IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, GATEMBU & MURGOR, JJ.A)

CIVIL APPEAL NO. 50 OF 2013

BETWEEN

KENINDIA ASSURANCE CO. LTD.....APPELLANT

VERSUS

MONICA MORAA.....RESPONDENT

(Appeal from a Judgment and Decree of the High Court of Kenya at Kisii (Musinga, J.) dated 23rd September, 2011

in

H.C.C.C NO. 43 OF 1999)

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JUDGMENT OF THE COURT

1. This appeal arises out of a judgment of the High Court delivered on 30th September 2011 holding the appellant liable to pay the respondent Kshs.8,000,000.00 under a Burglary Insurance Policy.

Background

2. In a plaint filed in the High Court of Kenya at Kisii on 22nd February 1999, the respondent sought judgment against the appellant for Kshs.8, 000,000.00 interest and costs. She pleaded that on the night of 23rd/24th December1997, during the currency of a Burglary Insurance Policy issued to her by the appellant, her insured premises situate on plot number 274 Sare-Awendo were broken into and stock in trade worth Kshs.12, 450, 000.00 stolen. She averred that the appellant was liable under the insurance policy to the extent of the insured amount of Kshs.8, 000,000.00.

3. In its statement of defence, the appellant admitted that it issued the insurance policy in question but denied liability. It also denied that the respondent's insured premises were burgled or that property worth Kshs. 12,450,000.00 was stolen. It contended that it lawfully repudiated liability under the policy asserting that the respondent applied for the policy to defraud it.

4. Four successive judges of the High Court at Kisii heard the case between the years 2000 and 2011. In a judgment delivered on behalf of Musinga, J. (as he then was) by Makhandia, J (as he then was) the court found as a fact that the respondent had insured her business premises on plot No. 274 with the appellant where the respondent was conducting business; that on the night of 23rd/24th December 1997 those premises were burgled; that while an assortment of good were stolen from those premises there was *"no proof that the value thereof amounted to Kshs. 12,450,000.00 as alleged by the* [respondent]" and that "*although the* [respondent] *did not prove that the goods that were stolen were valued at Kshs. 12,450,000.00* [the appellant] *is liable under the contract of insurance to compensate the* [respondent] *up to the sum of Kshs.8,000,000.00 as per the insurance policy*." Accordingly, the court entered judgment for the respondent against the appellant for Kshs.8, 000,000.00 interest and costs.

The appeal and submissions

5. The appellant's appeal is against part of that judgment. It is limited to the complaint that the Judge awarded Kshs.8,000,000.00 "*in the absence of actual prove (sic) of loss*"; that the Judge misapprehended the nature of the policy of insurance and erroneously proceeded on the false premise that "*mere existence of insurance interest guaranteed automatic entitlement to the sum insured.*"

6. The issue that arises for our consideration therefore is whether under the policy of insurance the respondent was under a duty to prove loss of the amount claimed. If so, whether the respondent proved the loss of Kshs. 8,000,000.00 that was awarded. Put differently, having established that the insured premises were broken into during the currency of the policy and goods stolen, was the respondent under a duty to prove the loss or did liability to the extent of the insured amount of Kshs. 8,000,000.00 automatically arise.

7. In his written submissions, learned counsel for the appellant Paul Wekesa submitted that the learned Judge correctly found that no evidence was produced by the respondent to prove the pleaded loss of Kshs.12, 450,000.00; that having made that finding there was no basis for the court to have held that the respondent was entitled to compensation to the extent of the insured amount of Kshs. 8,000,000.00 that he awarded. Citing the decision in **Hahn vs. Singh [1985] KLR 716** counsel argued that under the express terms of the policy the respondent had a burden, which she did not discharge, to prove the loss sustained; that the evidence tendered by the respondent through her witnesses did not establish that loss.

8. Counsel referred in particular, to the evidence of PW6 James Awino Ochieng the warehouse manager, Sony Sugar where it was stated that 10280 bags of sugar had been supplied, counsel argued that quite apart from the fact that it was not shown that that sugar was delivered to the insured premises, it would have been impractical for that quantity of sugar to have been stolen in the course of one night.

9. Counsel concluded by submitting that the Judge was wrong to order payment of compensation under the policy based on the fact that there was insurance for the amount of Kshs. 8,000,000.00. Referring to the case of **Madison Insurance Co Ltd vs. Solomon Kinara [2004] eKLR** counsel argued that the principle of indemnity requires an insurer to compensate an insured for actual loss which has to be established.

10. On his part, learned counsel for the respondent Mr. Nyamurongi opposed the appeal in a two-pronged attack. He submitted that the appeal is incompetent as it is founded on an incompetent notice of appeal. On the substance of the appeal, counsel argued that this Court should be slow to interfere with the decision of the trial court; that there is no doubt that the respondent's premises were raided and property stolen during the currency of the policy of insurance; that there was overwhelming evidence

demonstrating that the respondent had purchased merchandise for re-sale at her shop on dates proximate to the theft.

11. Relying on the case of **Kimatu Mbuvi t/a Kimatu Mbuvi & Bros vs. Augustine Munyao Kioko, Civil Appeal No. 203 of 2001[2006]eKLR** counsel submitted that the respondent should not lose her remedy merely because its quantification is difficult. He urged that there was evidence before the trial court to warrant the award of Kshs. 8,000,000.00; that the sugar that was stolen taken alone was worth well over that amount.

Analysis and determination

12. We have considered the appeal and submissions by counsel. The finding by the High Court that the respondent's insured premises were burgled on the night of 23rd/24th December 1997 during the currency of a Burglary Insurance Policy issued by the appellant is not contested. The only issue, as already indicated, is whether the trial court correctly awarded the respondent Kshs. 8,000,000.00.

13. As regards the competence of the notice of appeal, we think that this complaint has, unfairly, been taken rather late in the day. When the appeal first came up for hearing on 5th May 2015 counsel for the respondent, Mr.Nyamurongi, objected to production and reliance on legal authorities by counsel for the appellant that had not been supplied before hand in accordance with the rules of the Court. The Court upheld that objection and with the concurrence of counsel directed that the appeal be adjourned and be disposed by written submissions. There was no indication then or prior thereto that the competence of the appeal was an issue.

14. While we accept that jurisdiction is everything and without it a court must down its tools, Rule 84 of the Rules of this Court requires a party challenging the competence of an appeal on the ground that no appeal lies or that an essential step in the proceedings has not been taken or has not been taken within the prescribed time to do so within thirty days from the date of service of the notice of appeal or the record of appeal. That requirement is intended to avoid a situation where a party keeps a secret weapon only to unleash it at the eleventh hour.

15. A party wishing to challenge the competence of an appeal should do so at the earliest opportunity. In this case, the appellant has not had an opportunity to respond to the respondent's submissions on the competence of the appeal. Rule 104 (b) of the rules of the Court provides:

"104. Arguments at hearing

At the hearing of an appeal –

a. *…..*

b. *A respondent shall not, without the leave of the Court, raise any objection to the competence of the appeal which might have been raised by application under rule 84."*

Therefore, we decline the invitation to dispose of the appeal on a ground that has not been canvassed by both parties.

16. The question whether the trial court correctly made the award for Kshs. 8,000,000.00 in favour of the respondent is a matter of construction of the terms of the insurance policy itself. The relevant part of the Policy provides as follows:-

"*Now this Policy Witnesseth that if at any time during the said period or during any other period for which the Company may accept payment for the renewal of this Policy:*

a. *The property described in the schedule hereto or any part thereof shall be cost destroyed or damaged by theft following upon an actual forcible and violent entry of the premises by the person or persons committing such theft: or*

b. *Any damage falling to be borne by the insured shall be done to the Premises described in the schedule hereto following upon or occasioned by an actual forcible and violent entry of the Premises or any attempt thereat by the person or persons committing or attempting to commit such theft.*

Then the company will subject to the terms exceptions and conditions contained herein or endorsed thereon pay or make good to the insured such loss to the extent of the intrinsic value of the property so lost or such damage to the amount so sustained. Provided that the liability of the Company shall in no case exceed in respect of each item the sum expressed in the Schedule hereto to be insured thereon or in the whole the total sum insured hereby." [Emphasis added]

17. The appellant's obligation under those terms is to pay or make good the loss *"to the extent of the intrinsic value of the property so lost or such damage to the amount so sustained."* Such liability was then capped under the schedule to the policy to the sum of Kshs. 8,000,000.00.

18. Once the respondent established that she lost property that was insured in circumstances giving rise to a claim under the policy, (and it is not in issue that she did that), her obligation did not end there. She had to go a step further and establish the extent of such loss. In that regard, the respondent pleaded that the extent of her loss was Kshs. 12,450,000.00. But because the policy covered loss only up to an amount of Kshs. 8,000,000.00 that is the only amount that she was claiming in her plaint. But did the respondent establish that loss"

19. After reviewing the evidence, the learned Judge had this to say:

"***While I agree that an assortment goods was stolen from the plaintiff's shop, there is no proof that the value thereof amounted to Kshs.12,450,000/= as alleged by the plaintiff. That is the value that she gave to the police on 24th December, 1997 when she recorded her statement. The breakdown contained in her statement was not substantiated."***

And later, the Judge went on to say:

"***Although the [respondent] did not prove that the goods that were stolen were valued at Kshs. 12,450,000.00 the [appellant] is liable under the contract of insurance to compensate the [respondent] up to the sum of Kshs. 8,000,000.00 as per the insurance policy."***

20. By taking that position, the learned Judge was effectively saying that the respondent did not need to establish or prove that she sustained loss of Kshs. 8,000,000.00 and that the liability of the appellant to pay that amount arose on the happening of the insured risk.

21. In our judgment, the learned Judge fell into error in taking that approach. The express terms of the policy, as already indicated, required the insurer to make good the loss sustained. The loss sustained must be proved. It could not have been the intention of the parties, for example, that if goods worth Kshs. 50,000.00 were stolen then the insurer would be liable to pay the insured the full extent of the insured

amount of Kshs. 8,000,000.00. As this Court cautioned in **Madison Insurance Company Ltd vs. Solomon Kinara t/a Kisii Physiotherapy Clinic [2004] eKLR** the object of such insurance cannot be for the insured to make a profit from his loss.

22. The principle of indemnity underlying the nature of the policy of insurance under consideration was articulated by Supreme Court of India in the case of **United India Insurance Company vs. Kantika Colour Lab and others Civil Appeal No. 6337 of 2001** where that court stated as follows:-

"***Contracts of Insurance are generally in the nature of contracts of indemnity. Except in the case of contracts of Life Insurance, personal accident and sickness or contracts of contingency insurance, all other contracts of insurance entitle the assured for the reimbursement of actual loss that is proved to have been suffered by him. The happening of the event against which insurance cover has been taken does not by itself entitle the assured to claim the amount stipulated in the policy. It is only upon proof of the actual loss, that the assured can claim reimbursement of the loss to the extent it is established, not exceeding the amount stipulated in the contract of Insurance which signifies the outer limit of the insurance company's liability. The amount mentioned in the policy does not signify that the insurance company guarantees payment of the said amount regardless of the actual loss suffered by the insured. The law on the subject in this country is no different from that prevalent in England; which has been summed up in Halsbury's Laws of England - 4th Edition"*** [Emphasis added]

23. It is our judgment therefore, and we hold that the learned Judge erred in holding that the liability on the part of the appellant to pay Kshs. 8,000,000.00 to the respondent was established on the happening of the burglary without requiring the respondent to prove the loss.

24. What remains is for us to determine whether the respondent did in fact prove loss of Kshs. 8,000,000.00. In that regard, we are called upon to draw our own independent conclusion based on the evidence that was placed before the trial court. [See **Selle vs. Associated Motor Boat Company [1968] E A 123**].

25. The relevant evidence in that regard was that of the respondent herself (PW4), James Awino Ochieng the warehouse manager of Sony Sugar who was PW6, Charles Kipkorir Too, the purchasing and sales manager of Mutai Wholesaler who was PW7; Richard Bosire, sales manager St. Jude Wholesalers and Supermarket who was PW8; George Omondi Sikuku of South Nyanza Sugar Co who was PW9; Robert Kiprono Chepkwony of Mutai Wholesalers who was PW 10 and Jackson Menge the husband to the respondent who was PW 13.

26. The respondent (PW4) stated that she started wholesale and groceries business with her husband in 1997; that on 27th November 1997 they took out the policy and insured stock in trade against fire and burglary; that the goods in stock at the time were valued at Kshs. 16,000,000.00 but they took insurance cover for Kshs. 8,000,000.00; that on 23rd December 1997 she closed the shop at 6 pm and on returning to the shop the following day she found the shop had been broken into and her stock stolen.

27. The respondent produced a booklet (hereafter referred to as exhibit 9) setting out the stock in the shop for the period from 1st November to 23rd December 1997. She stated that the books of accounts and all records including invoices relating to the business were stolen. She went on to say that when the respondent took insurance on 27th November 1997, the value of the bags of sugar that were in stock exceeded the insured amount of Kshs.8, 000,000.00; that on 23rd December 1997 there were 5000 bags of sugar with a value of Kshs. 8,250,000.00; cooking fat with a value of Kshs. 1,104,700.00; as well as other goods that included tea leaves. She went on to say and that proceeds of sale were banked at the

National Bank of Kenya.

28. James Awino Ochieng, (Pw6), a warehouse manager with Sony Sugar Company testified that on 11th November 1997, the respondent ordered 10280 bags of sugar of 50 kilograms each with a value of Kshs. 16,448,000.00; he produced a release order as an exhibit and stated that the sugar was released to the respondent over the period between 13th November 1997 and 20th November 1997.

29. Charles Kipkorir Too, the purchasing and sales manager of Mutai Wholesaler, Kericho who was PW7 stated that the respondent was their customer; that she would buy goods worth between Kshs. 400,000.00 and Kshs. 700,000.00 at any one time; that on 8th December 1997 the respondent purchased petroleum jelly worth Kshs. 95,000.00; on 19th December, 1997 she purchased medicines worth Kshs. 136,000.00 and on 9th February 1998 she purchased rice worth Kshs. 280,000.00. Robert Kiprono Chepkwony of Mutai Wholesalers who was PW10 produced an invoice book as an exhibit. Based on the invoice book, he stated that the respondent purchased 500 cartons of cooking oil on 2nd December, 1997 worth Kshs. 900,000.00; 250 cartons of cooking oil and other goods worth Kshs. 1,675,800.00 on 4th December; 500 bags of rice worth Kshs. 650,000.00 on 15th December 1997.

30. George Omondi Sikuku of South Nyanza Sugar Co who was PW9 produced sugar release orders showing that between 11th November 1997 and 20th November 1997, 10,208 bags of sugar were released to the respondent's husband Jackson Menge who was PW 13. Jackson Menge on his part confirmed that he was running a wholesale business with his wife at Awendo Township and that the respondent was the one managing the shop. He confirmed that they got supplies from Mutai wholesalers; St. Jude Distributors and from Sony Sugar.

31. That then was the evidence tendered by, and on behalf of the respondent in support of her claim. Most of that evidence shows that the respondent was procuring large volumes of goods and that her business had a high turnover. Whereas that evidence shows goods procured by the respondent from different sources between November 1997 and mid December 1997, it does not give a complete picture. Other than exhibit 9, no independent evidence was produced to show the sales made over the period up to the time of the burglary. In her bid to explain how exhibit 9 survived while all other business documents were stolen, the respondent asserted that she "always carried" exhibit 9 in her bag and it was the basis upon which she reported the loss of Kshs. 12, to the police. We have carefully examined that booklet (exhibit9). It captured "stock in"; "sales" and "balance" on a daily basis. Looking at the ledger that records sugar, it shows that as at close of business on 23rd December 1997, the balance of sugar stocks was 5000. It was on that basis that the respondent stated that the value of sugar lost during the raid in the night of 23rd/24th December 1997 was in excess of Kshs. 8,000,000.00.

32. Bearing in mind the respondent's testimony that banking in respect of the respondent's business was done at National Bank of Kenya, we think the credibility of exhibit 9 would have greatly been enhanced by production of bank statements. Based on exhibit 9, there are instances, where the respondent captured sales of up to 700 bags of sugar in a single day. At the indicated price of Kshs. 1,600 per bag, that transaction would translate to Kshs. 1,120,000. Assuming such amount was banked, it would have been useful for the trial court to have been shown the bank statements in respect of the business. The statements would have gone a long way to authenticate the state of stocks in the business immediately prior to the burglary and to support the running stock account as entered by the respondent in exhibit 9.

33. In our view, there was no credible evidence before the trial court to show the stock in trade and therefore the extent of loss occasioned to the respondent by the theft during the night of 23rd/24th December 1997. While we appreciate, as we have already mentioned, that the respondent testified that

documents were lost in the course of the theft, there is no reason advanced why the respondent could not produce bank statements of the business account held at National Bank of Kenya or elsewhere to support the stock booklet, exhibit 9.

34. In conclusion therefore, it is our judgment and we hold that under the terms of the policy of insurance between the parties the appellant's liability to the respondent is limited to the actual loss that the respondent could in fact prove; that the happening of the burglary did not, in itself, entitle the respondent to the payment of the amount of Kshs. 8,000,000.00 stipulated in the schedule to the policy; and that based on the evidence presented, the respondent did not prove the loss she sustained.

35. For those reasons, we allow the appeal and set aside the judgment of the High Court dated 23rd September 2011 and delivered on 30th September 2011 in Kisii High Court Civil Case No.43 of 1999.

36. Considering however that the respondent did establish that theft occurred during the currency of the policy but failed to prove the extent of loss, we think that those circumstances dictate that each party should bear its own costs of the appeal and of the proceedings in the High Court.

Orders accordingly.

Dated at Kisumu this 4th day of March, 2016.

D. K. MARAGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

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

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DEPUTY REGISTRAR