



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL APPEAL NO. 20 OF 2018

MICHAEL KINYUA NJUE.....APPELLANT

VERSUS

APA INSURANCE COMPANY LIMITED....RESPONDENT

(Being an appeal from the judgment of Hon. Ndeng'eri (S.R.M.) delivered on 17.5.2018 in CMCC No. 248 of 2016)

JUDGMENT

1. The appellant herein who was the Plaintiff in the lower court, filed the instant appeal having been dissatisfied with the judgment by the Senior Resident Magistrate in Embu CMCC No. 248 of 2016 and thus set out the grounds of appeal as indicated on the face of the memorandum of appeal dated 23rd May, 2018.

2. The appellant sought for orders that:

a. This appeal be allowed with costs to the appellants.

b. The judgment dated 17.05.2018 be set aside.

c. A declaration be made as prayed in the plaint dated 15.11.16 and judgement be entered for the appellant against the respondent for Kshs. 550,000.00.

3. In the Plaint filed before the lower court, the Plaintiff prayed for judgement against the defendant for a declaratory order that the defendant is statutory/contractually obligated to indemnify/compensate the Plaintiff as per the policy of Insurance number AV700/0045783; and costs of the suit and interest at court rate.

4. The Plaintiff's case was that he was comprehensively insured by the defendant under the terms of policy of insurance number AV700/0045783 in respect of all comprehensive claims arising from the loss and/or damage to his motor vehicle registration number KBC 585J which policy was in force from 11th August, 2015 to 18th August, 2016.

5. That on the 18th March, 2016, the said motor vehicle was involved in an accident as a consequence of which, it was extensively damaged and upon assessment it was declared a write off. He averred that the costs of repairs and all the miscellaneous expenses, after assessment, exceeded the pre accident value of the vehicle as per the value disclosed in the Insurance Contract.

6. The record shows that, though the defendant filed a defence to the Plaintiff's claim in which it denied the same, the matter proceeded for hearing *ex parte* as neither a representative of the defendant nor its advocate attended court yet the hearing date was taken by consent. In its amended defence, the defendant denied having ever issued a policy of Insurance Number AV 700/00457783 to the Plaintiff, being a comprehensive cover as alleged or at all. Further, the defendant denied being contractually obligated under any policy of Insurance or at all to compensate or indemnify the Plaintiff of any loss or damage in respect of the said motor vehicle as alleged or at all.

7. The defendant also denied any knowledge of the accident that is alleged to have occurred on the 18th March, 2016 involving the Plaintiff's aforesaid motor vehicle or at all. The loss and damage suffered by the Plaintiff as pleaded in the plaint were also denied. In total, the defendant denied any obligation to compensate the Plaintiff for any loss of his vehicle or at all or having breached any trust, fidelity or any statutory obligations or at all and the Plaintiff was put to strict proof.

8. In the alternative and without prejudice to the foregoing, the Defendant averred that if there existed any contract of Insurance which in any event was denied, the Defendant was not liable to compensate the Plaintiff as he was in fundamental breach of the express terms and conditions of the said policy of insurance. The particulars of breach of the policy conditions were particularized in par. 5 of the defence.

9. At the hearing of the suit, the plaintiff testified and produced several documents in support of his case. In addition, he called one witness. He prayed for a total of Kshs. 550,000 plus 25,000 being towing charges.

10. The parties proceeded to file their submissions and upon consideration of the pleadings, the evidence on record and the said submissions, the trial court found that the plaintiff did not prove his case on a balance of probabilities and dismissed the suit.

11. It is this judgment which provoked the appeal herein.

12. At the hearing of the appeal, directions were taken that the appeal be canvassed by way of written submissions and the parties herein filed their rival submissions.

13. The appellant submitted that the trial court erred in dismissing the case as it had only sought a declaratory order and further that the trial court failed to make a binding declaration of the appellant's right to the relief sought in the plaint in respect of whether the appellant had a claim. It is his submission that by failing to take cognizance and properly interpret and apply the provisions of Order 3 Rule 9 in favor of the appellant, the trial court erred. It was further submitted that Sections 1A, 1B, 3A and Article 159 (2)(b) of the Constitution are all binding and guiding legal provisions that are necessary and applicable by the court in its proper administration of justice. That the failure of the trial court to interpret and/or apply these provisions, denied justice to the appellant, and his suit was erroneously dismissed

14. On the hand, the respondent submitted that the trial court was right to dismiss the suit since the appellant had not pleaded the amount of money that he was claiming for compensation. That the appellant's claim was of material damage and as such, it ought to have been specifically pleaded; reliance was made on the case of **Linus Fredrick Msaky v Lazaro Thuram & Another [2016] KLR**. They therefore prayed that this appeal be dismissed with costs to the respondent.

15. This being a first Appeal, the court relies on a number of principles as set out in **Selle and Another Vs Associated Motor Boat Company Ltd & Others [1968] 1EA 123**:

“... 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 allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.”

16. The court has considered the pleadings, evidence adduced at trial, and submissions in the lower court and on appeal in support of the grounds of appeal. The sole issue for determination is whether the Appeal herein has merits. The court will address its mind as to whether the Plaintiff proved his case on a balance of probabilities.

17. The applicable law as to the burden of proof is found in **Section 107 (1) of the Evidence Act** which states that:

“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.”

18. Section 108 further provides that:

“The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

19. Further, it has since been settled that the standard of proof in civil proceeding is on a balance of probabilities. The court of Appeal in **Palace Investment Ltd –vs- Geoffrey Kariuki Mwenda & Another [2015] eKLR**, held that:

“Denning J, in Miller –vs- Minister of Pensions [1947] 2 All ER 372 discussing the burden of proof had this to say; -

a. “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 a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.

b. This burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the 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.”

20. The appellant moved the trial court by way of a plaint dated the 15th November, 2016, in which he sought a declaratory order that the defendant/respondent is statutory contractually obligated to indemnify/compensate the appellant as per the policy of insurance number AV700/0045783. In addition, he prayed for the costs of the suit and interest at court rate.

21. The appellant’s claim was that he was comprehensively insured by the respondent under the terms of policy of insurance number AV700/0045783 in respect of all comprehensive claims arising from the loss and/or damage to his private motor vehicle registration number KBC 585J.

22. It was the appellant’s case that on the 18th March, 2016, his aforesaid motor vehicle was involved in a road traffic accident and it was extensively damaged and upon assessment of the same, it was declared uneconomically repairable and was accordingly written off.

23. In the case of **Wareham t/a A.F. Wareham & 2 Others Kenya Post Office Savings Bank [2004] 2 KLR 91**, the Court of Appeal stated in this regard that: -

“We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the Civil Procedure Rules. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail.”

24. The Appellant averred that the policy was a comprehensive insurance cover for motor vehicle registration number KBC 585J. He sought a declaratory order that the defendant is under a contractual and statutory obligation to compensate/ indemnify him for the loss incurred on 18.03.2016 when his vehicle was involved in an accident and that the sum insured as total loss was Kshs. 550,000.00 as per the policy number AV700/004578.

25. The duty of proving the averments contained in the plaint lay squarely on the Appellant. In **Karugi & Another V. Kabiya & 3 Others [1987] KLR 347** the Court of Appeal stated that:

“[T]he burdens on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof. We would therefore venture to suggest that before the trial court can conclude that the plaintiff’s case is not controverted or is proved on a balance of probabilities by reason of the defendants’ failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant.... The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim.”

26. The court has perused contents of the Plaint and the prayers sought by the Appellant. He prayed for declaratory Orders and the costs of the suit. In his evidence he has itemized his claim and prayed for a specific amount of Kshs. 550,000 being the pre accident value of the vehicle and a further sum of Kshs. 25,000 as towing charges. In support of his claim he produced a certificate of Insurance and pre-accident insurance vehicle inspection report. The court notes that though the value of the vehicle as at 5th August, 2015 is shown as Kshs. 550,000 the Insurance Contract was not produced as an exhibit before the court. The Plaintiff’s claim was based on that Contract which contains the terms and Conditions of the policy. The defendant having denied ever entering into any contract with the Plaintiff, the burden was on the Plaintiff to proof not only the existence of such a Contract but also the terms and conditions of the same and in particular the sum assured.

27. Further, upon perusal of Prayer 1 in the Plaint, the declaratory Orders that are sought are as per the policy of Insurance number AV700/0045783. The only way the Plaintiff would have succeeded in his claim was by producing the Insurance Contract to proof to the court that the vehicle was indeed insured for Ksh. 550,000. The Certificate of Insurance that was tendered in evidence only proves that the Plaintiff had an Insurance cover with the Defendant and nothing more!

28. In the circumstances of this case, and in the absence of the said contract, the declaratory Orders sought could not issue as the court could not have been in a position to tell what the terms and conditions of the Policy were. The evidence of the Plaintiff and the declaratory orders were based on that Contract and his evidence is of no value without it. This court cannot issue declaratory orders in a vacuum.

29. In view of the foregoing, I find that the learned Magistrate analyzed the law and facts properly and I would have no reason to interfere with her finding.

30. In the end, I find that the appeal has no merit and it is hereby dismissed with no order as to costs.

31. It is so ordered.


DELIVERED, DATED AND SIGNED AT EMBU THIS 23RD DAY OF FEBRUARY, 2022

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent

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