, and that the 1st respondent was successful and was thus awarded costs of Kshs. 85,000/=. The tribunal thus revoked the verdict of IRA issued in the letter dated 28/1/2022 and allowed the appeal directing the appellant herein to settle the 1st respondent's claim as the discharge voucher dated 29/10/2018.

5. The appellant was dissatisfied with that decision and filed the instant appeal against the tribunal's judgment of 4/5/2022 vide the amended memorandum of appeal dated 30/6/2022 on six grounds of appeal which can be summarized as follows; the tribunal erred in holding that the decision of the Commissioner of Insurance was not valid as it gave weight to the appellant's technical reports contrary to the law on validity of expert witnesses; the tribunal erred in misapplying Section 170(1) of the *Insurance Act* by analysing the facts before it separate from the reasoning of the Commissioner dated 22/12/2021; the tribunal erred in holding that the reports submitted by the parties before the Commissioner of Insurance and the tribunal were of no evidential value yet there was no challenge on their validity at the time of production; that the tribunal erred by failing to issue directions on the applicable rules of evidence at the hearing as per Section 170(3) of the *Evidence Act*; that the tribunal erred in holding that parties ought to have called their expert witnesses to testify under Section 170 of the Insurance Act yet the tribunal was the master of the proceedings and directed that the case be dispensed with by way of written submissions; and that the tribunal erred in finding that the appellant had failed to discharge the burden of proof of the allegations of fraud on the part of the respondent and upheld the claim on account of the discharge voucher which was legally vitiated.

6. The appellant thus sought orders that the appeal be allowed with costs and the judgment of the tribunal dated 4/5/2022 be set aside and substituted with an order striking out the 1st respondent's purported appeal with costs.

7. The appellant filed submissions dated 13/3/2024 in support of the appeal whereas the 1st respondent's were dated 30/4/2024. The 2nd respondent's submissions were not on record at the time this Court retired to write its ruling.

8. I have considered those submissions alongside the entire record and pleadings before court. Taking into account the grounds raised in the memorandum of appeal and considering the entire reading of the impugned judgment of the tribunal, I note that the main issue for determination is whether the finding of the tribunal as regards the enforceability of the discharge voucher dated 29/10/2018 ought to be set aside. It is that finding that held the appellant liable to settle the 1st respondent's claim thus a determination on that issue alone will inform whether or not the tribunal's judgment ought to be set aside as prayed.

9. It is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts and come up with its findings and conclusions see Court of Appeal for East Africa in *Peters v Sunday Post Limited* [1958] EA 424.

10. It is not denied that the appellant issued the 1st respondent with a discharge voucher dated 29/10/2028 which the 1st respondent duly executed and returned to the appellant. The question to answer is, what is the legal status of a discharge voucher? Clause 6(1) of the Guidelines on Claims Management for the Insurance Industry 2012 issued by the IRA provides that: -

> "An admission of liability contemplated in Section 203(1) shall be construed to mean performance of an act by an insurer that is consistent with the settlement of the claim and shall include but not limited to making of an offer, issue of a discharge voucher, authorizing repair and replacements..."

11. From that alone, issuance of a discharge voucher by an insurer is an admission of liability and is construed to mean that the insurer had admitted the claim and the same ought to be settled.

12. The Court of Appeal stated in *Trinity Prime Investment Limited V Lion of Kenya Insurance Company Limited* [2015] eKLR that: -

> "The execution of the discharge voucher, we agree with the learned judge, constituted a complete contract. Even if payment by it was less than the total loss sum, the appellant accepted it because he wanted payment quickly and execution of the voucher was free of misrepresentation, fraud or other. The appellant was thus fully discharged."

13. It then follows that once a discharge voucher is issued and duly executed, a binding contract is formed between the parties. The same was held in *Lochab Transport Ltd v Kenya Arab Orient Insurance Ltd* [1986] eKLR wherein the court held that: -

> "In this case a contract to settle the plaintiff's claim under the policy was clearly made. The sending of a completed discharge voucher to the plaintiff was plainly an offer. His signing and returning the same was clearly an acceptance. The parties had to all outward appearances settle the claim. The contract is good unless and until it is set aside for failure of some condition which the existence of the contract depends or for fraud or on some equitable ground."

14. Finally, in *Coastal Bottlers Limited v Kimathi Mithika* [2018] eKLR the Court of Appeal stated that: -

> "Whether or not a settlement agreement or a discharge voucher bars a party thereto from making further claims depends on the circumstances of each case. A court faced with such an issue, in our view, should address its mind firstly, on the import of such a discharge/ agreement; and secondly, whether the same was voluntarily executed by the concerned parties."

15. I have considered the circumstances of this case. It has already been found that the discharge voucher issued by the appellant created a valid contract between the parties. It was for the appellant to show that there were some conditions upon which the contract could be avoided. Upon issuing the discharge voucher, the 1st respondent executed the same and returned it to the appellant and, to him, that was the end of the matter and he awaited release of the funds. The appellant instead appointed an investigator and upon conclusions of the investigations, the appellant declined to settle the claim on the basis of the reports from Instep Loss Assessors Ltd and Fineline Motor Assessors. The reports indicated that the damages on the subject motor vehicle were inconsistent with the accident, and if at all the accident occurred, the damages were exaggerated. The appellant thus found that the 1st respondent had breached the doctrine of utmost good faith and misrepresentation of material facts.

16. However, once the 1st respondent reported the matter to IRA, the 2nd respondent herein, IRA referred the matter to the IFIU which returned a report dated 7/7/2020 which found that indeed, an accident had occurred as alleged and was reported to the police station and officers from the station visited the scene and towed the involved vehicles to the station. The report also found that extracts from the occurrence book confirmed that the accident was reported and there were three witnesses inclusive of the drivers and attending police officers. Upon receipt of that report, the IRA wrote to the appellant vide letter dated 21/7/2020 and noted that the appellant could not decline a claim on the basis of non-disclosure of material facts which the policyholder could not have reasonably be expected to have known, or misrepresentation unless it was fraudulent or negligent misrepresentation of material facts. The IRA thus informed the appellant that it was expected to review the matter with a view of indemnifying the insured for the loss incurred.

17. Up to that point, this Court notes that none of the reports alleged any fraud on the part of the 1st respondent or negligent misrepresentation on his part. In as much as inconsistencies were noted, none of the reports expressly cast blame on the 1st respondent. I do note that as per the IFIU report, it was concluded that there was no fraud committed by the 1st respondent and it was further correctly stated that the threshold required to establish fraud was beyond reasonable doubt and the evidence and information gathered during the investigation did not give sufficient grounds to demonstrate any fraudulent activity committed by the insured.

18. The appellant was to then decline the IFIU report and instead referred the matter to the DCI for further investigations. It is those investigations that would have revealed any fraud on the part of the 1st respondent. However, this court notes that even at the time of the tribunal's judgment, the appellant had not tabled any evidence of fraud on the part of the 1st respondent including a report from the DCI. It then causes this court to wonder why IRA had a sudden shift from its earlier finding that on the basis of the IFIU report, the appellant ought to have indemnified the 1st respondent. In an interesting turn of events, IRA, without any cause, found that there was no sufficient reason to direct the appellant to settle the claim.

19. On what basis was that decision arrived at? From the evidence on record, it is clear that by the time IRA issued that verdict, the appellant had not submitted any report of the DCI investigations. Indeed,

the IRA had itself written to the appellant twice vide letters dated 31/5/2021 and 8/11/2021 seeking to know from the appellant the status of the matter before the DCI to enable it conclude the matter and on both occasions the appellant updated that the investigations were still ongoing. What then changed between IRA's letter of 21/7/2020 when IRA advised the appellant to indemnify the 1st respondent, and its' letter of 28/1/2022 where IRA found that there was no sufficient reason to direct the appellant to settle the claim? Nothing. The decision was unsupported noting that there was nothing tabled before the IRA to establish fraud on the part of the 1st respondent. The facts still remained, as well advised by the IRA, that the accident was proven to have occurred and reported and there were witnesses to that effect, the subject motor vehicle was owned by the 1st respondent and was driven by an authorized driver, there was a valid insurance policy between the 1st respondent and the appellant, and the appellant could not avoid the 1st respondent's claim on the basis of non-disclosure or misrepresentation unless fraud or negligence was proven. Was any of that proven? No.

20. It is more likely that after the 1st respondent filed Appeal No. 3 of 2021 before the tribunal due to the obvious delay, and following the tribunal's order dated 16/12/2021 directing the IRA to issue a written undertaking on when a decision of the 1st respondent's complaint would be rendered, IRA felt pressured to make a verdict and close the file and thus rushed to give an unsupported verdict that was contrary to its initial finding and advise to the appellant which was based on the IFIU report, noting that the IFIU report still recommended that the claim be settled as per the terms of the insurance policy after conducting investigations. Had there been any element of fraud or negligent misrepresentation on the 1st respondent's part, it would have been expected that the IFIU report would have captured the same and arrived at a different recommendation. It would have also been expected that the DCI report would have been tabled and charges preferred against the 1st respondent and any other suspects. However, without any dint of proof of fraud on the 1st respondent, both the appellant's and IRA's decision remained unsupported and there was nothing to vitiate the contract created by the discharge voucher dated 29/10/2018.

21. This Court agrees with the finding of the tribunal that a binding contract was created once the discharge voucher was issued and that the issuance of the voucher was not only an admission of liability but also an offer to settle the claim and that its execution and return by the insured amounted to an acceptance. See Saimon Ntasikoi Noonkanas v Resolution Insurance Limited (2021) Eklr where the court found a discharge voucher amounted a definite offer by the insurer and acceptance by the insured and all that remained was payment of the agreed sums as there was an ex facie binding contract between the parties. The tribunal correctly found that there was no suit filed by the appellant to set aside the contract on grounds of fraud or any other vitiating factor and that IRA had failed to proof any fraud on the part of the 1st respondent herein or any other vitiating factor thus the contract remained valid and enforceable.

22. I find it paramount to add that the tribunal correctly found that the burden of proof to establish fraud on the part of the 1st respondent lay with the appellant herein. The tribunal relied on the case of *Credit Kenya Ltd v Gateway Insurance Company Ltd* (2000) eKLR which this Court similarly associates itself with wherein it was held that: -

> "A consequence of the principle that a contract is one uberrimae fidel is that a fraudulent claim by the assured entitled the assured to avoid the contract. Mere exaggeration is not conclusive evidence to fraud though it affords strong evidence of fraud if the claim is out of all proportion to the true loss as does gross negligence. The burden of proving that the assured caused the loss deliberately lies on the insurance; but the assured has to establish an accident...The burden of proving fraud lies with the defendant in this case. It is they who

have to strictly prove fraud on the part of the plaintiff. I expected there to be a thorough police investigation of this matter with the assistance of the loss assessor. This should have come to the arrest of both suspects who should have been duly charged in a court of law under a criminal offence Where this a conviction preferred by a court of law, it is conclusive evidence that theft and fraud did occur. The report written by the Loss Assessor has made several allegations that are grounded on suspicion. It was imperative that the suspects were charged...This has not been done. A person is innocent until proven guilty in the eyes of the law. I find that the plaintiff did not breach the policy"

23. What more is there to add? The appellant failed to establish any fraud on the part of the 1st respondent and all the reports availed before the tribunal raised suspicions which at the end of the day were unsupported. I do agree with the tribunal findings that IRA gave weight to reports which, to this court's mind, did not accuse the 1st respondent of any fraud. The appellant failed to proof fraud on the part of the 1st respondent or any vitiating factor to avoid the contract, the tribunal's finding compelling the appellant to settle the claim was thus sound.

24. I find no reason to disturb that finding having re-assessed and re-evaluated the evidence on record. Though the appellant complained that the tribunal misapplied the law on validity of expert evidence, I find that the main issue for consideration before the tribunal was whether or not there was a valid contract created by the discharge voucher, and whether or not the contract was vitiated by fraud or any other compelling reason. I do however note that by virtue of Section 170(2) of the *Insurance Act*, the tribunal was at liberty to allow or disallow admission of the various investigation reports despite that they would otherwise be inadmissible under Evidence Law. The tribunal found that the reports were unsupported as the qualification of the makers of such reports were missing such as the names and individual qualifications allowing the maker to be deemed 'expert witnesses.' The tribunal found that the qualifications of the makers were not revealed in the body of the reports and the makers had not been cross-examined thus the reports were deemed inadmissible. I see nothing wrong with that verdict.

25. The upshot is that the appeal is found to be unmerited and the same is hereby dismissed. The tribunal's judgment is hereby upheld and the appellant is hereby ordered to settle the appellant's claim forthwith in line with the discharge voucher dated 29/10/2018 together with interest at court rate from 4/5/2022 till payment in full plus costs of the appeal at the tribunal as already assessed at Kshs. 85,000/=. The 1st respondent is also awarded costs of the appeal.

It is so decreed.

DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 26TH DAY OF JUNE, 2024.

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J.K. NG'ARNG'AR, HSC

JUDGE

In the presence of:-

Nyarhume (holding brief) for the Appellant

Njemo for the Respondent

Court Assistant- Peter Ong'idi

Further Order;

30 days stay granted.

J.K. NG'ARNG'AR, HSC

JUDGE