Real Insurance Co. Limited v Wanyeki (Civil Appeal 424 of 2019)
[2023] KEHC 1339 (KLR) (Civ) (24 February 2023) (Judgment)

Neutral citation: [2023] KEHC 1339 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 424 OF 2019

AA VISRAM, J

FEBRUARY 24, 2023

BETWEEN

REAL INSURANCE CO. LIMITED ..... APPELLANT

AND

DANIEL WANYEKI ..... RESPONDENT

(Being an appeal from the entire Ruling and Order of the Chief Magistrate's Court at Nairobi the Hon. A. N. Makau delivered on 15th March, 2019 in CMCC No. 7944 of 2018)

JUDGMENT

Introduction

1. The respondent (plaintiff in the lower court) instituted a suit against the appellant's insured at the trial court following a road traffic accident that occurred on or about November 29, 2014 involving motor vehicle registration No xxxx ('the Motor Vehicle'). The respondent blamed the appellant's insured for the occurrence of the accident.

2. The respondent served the appellant's insurer at trial as well as the appellant herein. However, the matter initially proceeded undefended and judgment was entered against the appellant.

3. The respondent then filed a declaratory suit against the appellant which provoked the appellant to file a defence dated October 16, 2018 ('the Defence') for the first time.

4. In its Defence, the appellant stated that it was not the insurer of the Motor Vehicle as at the date of the accident; and that it had effected the first insurance cover of the Motor Vehicle on June 17, 2015, long after the accident occurred on November 29, 2014.

5. In response, the respondent filed an application to strike out the defence dated December 11, 2018 based on Order 2 Rule 15, which application was allowed. Judgment was entered as prayed for in the declaratory plaint vide the trial court's ruling delivered on May 17, 2019 ('the Ruling').

6. This is the appeal of that Ruling. Vide its Memorandum of Appeal dated March 21, 2019 the appellant complained of the following:

    1. That the learned magistrate erred in law and in fact in striking out the appellant's defence and entire judgment for the respondent as prayed by the application dated October 31, 2018 without taking into consideration in the nature of the claim, the summary nature of the procedure, the documents produced by the appellant in the replying affidavit and the submissions made therein;

    2. That the learned magistrate erred in law and in fact in finding that the appellant presented a defence which raised no triable issues.

    3. That the learned magistrate erred in law and in fact in finding that Wamuyu Stella and Moses Githinji were insured by the appellant without adequate evidence pointing out the same.

    4. That the learned magistrate erred in law and in fact in finding that motor vehicle registration number xxxx was insured by the appellant as at the date of the accident November 29, 2014.

    5. That the learned magistrate erred in law and in fact in taking the contents of the Police Abstract as the absolute proof of existence of an insurance Policy issued by the defendant over motor vehicle registration number xxxx as at the date of the accident November 29, 2014.

    6. That the learned magistrate erred in law and in fact in disregarding the appellant's documents including Insurance proposal Form, Insurance policy schedule and insurance sticker which showed that the insurance policy issued by the appellant became effective on June 17, 2015 well after the date of the alleged accident.

    7. That the learned magistrate erred in law and in fact in failing to find that the appellant had presented a defence which raised several triable issues for determination.

Appellant's Submissions

7. The appellant filed written submissions dated January 10, 2023. In their submissions they argued that the Defence raised triable issues which warrant a full hearing. In particular, that the trial court failed to appreciate that it was not the insurer of the Motor Vehicle; that the trial court failed to consider documents annexed to its Replying Affidavit; and that the trial court failed to properly apply the principles of law applicable to an application for striking out.

8. On the first point, the appellant submitted that under section 10 (2) of the Act, it must be proved that the insurance company actually covered the insured's car involved in the accident. The appellant stated that the trial court did not appreciate that entries in a police abstract are not conclusive proof

of existence of an insurance cover. The appellant relied on the case of *Kasereka v Gateway Insurance Co LTD [2013] eKLR*, where it was held that:-

> 'It follows that for the purpose of this application, on a balance of probability, the court finds that the Gateway Insurance Company Limited appears to be the insurer of motor vehicle registration number xxxx. I say 'appears' because the contents of a police abstract is rebuttable and is not conclusive. I refer to the reverse of this document. However it suffices to say that having been unchallenged by the defendant, the balance tilts in favour of the plaintiff. This means the denial by the defendant that there was a contract of insurance between itself and Hoe Engineering Works Limited is strictly a triable issue.'

9. On the second point, the appellant submitted that the trial court failed to appreciate that it had produced insurance documents. These included the vehicle release order, memo, insurance stickers, insurance proposal form and insurance policy which showed that the vehicle was purchased on May 20, 2015 by a Mr Cyrus Gathatua from Toyotsu Auto Kart Kenya, way after the alleged accident on November 29, 2014.

10. Further, that Bimasure Insurance Agencies Limited wrote to Real Insurance/Britam for a policy cover on August 14, 2015. Insurance sticker was then issued to Mr CG Mwatha on July 16, 2015. Bimasure Insurance Agencies Limited forwarded an insurance proposal form to Britam on May 16, 2015. An insurance policy was issued to Mr CG Mwatha on May 16, 2015. The Insurance Policy number was xxxx. Accordingly, no insurance policy existed as at the date of the accident.

11. On the third point, the appellant submitted further that the trial court failed to appreciate that all the appellant was supposed to show was that it's Defence on record raised triable issues which ought to go for trial. It relied on the case of J*ob Kiloch V Nation Media Group Ltd, Salaba Agencies Ltd & Michael Riorio [2015] eKLR*, where the Court stated as follows:

> ' What then is a defence that raises no bona fide triable issue. A bona fide triable issue is any matter raised by the Defendant that would require further interrogation by the court during a full trial. The Black's Law Dictionary defines the term 'triable' as, subject or liable to judicial examination and trial'. It therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the Court.'

12. The issue of whether there existed a valid insurance policy is a matter that could not be determined summarily without a full trial.

The Respondent's Submissions

13. The respondent filed his written submissions on January 20, 2023. He argued that the appellant is statutorily bound to satisfy the judgment entered against it in the primary suit as provided under Section 10 (1) of the Act, which reads as follows:

> ' If after a policy of insurance has been effected, judgment in respect of any such liability is required to be covered by a policy under paragraph (b) of section 5 (being a liability covered by the term of the policy) is obtained against any person insured by the policy, notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.'

14. The respondent submitted that the evidence at the trial supports his contention that the appellant had insured the Motor Vehicle at the time of the accident. He argued that the appellant had not denied policy number NRB/MPTK/POL/910044 in its pleadings, and it was statutorily bound to satisfy the judgment.

15. The respondent stated that the Act afforded an insurer certain statutory defences in section 10(2) of the Act, but the appellant opted not to rely on them. He relied on the Court of Appeal decision in *Blueshied Insurance Co Ltd v Raymond Buuri M'rimberia [1998] eKLR* regarding the circumstances under which an insurer can avoid liability. In that case, the court dealt with the issue of declaratory suit under section 10(1) of the Act and stated;

> ' Under S.10 (4) the liability of the insurer to satisfy the judgment under S.10 (1) is excluded only if, not only that the insurer had commenced an action within the time scale prescribed thereunder, but also that it has obtained a declaration that it is entitled to avoid its liability under the insurance policy.'

16. The respondent had obtained judgment and decree from the lower court. He had served the appellant with Statutory Notice together with notice of his intention to commence legal proceedings against the appellant's insured in the lower court. These documents bear the appellant's official stamp.

17. The appellant did move the court to obtain a declaration to avoid liability despite being aware of its rights under section 10 (2) and (4) of the Act.

18. The respondent cited the authority of *Gateway Insurance Co. Ltd v Thomas Njega Gitau & Another [2014] eKLR* where the court stated:

> ' On the other hand, it is possible that the insurer was given notice by the claimant or any other person. If that were the position, then failure by the insurer to commence the declaratory suit within 3 months of the institution of the case by Elizabeth against Thomas, would render the insurer liable to pay the decretal amount'

19. Further, in Blueshield Insurance Co Ltd v Raymond Buuri M'rimberia (supra) the court stated that;

> ' Under Section 10 (4) of the *Insurance (Motor Vehicle 3rd Party Risks) Act* cap 405 the appellant was entitled to avoid liability by obtaining a declaratory judgment that he was entitled to avoid liability under the policy on the ground that there was non-disclosure or misrepresentation of a material fact. No such suit was however filed by the appellant nor has the appellant ever served any mandatory notice of any intention to file such suit. Thus the appellant cannot seek solace under Section 10 (4) of Cap 405,'

20. The contention by the appellant that it was not the insurer of the defendant in the primary suit is a sham, mere denial and an attempt to obstruct justice and embarrass the respondent's case by engaging in lengthy and unnecessary litigation which is clearly an abuse of the court process.

21. Based on the evidence and the pleadings at trial, the appellant was the insurer of the insured at the time of the accident. The police abstract produced in evidence affirmed this position. The respondent submitted that the policy document and certificate of insurance are in the custody of the insurer, and the same is not easily accessible to the respondent.

22. The respondent submitted that the appellant ought to have produced evidence in the lower court if it intended to refute the insurance policy with the insured. This was never done, and neither was

the relevant objection raised at the trial court to avoid the policy. He relied on the case of *Gerald Njuguna Mwaura v Africa Merchant Assurance Co. Limited [2020] eKLR* where the learned judge while determining a similar issue stated that;

> ' The respondent did not claim that it had avoided the policy or that it had obtained stay of execution of that decree. Rather, its argument was that it was not the insurer of the motor vehicle. That argument, in my respectful view, could not be made in the declaratory suit'.

Analysis and determination

23. As this is the first appeal, this court is called upon to analyse and re-assess the evidence on record and reach its own conclusions bearing in mind that it neither saw nor heard the witnesses testify (see *Selle v Associated Motor Boat Co [1968] EA 123*). In *Kiruga v Kiruga & Another [1988] KLR 348*, the Court of Appeal observed that;

> ' An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but this is a jurisdiction which should be exercised with caution.'

24. The main issue for determination in this appeal is whether the order to strike out the appellant's defence was in accordance with the principles set out in Order 2 Rule 15 of the *Civil Procedure Rules*. The said Order provides as follows:

> ' 15. (1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that;
>
> a) It discloses no reasonable cause of action or defence in law; or
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> b) It is scandalous, frivolous or vexatious; or
>
> c) It may prejudice, embarrass or delay the fair trial of the action; or
>
> d) It is otherwise an abuse of the process of the court and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.'

25. In the leading case of *D T Dobie V Joseph Muchina Civil Appeal No 37 of 1978* the Court of Appeal stated :

> ' No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendments, it ought to be allowed to go forward for a Court of justice ought not to act in darkness without the full facts of a case before it'.

26. The above authority must however be read in accordance with the law applicable to motor vehicle insurance cases. Section 10(4) of the Act provides as follows:

> '10 (4) No sum shall be payable by an insurer under the foregoing provisions of this Section if in an action commenced before, or within three months after, the commencement of the proceedings in which the judgment was given, he has obtained a declaration that, apart from

any provision contained in the policy he is entitled to avoid it on the ground that it was obtained by the non-disclosure of a material fact, or by a representation of fact which was false in some material particular, or, if he has avoided the policy on that ground, that he was entitled so to do apart from any provision contained in it:'

> 'Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not thereby become entitled to the benefit of this subsection as respects any judgment obtained in proceedings commenced before the commencement of that action, unless before or within fourteen days after the commencement of that action he has given notice thereof to the person who is the plaintiff in the said proceedings specifying the non-disclosure or false representation on which he proposes to rely, and any person to whom notice of such action is so given shall be entitled, if he thinks fit, to be made a party thereto.'

27. In light of the above law, was there a triable issue under Order 2 Rule 15? The Magistrate stated that 'having determined the respondent gave statutory notice as required under section 10 (2)(a) of the Act, there was no triable issue'. To my mind this was a reasonable conclusion. It is clear that the appellant was served with Statutory Notice pursuant to section 10 of the Act on February 25, 2015. Further, the respondent attached a copy of the plaint and summons to enter appearance to enable the appellant enter appearance and defend the suit, if it so wished.

28. The Statutory Notice bears the appellant's stamp and the appellant has not disputed that it received the said notice. It is also not disputed that prior to the said notice, the respondent also served the appellant with a demand letter dated December 15, 2014 informing it that legal action was imminent against its insured to recover damages. Again, the respondent's stamp is present on this letter, proving that it received it. This fact is not disputed.

29. The appellant's argument is that those persons mentioned in the said letter were not insured by it. I might ask myself, but how would the respondent be expected to know this, unless the appellant had told him so? I expect that this may be one of the purposes contemplated under section 10 of the Act, precisely, to inform the victim (by way of objection) immediately, or at the very latest, within three months, that it would be objecting to the claim.

30. The appellant did not take advantage of the statutory framework available to it. Instead, it did not act until judgment had been entered against it and it was ordered to make payment pursuant to the decree issued in the lower court.

31. Armed with limited knowledge, the respondent relied on the contents of the police abstract as evidence that the appellant was the insurer of the Motor Vehicle. I am satisfied that respondent was entitled to do this. In *APA Insurance Co Ltd v George Masele [2014] eKLR*, my brother Mabeya, J stated:

> ' The certificate of Insurance is usually issued to the insured and not the road accident victim. The details in the police abstract as to the details of the insurance are in the ordinary cause of events obtained by the police from the certificate of insurance affixed to the motor vehicle or are supplied by the insured.'

32. Had the appellant wished to avoid this, it ought to have acted at the time it was served with the Statutory Notice in accordance with the time frames set out in section 10 of the Act. It did not.

33. In *APA Insurance Limited v Theodora Atieno Okal [2012] eKLR* the Court of Appeal stated:

> ' I see no reasonable ground to interfere with the magistrate's other finding, that the Appellant having been duly served with a Notice under Section 10(4) of Cap 405 , but having failed to file a relevant objection as prescribed therein, was thereafter, statutorily barred from raising the same objection whether under the Act or thereafter, in court in this suit. Indeed, it is my further finding, that where the Insurance Company has failed to file an objection within three months after being served with notice to satisfy such a decree it cannot have the benefit of the envisaged (sic) declaration to avoid liability'

34. This position is buttressed in the Court of Appeal decision of Blueshield Insurance (supra).

35. Based on the reasons and authorities cited above, I am satisfied that the Magistrate was correct in his assessment. There was no triable issue before him. Having correctly established that the respondent had served the appellant with Statutory Notice, the appellant was statutorily time barred from raising his defence/ objections at that stage.

36. I find that this appeal is without merit. The appeal is dismissed with costs to the respondent.

DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 24TH DAY OF FEBRUARY 2023

ALEEM VISRAM

JUDGE

In the presence of;

.....for the Appellant

.....for the Respondent