



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 287 OF 2017

KENINDIA ASSURANCE CO. LTD.....APPELLANT

VERSUS

CHARLES MUNGAITHI AND MUNGAITHI MWANY'A

(Suing an Administrator of JAMES MUMO MUNGAITHI).....RESPONDENTS

JUDGEMENT

The respondents were the plaintiffs in the lower court case No. CMCC 1741 OF 2009 against Stephen Gacheru Njenga and Luxor Autos as defendants. Following the hearing in that matter, the respondents were awarded the sum of Kshs. 188,850/= general damages plus costs at kshs. 38,235/= making a total of Kshs. 227,085/=.

Their case against the two defendants was as a result of a fatal road traffic accident involving the deceased James Mumo Mungaithi and motor vehicle registration No. KAP 838V which was said to be insured by Kenindia Assurance Company Limited. After the said Judgment, the respondents wrote to Kenindia Assurance Company Limited to honour the decree but there was no reply. The respondents then filed a declaratory suit being Milimani CMCC No.4632 of 2012 against Kenindia Assurance Company Limited.

In a judgment delivered on 12th May, 2017 the lower court held that the respondents were entitled to judgment against the appellant. It is that judgment that aggrieved the appellant who then lodged this appeal.

In the Memorandum of Appeal dated 8th and filed on 9th June, 2017 the appellant complained that the lower court was wrong to hold that it was liable to pay the sum ordered in the lower court, and that it failed to consider the submissions thereby arriving at the wrong decision.

It was also stated that the evidence adduced was not taken into account, and there was a shifting of the burden of proof to the appellant contrary to the law.

Further, the lower court erred in holding that the payment of adjournment costs by the appellant was an admission of liability. Parties have filed submissions in this matter which I have considered. In finding in favour of the respondents, the lower court observed that the police abstract produced during the trial by both parties showed that on the date of the accident, that is 5th February, 2007, motor vehicle registration No. KAP 838V which was involved in the said accident was insured by the appellant and that Stephen Gacheru Mbugua was driving the same.

The appellant had filed a defence denying that it issued the insurance policy to Luxor Autos. In evidence D.W. 1 Simiyu Kioko Mwanzia who testified for the appellant stated that the insured was Marcy W. Mburu, and that the number of the insurance policy cited by the respondents had differences in the 3rd numeral. In any case, their insured was never sued in the original suit neither did she report the accident in question.

The said witness however confirmed that Kenindia Assurance Company Limited covered the said motor vehicle and that Mary W. Mburu had not been called to testify. The lower court found there was a valid insurance policy but that the appellant had not obtained a decree entitling it to avoid liability.

As the first appellate court it is my duty to evaluate the evidence adduced in the lower court with a view to arriving at independent conclusions. This I have done. A lot of emphasis has been placed on the fact that the 3rd numeral of the insurance policy produced by the appellant and the respondents respectively are different. In my view however, the issue is whether or not the appellant insured the motor vehicle that was involved in the accident on the material date. There is no doubt in that respect.

After the judgment in the lower court the respondents wrote to the appellant informing it of the said judgment, but the appellant ignored and or refused to reply. In the record of appeal at page 11 there is a letter dated 14th November, 2011 addressed to the appellant's Managing Director by the advocates for the respondents. This letter informed the appellant of the lower court judgment and requested settlement of the same. The letter was received by the appellant on 17th November, 2011. There is a stamp showing the same. This however was not acted upon.

It is instructive that in the statement of defence, the appellant only raised the issue of the number in the policy and that it did not insure Luxor Autos. There is nowhere Mary W. Mburu was mentioned in that statement of defence. I also note that the appellant denied insuring the subject motor vehicle in paragraph 5 of the defence. This however has been dislodged by both the appellant and the respondents. Compliance with Cap 407 has been established by reference to the notice forwarded to the appellant which I have cited above.

Proof of a civil matter is on a balance of probabilities. The respondents established by way of evidence that they has a decree against the insured of motor vehicle registration No. KAP 838V covered by the appellant. They have also proved they notified the appellant of the decree by the lower court. That decree remains unsettled.

Under Cap 405 Laws of Kenya the appellant is required to settle that decree. It has not done so. The respondents were in order to file the declaratory suit against the appellant. There is no decree in favour of the appellant to avoid settlement of the lower court judgment.

The defence filed could not dislodge the evidence presented by the respondents. The lower court cannot be faulted for finding in favour of the respondents. It follows therefore that this appeal is devoid of merit and therefore dismissed with costs to the respondents.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF MARCH, 2021.

A. MBOGHOLI MSAGHA

JUDGE