



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS) Civil Appeal 398 of 2006

CONCORD INSURANCE COMPANY LTD.APPELLANT

VERSUS

JARED WIGINA t/a

HARDWINGS SERVICESRESPONDENT

(Appeal from the judgment and orders of Hon. Mrs. T.W.C. Wamae, Senior Resident Magistrate,

delivered on 25th May, 2006, in the Chief Magistrate's Court at Nairobi Civil Case No. 6281 of 2004)

J U D G M E N T

1. This appeal arises from a suit which was filed in the Chief Magistrate's Court at Nairobi, by Jared Wigina t/a Hardwings Services, hereinafter referred to as the respondent. He had sued Concord Insurance Company Ltd. hereinafter referred to as the appellant, seeking judgment for the insured sum of Kshs.550,000/= together with interest at 23%, loss of use of the vehicle, costs and interests.
2. The respondent claimed that he took a comprehensive insurance cover for his motor vehicle registration No. KAL 603A (hereinafter referred to as the subject vehicle), with the appellant. On the 12th September, 2003, the respondent was violently robbed of the subject vehicle by unknown persons. The respondent lodged a complaint with the police but the subject vehicle was not traced.
3. The respondent reported the matter to the appellant but the appellant disclaimed liability, as a result of which the respondent lost his insured sum of Kshs.550,000/=. The respondent further claimed to have lost use of his motor vehicle.
4. In its defence filed on 28th June 2004, the appellant denied the respondent's claim that he took a comprehensive insurance cover with the appellant. The appellant maintained that the respondent had only executed a risk note which was not to operate as a policy. The appellant further maintained in the alternative, that if it signed the alleged policy and risk note, it did so upon the false and fraudulent misrepresentation made by the respondent. The appellant further maintained that the respondent did not have any interest or insurable interest in the said vehicle.
5. The appellant further denied that the motor vehicle was stolen, and claimed that the alleged theft or loss of motor vehicle was based on fraudulent, false and untrue statement, misrepresentation, concealment and suppression of the truth. The appellant averred that the policy if any, was breached by the respondent and therefore the appellant is not obligated to indemnify the respondent for the purported loss of the motor vehicle.
6. During the hearing before the trial Magistrate, the respondent testified in support of his case whilst Stephen Kimani, a claims officer of the appellant and Robert Munyi Nyaga, a private investigator, testified on behalf of the appellant.
7. The respondent testified that he is a private investigator. He acquired the subject vehicle which is a Suzuki Vitara from a motor vehicle dealer called, Sultan Abdi. He insured the subject vehicle with the appellant company between the years 2001 to 2003. He insured the subject vehicle through a broker, Milan Insurance Agencies.

8. On 12th September, 2003, the respondent left his offices which were situated at Harambee Plaza, and went to Sagret Hotel. At about 5 p.m., while he was driving along Ngong Road, he slowed down at Kirichwa Road to go over the bumps. A motor vehicle from behind him then blocked his car. He was then carjacked, and pushed to the back of the vehicle. The carjackers then commandeered the vehicle which they drove to Kikuyu, Waiyaki Way and then Parklands where they dropped the respondent and went away with the vehicle.

9. The respondent reported the matter to the police, but the vehicle was never recovered. He lodged a claim with the appellant, but the appellant rejected his claim. The respondent produced letters in regard to excess payment which he paid to the appellant through his agent. He also produced a copy of certificate of insurance and copy of the logbook for the said vehicle.

10. Under cross examination the respondent maintained that he bought the vehicle and had it registered in his name, on 11th May, 2007 which was about 8 months after the vehicle was stolen. After the said vehicle was stolen, he tried unsuccessfully to trace the person who had sold the vehicle to him.

11. Stephen Kimani, who is a claims officer with the appellant testified that the respondent had insured the subject vehicle with the appellant through a broker Milan Insurance Agencies. The respondent already had two vehicles insured by the appellant and the subject vehicle was being added to the policy. The respondent issued a risk note upon which a certificate of insurance was issued. The appellant then issued two policy documents for the two vehicles which were earlier insured, but did not issue a policy document in respect of the subject vehicle because it was added to the other two vehicles. The policy document was issued to the broker for onward transmission to the respondent.

12. Sometime in September 2003, the respondent reported the loss of the subject vehicle and filed a claim form. The appellant appointed a firm of investigators, Range Hawk Loss Adjustors to investigate the loss. Robert Munyi Nyaga, who is employed by the firm, took up the matter. He followed up the matter, but the respondent was not able to get the person who sold him the motor vehicle, or the record of the sale or anti device certificates.

13. Robert also found that the licence for the motor vehicle had expired on 31st July, 2006 and therefore as at the time of the accident, the motor vehicle was on the road without a licence. The investigator suspected that the respondent was not telling him the truth about the reasons why he parked the vehicle outside. Efforts to trace the person who sold the vehicle to the respondent were completely unsuccessful.

14. Robert therefore compiled a report in which he advised the appellant that the subject vehicle did not exist at the time it was allegedly stolen, and that the respondent did not have ownership documents or a road licence.

15. Counsel for each party filed written submissions each urging the Court to find in favour of his client.

16. In her judgment, the trial Magistrate found that the investigators report as to the non existence of the subject vehicle was based on hearsay, suspicion and speculation, and was also inconclusive. She noted that the appellant had failed to prove that the subject vehicle did not exist when it was allegedly stolen. She found that there was no good reason for the appellant denying the respondent's claim. The failure to compensate the respondent was therefore not justified. She found that the respondent's claim for costs of car hire was not established nor was the claim for interest. She gave judgment for the respondent in the sum of Kshs.550,000/= together with interest at Court rates.

17. Being aggrieved by that judgment the appellant has lodged this appeal raising 7 grounds as follows:

(i) That the learned trial Magistrate erred in law in awarding damages of Kshs.550,000.00 which damages were not awardable in the circumstances as the claim was not proved by the respondent as required in law;

(ii) That the learned trial Magistrate erred in law in awarding Kshs.550,000.00 which damages were not specifically proved as required in law;

(iii) That the learned trial Magistrate erred in law and in fact in failing to consider the submissions of the appellant filed in court on 19th May, 2006;

(iv) That the learned trial Magistrate erred in law and in fact in failing to consider the authorities submitted by the appellant;

(v) That in any event the learned trial Magistrate erred and misdirecting herself in appraisal of the evidence tendered before her;

(vi) The trial Magistrate erred in law and fact by totally ignoring the evidence submitted by the defence witnesses;

(vii) The learned Magistrate misdirected herself by taking into consideration issues that were not pleaded and were not before the court for determination.

18. For the appellant it was submitted that the respondent did not have any agreement for sale of the subject vehicle, nor could he recall the date when he bought the subject vehicle. Further, the respondent admitted having registered the subject vehicle into his name, 8 months after the alleged loss of the subject vehicle. It was submitted that this fact raised suspicion on the sincerity and viability of the respondent's claim. It was maintained that the fact that the respondent registered the subject vehicle in his name, after it was allegedly stolen amounted to fraud, as the respondent was attempting to take advantage of the ignorance of the material facts on the part of the appellant.

19. It was further submitted that there was inconsistency regarding the ownership of the subject vehicle, the vehicle having been insured by Hard Wings Services, and the registration of the vehicle having been effected in the name of J.O. Wignah. It was maintained that the respondent did not have any insurable interest in the subject vehicle, and therefore he did not display utmost good faith. Relying on ***Elias Gachii Karanja vs. Concord Insurance Company Limited, HCCC No. 1426 of 1993***, it was maintained that the appellant was entitled to repudiate the insurance contract due to lack of disclosure of material facts. It was further pointed out that the respondent did not have a valid road licence for the subject vehicle, at the time of the alleged theft, and that this was a material fact which ought to have been taken into consideration.

20. For the respondent it was submitted that the evidence adduced before the trial Magistrate, including appropriate documents revealed that the subject vehicle was insured at a sum of Kshs.550,000/= as at the time it was stolen. It was maintained that the trial Magistrate did not therefore err in awarding the sum of Kshs.550,000/= which was claimed by the respondent.

21. It was submitted that the respondent had a locus to claim compensation as he was the person who had insured the subject vehicle. It was pointed out that although the appellant refused to pay the respondent's claim alleging that the respondent was not the owner of the subject vehicle, it was admitted by the appellant's witness that the appellant had on two previous occasions, settled respondent's claim involving the subject vehicle. It was submitted that the appellant was therefore estopped from denying that the respondent was the registered owner of the vehicle. In this regard the case of ***Kay Jay Rubber Products Ltd vs. Development Finance Co. Ltd [1991] KLR 195 & Another***, was relied upon.

22. With regard to the issue of insurable interests, the case of ***Kenya Bankers Association & Others vs. Minister for Finance & Another, [2002] 1 KLR 61***, was relied upon for the proposition that demonstration of minimal personal interest, was sufficient to give a person locus. It was submitted that there was evidence that the respondent paid premiums to the appellant for the insurance cover in respect of the subject vehicle, and that the appellant had previously settled the respondent's claims involving repairs to the subject vehicle. It was pointed out that the policy documents were not given to the respondent nor were they produced in Court. It was therefore difficult for the Court to appreciate the terms or conditions which were allegedly breached.

23. Relying on ***John Bruno vs. Stephen Mwangi Civil Appeal No. 85 of 1997***, it was submitted that it was not a must for a property to be registered in the name of a person in order for such person to claim an interest or locus standi. It was pointed out that there was no other person who had raised a claim to the subject vehicle, other than the respondent. Relying on ***Hardy Iramy General Principles of Insurance***, it was submitted that proof of ownership was not necessary as insurable interest may be founded on contract. The case of ***Insurance Company of East Africa vs. Wellington Omodho, HCCC (Milimani) No. 1650 of 2001***, was relied upon for that proposition.

24. It was submitted that although the appellant did not insure the subject vehicle in his name, the theft of the subject vehicle was quite unrelated and it made no difference even if the subject vehicle had been registered in the name of the respondent at the time of taking the insurance policy. It was argued that what was material was that the motor vehicle was insured by the appellant and allowing the appellant to avoid the contract without paying the amount, will be benefiting the appellant at the expense of the respondent. With regard to the subject vehicle not having a road licence, it was submitted that that was a traffic offence which could not lead to dispossessing the owner of the subject vehicle.

25. With regard to the failure of the respondent to file a reply to the defence, it was submitted that the trial Magistrate was not bound by the rules of procedure and that in any case, the appellant having participated in the hearing of the suit in the lower Court, waived the application of Order VI Rule 9(1) of the Civil Procedure Rules. Counsel for the respondent dismissed the investigation report which was produced in evidence by the appellant's witness, maintaining that the same was inconclusive. The Court was therefore urged to dismiss the appeal.

26. I have carefully reconsidered and evaluated all the evidence which was adduced before the trial Magistrate. I have also considered the submissions which were made before the trial Court, and before me, as well as the authorities which were cited. It is evident that the subject vehicle was insured by the appellant at the request of Hardwings Services. In paragraph 1 of the plaint, the respondent sued in his name, but indicated that he was trading as Hardwings Services. That pleading was admitted by the appellant in paragraph 2 of the statement of defence. Therefore reference to Hardwings Services is synonymous with reference to the respondent as there is no distinct legal personality between the respondent and his business name. The fact that the subject vehicle was insured by Hardwings Services and registered in the name of the respondent was not therefore inconsistent with the respondent's alleged ownership of the subject vehicle.

27. The question is whether the subject vehicle actually belonged to the respondent or whether the respondent had an insurable interest, whether the subject vehicle was stolen, if so whether the appellant was liable to compensate the respondent on account of the insurance contract; or whether the respondent was in breach of the insurance contract.

28. The respondent maintained that he was violently robbed of the subject vehicle, and that the vehicle has not been recovered despite a report being made to the police. The appellant was however suspicious of the respondent's claim. I have examined the investigation report which was produced by the appellant's witness. I find that the same was based mainly on hearsay as the informants were not called to testify. The report could not therefore be relied upon on its own.

29. Nonetheless, the appellant's suspicions were based on the following factors: Firstly, prior to the alleged theft of the subject vehicle, the subject vehicle was not being parked at its usual parking bay for at least a week. Secondly, the respondent was unable to produce the logbook for the subject vehicle as he claimed it was stolen from his office. Thirdly, the motor vehicle did not have a current road licence as at the time of the alleged theft. Fourthly, the respondent was unable to trace the person who sold the motor vehicle to him or produce any evidence of the sale. Fifthly the respondent had a poor hazard record as he had lodged two claims for repair of the subject vehicle, before the alleged theft. Finally, the respondent registered the subject vehicle in his name about 8 months after the alleged sale. All the above factors were apparently not denied by the respondent.

30. With regard to the ownership of the subject vehicle, the respondent produced in the lower Court, a photocopy of the original logbook as Plaintiff's Exhibit 6. That document showed that the subject vehicle was registered in the name of Ronald O. Ogwali until 11th May, 2004, when it was transferred into the name of the respondent. The respondent claimed to have bought the subject vehicle from Sultan Abdi. He did not however, produce anything to show any connection between Sultan Abdi and the subject vehicle. Indeed in the respondent's letters which were produced as defence exhibit No. 6 and 7, the respondent claimed to have bought the motor vehicle from one Zulfika of Gatundu Close. Thus the evidence adduced by the respondent in respect of the ownership of the subject vehicle fell short of establishing ownership. The attempts to have the motor vehicle registered in the respondent's name long after the alleged theft of the motor vehicle only goes to confirm the suspicion that the motor vehicle did not belong to the respondent.

31. Given the circumstances of this case as aforesaid, the appellant's contention that the subject vehicle was not in existence as at the time of the alleged theft was based on reasonable suspicion. The fact that the subject vehicle was not seen at its normal parking for some time, and the fact that the respondent could not produce the original logbook for the motor vehicle led to a reasonable suspicion that the respondent may have cooked up the story of being carjacked after disposing of the motor vehicle.

32. Further the fact that the respondent had the subject vehicle registered in his name, 8 months after the alleged disappearance of the motor vehicle casted aspersion on the respondent's good faith, as it revealed that the motor vehicle was not registered in the name of the respondent at the time it was insured, a fact which was apparently not revealed to the appellant. The fact that the appellant may have settled the respondent's previous claims does not in any way prevent the appellant from denying the respondent ownership of the subject vehicle given that the material facts relating to ownership of the subject vehicle were not within the appellant's knowledge. I find that the respondent failed to prove that

he had an insurable interest in the subject vehicle.

33. It is true that the respondent paid the insurance premium for the cover of the subject vehicle, and the excess premium. The insurance contract between the appellant and the respondent was however one based on good faith. The respondent having demonstrated lack of good faith and his report that the subject vehicle was stolen being suspicious, and there being no evidence that he had any insurable interest in the subject vehicle, the respondent was in breach of the contract and the appellant was justified in disclaiming liability under the contract. In the circumstances the appellant was not liable to pay the respondent the insured sum of Kshs.550,000/=.

34. Accordingly, I allow this appeal, set aside the judgment of the lower Court, and substitute thereof an order dismissing the respondent's suit. I award costs of the suit in the lower Court and costs of this appeal to the appellant.

Dated and delivered this 17th day of November, 2009

H. M. OKWENGU

JUDGE

In the presence of: -

Mrs. Karanu for the appellant

Mr. Onindo for the respondent

Eric, court clerk