

REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT KAKAMEGA  
CIVIL APPEAL NO. E018 OF 2021

SILAS CHAMBUNI.....APPELLANT  
VERSUS  
GEMINI INSURANCE COMPANY LIMITED.....RESPONDENT

(An appeal arising from the judgment of Hon. M Onyango, Resident Magistrate,  
RM, delivered on 22<sup>nd</sup> February 2021, in Mumias CMCCC No. 1089 of 2017)

JUDGMENT

1. The suit at the primary court was initiated by the appellant against the respondent, for a mandatory order to compel the respondent to repair his motor vehicle registration mark and number KBP 961J to his satisfaction, or, in the alternative, to pay to him the value of the car. His case was that the motor vehicle was comprehensively covered with the respondent; had had an accident during the duration of the cover, and the respondent had declined to repair it. The appellant filed a defence, in which it denied liability, saying that the cover that it was aware of had been taken out by Mumias Sugar Company, which was jointly registered as owner with the appellant, but the agreed premiums were not paid, hence at the time the accident occurred there was no contract of insurance, upon which it could undertake the repairs.
2. A trial was conducted, in which the appellant testified, and the respondent called a witness. Judgment was delivered on 22<sup>nd</sup> February 2021. The suit was dismissed, on the basis that there was no proof that the appellant had paid the premiums on the insurance contract.
3. The appellant was aggrieved, hence the instant appeal. The grounds in the memorandum of appeal, dated 26<sup>th</sup> March 2021, revolve around the trial court making an error in finding that the appellant had failed to pay the premiums; the trial court had shifted burden of proof from on a balance of probability to proof beyond reasonable doubt; the trial court failed to prove the totality of the evidence; the written submissions and authorities were not considered; the defence pleaded a motor vehicle other than that in the plaint; the admissions made by the respondent were ignored; the general policy document relied on by the respondent was not related to the suit; and the trial court misconstrued the provisions of section 156 of the Insurance Act.
4. Directions were given on 28<sup>th</sup> September 2021, for disposal of the appeal by way of written submissions. There was compliance by the appellant. Written submissions dated 16<sup>th</sup> November 2021 are on record. I have not seen written submissions by the respondent. The respondent has flagged 3 issues for determination, being whether the vehicle pleaded in the defence is the same as that pleaded in the plaint; whether the respondent had insured the suit vehicle as at the time of the accident; and whether the trial court fell into error by dismissing the suit with costs. On the first issue, it is submitted that the accident vehicle, as

per the plaint was KBP 961J, while the defence was on KBL 903N, which meant that the defence had not challenged the case by the appellant as set out in the plaint. On the second issue, it is submitted that the plaintiff had proved his case, by placing before the court evidence of the accident, the policy cover and 2 payslips evidencing payment. *Virani t/a Kisumu Beach vs. Phoenix of East Africa Assurance Company Limited* [2004] eKLR (Omolo, O'Kubasu & Waki, JJA) and *Insurance Company of East Africa vs. Marwa Distributors Limited* [2015] eKLR (Majanja, J) are cited, to support the submission that non-payment of premiums does not invalidate the insurance contract.

5. The plaint was about a motor vehicle KBP 961J, while the defence relates to a motor vehicle KBL 903N. The said defence was not amended at any time before or in the course of trial to refer to the vehicle pleaded in the plaint. At the trial, the appellant produced a logbook, which indicated him as co-owner of the vehicle with Mumias Sugar Company Limited. The witness called by the respondent, DW1, made no reference whatsoever to the details of the motor vehicle that the respondent had allegedly insured. He just spoke about the insured motor vehicle without identifying it by registration mark and number. A party is bound by its pleadings. Since the defence referred to a KBL 903N, then it would follow that the testimony by DW1 centred on insurance of KBL 903N, and not KBP 961J.
6. Related to that is the policy document and schedule that DW1 produced. The policy document is not executed by either the insured nor the insurer. The signature on it, signed on behalf of the Chief Executive Officer, is on the section where the policy is forwarded to the insured. The signature does not authenticate the policy document, but merely forwards the document. The schedule of the vehicles allegedly covered as per the alleged policy includes KBP 961J, and, therefore, there is evidence that the policy document produced by DW1 related to the vehicle the subject of the suit.
7. The appellant did not produce any policy document, but relied on insurance stickers and the police abstract on the said motor vehicle. The respondent did not deny the policy of insurance indicated in the said sticker, which was also reflected in the police abstract. Its case was that the policy was not with the appellant, but with another, being Mumias Sugar Company Limited. That would mean that the appellant was not privy to the insurance contract, and he could not enforce it against the respondent, for only the insurer could enforce the contract. The respondent did not place before the court any document showing that the contract in question was with the Mumias Sugar Company Limited. Yet the appellant had evidence that the vehicle was insured. He also produced payslips that showed that some deductions were made from his salary, by his employer, Mumias Sugar Company, to meet those premiums. The police abstract shows that the subject vehicle was covered by the respondent within the period the accident happened, hence the cover was current. The fact, from the payslips, that premiums were met from his salary meant that he was privy to the subject contract.
8. There is, though, the issue of the non-payment of premiums. The payslips for March 2017 and April 2017 were produced. The accident happened in January 2017. I can state definitively whether or not there was proof of non-payment of

premiums. Whatever the case, the law in Kenya is that stated in *Virani t/a Kisumu Beach vs. Phoenix of East Africa Assurance Company Limited* [2004] eKLR (Omolo, O'Kubasu & Waki, JJA) and *Insurance Company of East Africa vs. Marwa Distributors Limited* [2015] eKLR (Majanja, J), that non-payment of premiums does not invalidate the insurance contract, unless there is an express term in the contract on that. The respondent did not display any such contract which could carry such a term.

9. The trial court had material, which showed that the motor vehicle stated in the plaint belonged to him. The insurance sticker and the police abstract showed that the vehicle was insured by the respondent, and the cover was current as at the date of the accident. That ought to have been adequate to establish a case against the respondent, the non-payment of premiums notwithstanding.
10. Overall, I find merit in the appeal herein. I, accordingly, therefore, allow it, set aside the orders made, in the judgment delivered in Mumias CMCCC No. 108 of 2019, on 22<sup>nd</sup> February 2021, and substitute them with an order in terms of prayer 2 of the plaint. The appellant shall have the costs. Orders accordingly.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA ON  
THIS.....1<sup>ST</sup>.....DAY OF .....AUGUST.....2023

WM MUSYOKA  
JUDGE

Mr. Erick Zalo, Court Assistant.

Appearances

Mr. Khaemba, instructed by Bryan Khaemba Kamau Kamau & Company, Advocates for the appellant.

Ms. Asuna, instructed by Staussi Asuna & Oluoch, Advocates for the respondent.