REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 78 OF 2019

KENYAN ALLIANCE INSURANCE COMPANY LIMITED...................APPELLANT

VERSUS

NAOMI WAMBUI NGIRA & STANLEY NGIRA NGUGI

(Suing as the Legal Representatives and Administrators of the estate of

NELSON MACHARIA MAINA (Deceased)..RESPONDENTS

JUDGMENT

1. The appeal before this Court emanates from a declaratory suit filed by the Respondents against the Appellant by which suit the Appellant was ordered to pay the sum of Ksh 2,413,048/= to the Respondents vide Judgement delivered by Hon. Mrs. L. Ambasi (C.M) on 27th June 2019.

2. The filing of the declaratory suit was informed by an earlier Judgment in the primary suit, in which the Respondents were awarded damages of Ksh 3,126,175/= under the Law Reform Act and the Fatal Accidents Act for fatal injuries sustained following a road traffic accident that occurred on 17th July 2014 involving motor vehicle registration number KBS 086K / ZD 0904 in which the deceased was travelling. The declaratory suit was filed to seek enforcement of this earlier Judgment.

3. Being dissatisfied with the outcome of the declaratory suit, the Appellant has filed the instant appeal which is premised on the fifteen (15) grounds of appeal as set out in the Memorandum of Appeal dated 15th July 2019. Most of the grounds are repetitive, touching on similar issues and this Court has collapsed the same into the following six (6) grounds: -

> ***a) The learned magistrate erred on fact and in law in holding that the Appellant was liable to satisfy the decree obtained in Meru CMCC No.102 of 2016 and ordering the respondent to satisfy the said decree in total disregard to the provisions of section 5 (b) (i) and Section 10 (1) of the Insurance (Motor Vehicle Third Party Risks) Act and under the insurance policy.***
>
> ***b) The learned magistrate erred in law and on fact in holding that the Appellant's denial of liability came late and outside the statutory periods set out in the Insurance (Motor Vehicle Third Party Risks) Act.***
>
> ***c) The learned magistrate erred on fact in holding that the Appellant had made part payment of the decree obtained in MERU CMCC No.102 of 2016.***
>
> ***d) The learned magistrate erred in law and on fact in wholly disregarding the evidence adduced on behalf of the Appellant and displaying open bias against the Appellant during hearing.***
>
> ***e) The learned magistrate erred in law by totally failing to consider submissions filed by the Appellant's advocates and authorities cited therein.***
>
> ***f) The learned magistrate's judgment was rendered/delivered per incuriam.***

4. Ultimately, the Appellant seeks to have the impugned Judgement set aside, reversed and/or varied as well as the dismissal of the entire case of the Respondent against it.

Appellant's Submissions

5. The Appellant contends that since the deceased was an employee of the insured and was at the time of the accident, in the course of his employment, no liability or duty should be attached against the Appellant to pay for his death and as such, the declaratory suit could not hold pursuant to the provisions of Section 5 (b) (i) of the Insurance (Motor Vehicle Third Party Risks) Act (hereinafter referred to as the Act). It contends that pursuant to Section 5 (b) (i) of the Act, employees of insured persons are not considered third parties for purposes of the Act, unless an insurance policy has specifically covered such liability.

6. The Appellant further contends that the insured did not notify them of the primary suit (Meru CMCC No. 102 of 2016) and it denies having made part payment of the decree as alleged by the Respondents. It also contends that it never appointed the firm of J.K Kibicho & Co. Advocates to defend the primary suit or to file the appeal and that the learned magistrate completely missed the point by failing to address herself to the provisions of Section 5 (b) (i) as read together with Section 10 (1) of the Act.

7. The Appellant further contends that Section II of the policy of insurance issued to the insured indeed exempted such liability as is contemplated under Section 5 (b) (i) of the Act. It contends that the trial magistrate's failure to consider binding authorities it had placed before her violated established principles therefore rendering her judgment *per incurium* which ought to be upset.

8. The Appellant further submits that despite the holding by the lower Court that it was time barred and could not deny all liability under the Insurance Act, the learned magistrate did not mention the statutory periods which gave rise to the said limitation. According to the Appellant, the Court must have been referring to Section 10 (4) of the Act. The Appellant however submits that this did not oust the provisions of Section 5 (1) (b) as read together with Section 10 (1) of the Act.

9. For these averments, the Appellant relies on the cases of **Gateway Insurance Company Limited v Sudan Mathews (2003) eKLR, Philip Kimani Gikonyo v Gateway Insurance Company Limited (2007) eKLR, Madison Insurance Co. Kenya Ltd v Justus Ongera (HCCC No. 164 of 2002), Kenya Orient Insurance Co. Ltd v Benjamin Ochina (2013) eKLR, Kenindia Assurance Co. Ltd v Laban Idiah Nyamache (2011) eKLR, Solomon Okeyo Okwama & Another v Kenya Alliance Insurance Co. Ltd (2009) eKLR** and **Co-operative Insurance Co. Ltd v Bridgestone Construction Co. Ltd (2011) eKLR.**

10. The Appellant further submits that it did not make any part payment of the decretal sum awarded in the lower Court and that no evidence had been adduced to prove that it was indeed the Appellant that had made the part payment.

11. The Appellant finally submits that the Judgment of the lower Court was rendered ***per incurium*** being one which ignores a contradictory statute or a binding authority and is therefore wrongly decided and of no force and that the Appeal ought to be allowed.

Respondent's Submissions

12. The Respondents in their submissions maintained that they received a Judgment in the primary suit, (Meru CMCC No. 102 of 2016) and that the Appellant, though aware of this suit, elected not to take any action to protect its interests. They submit that they served the Appellant with the statutory notice in compliance with Section 10 (2) of the Act. They contend that after being served with the statutory notice, the Appellant neither responded, challenged the contents thereof nor sought a declaration and that this fact was conceded by the Appellant.

13. The Respondents further submit that Section 10 (4) of the Act obligates an insurer to obtain a declaration even where a policy of insurance contains a provision that the insurer 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 a fact which was false in some material particular or if he has avoided the policy on that ground that he was entitled to do so apart from any provision contained in it. The Respondents fault the Appellant for failing to move the Court as so required. The Respondent relied on the case of **Kenindia Assurance Co. Ltd v Joseph Amudanyi (2010) eKLR.**

14. The Respondents submit that the Learned Magistrate did not err by finding that the Appellant's repudiation came rather too late in the day and that the Appellant did nothing thereby choosing to sleep on its rights and wrongly find fault on the trial Court.

15. The Respondents submit that the instances when an insurer is required to file a suit for a declaration are not limited to the instances of non-disclosure or by a representation of fact which was false in some material particular.

16. The Respondents further submit that the question of whether or not the deceased was an employee would entitle the Appellant to avoid or cancel the policy but would not entitle the Appellant to avoid the Judgment obtained against its insured. The Respondents relied on the case of **Madison Insurance Co. Ltd v Justus Ongera (2004) eKLR** for the proposition that 'Once Judgment is in place in a primary suit, any challenge to its legality or finding could only be by way of appeal but could not be raised in the declaratory suit.'

17. The Respondents further submit that the Appellant should have brought their insured to testify as to who paid the amount if it was not them who so paid.

Issues for Determination

18. The Appellant has raised fifteen (15) grounds of appeal. After going through the submission by parties, this Court finds that there are only two (2) main issues which arise for determination in the instant appeal.

> ***i) Whether the Appellant was exempted from the requirement to obtain a declaration pursuant to the provisions of Section 10 (4) of the Act by virtue of the provisions of Section 5 (b) (i) of the Act as read together with Section 10 (1) of the Act.***
>
> ***ii) Whether it is the Appellant who settled the part payment of Ksh 1,278,606/=.***

Whether the Appellant was exempted from the requirement to obtain a declaration pursuant to the provisions of Section 10 (4) of the Act by virtue of the provisions of Section 5 (b) (i) of the Act as read together with Section 10 (1) of the Act.

Type of Liability Covered Under the Act

19. Following entry of Judgment in the primary suit, the Respondent being guided by the provisions of Section 10 (1) of the Act filed a declaratory suit seeking to have the Appellant be ordered to settle the decretal sum.

20. The Appellant however contends that pursuant to the provisions of Section 5 (b) (i) of the Act as read together with Section 10 (1) of the Act, no liability attaches against it to the deceased's estate, as the deceased was not a third party as contemplated in the provisions of the said section. The said section provides as follows: -

> ***5. Requirements in respect of insurance policies***
>
> ***In order to comply with the requirements of Section 4, the policy of insurance must be a policy which –***
>
> > ***(a) Is issued by a company which is required under the Insurance Act, 1984 (Cap 487) to carry on motor vehicle insurance business; and***
> >
> > ***(b) Insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of, or bodily injury to, any person caused by or arising out of the use of the vehicle on a road:***
> >
> > ***Provided that a policy in terms of this section shall not be required to cover –***
> >
> > ***i) <u>Liability in respect of the death arising out of and in the course of his employment of a person in the employment of a person insured by the policy or of bodily injury sustained by such a person arising out of and in the course of his employment; or</u>***
> >
> > ***ii) Except in the case of a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, liability in respect of the death of or bodily injury to persons being carried in or upon or entering or getting on to or alighting from the vehicle at the time of the occurrence of the event out of which the claims arose; or***
> >
> > ***iii) Any contractual liability.***
> >
> > ***iv) Liability of any sum in excess of three million shillings, arising out of a claim by one person.***

21. The above is replicated in the insurance policy which was produced in evidence and which provides as follows: -

> ***We will not pay***
>
> ***a) For death of or bodily injury to any person in your employment arising out of and in the course of such employment.***

22. It is not in dispute that the deceased, one Nelson Macharia Maina was an employee of one Wilson Chege Gakunyi who was the insured at the material time. At the time of the accident, the deceased was travelling in the insured's motor vehicle registration number KBS 086K / ZD 0904 and he was employed as a turn boy tasked to load and offload goods from the motor vehicle. It is therefore clear that the deceased, was not such a person who could benefit from the cover entered into between his employer, Wilson Chege Gakunyi and the Appellant. As per the aforementioned provisions, indeed the deceased and/or his estate cannot benefit from the cover between the Appellant and it's insured, Wilson Chege Gakunyi.

Type of Judgment Required to be Settled

23. Turning to the provisions of Section 10 (1) of the Act, the same provides as follows: -

> ***If, after a policy of insurance has been effected, <u>judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of section 5 (being a liability covered by the terms of the policy)</u> is obtained against any person insured by the policy, then 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 the 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.***

24. This Court finds that the requirement that the insurer settles the decretal amount following entry of Judgment is only applicable for such Judgments involving liability which is required to be covered both under the Act and under the insurance policy. The Act uses the following terms to describe the type of Judgment which ought to be settled: -

> ***<u>Judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of section 5 (being a liability covered by the terms of the policy)</u>***

In the premises, it would be wrong to compel an insurance company to settle a Judgment which arises from liability not contemplated by the law makers and even then which is not the subject of an insurance policy between the parties involved. In fact, in this case, the liability has been expressly excluded by virtue of the aforesaid Section 5 (b) (i) of the Act. Should the insurer be obligated to settle any such Judgment, this would not only have the effect of ascribing on parties that which they did not contract, but also to find against the provisions of law. The end result would be to confer an unnecessary benefit on an undeserving party while punishing the insurer for that which it did not contract and/or acquiesce to.

25. This view was clearly enunciated in the case of ***The Great Insurance Company of India Ltd –vs- Lilian Everlyn Cross and Another [1966] E.A 90, 97,,*** where Newbold V.P sitting at the Court of Appeal held as follows with respect to the applicability of Section 10 of the Act: -

> ***"It is submitted on behalf of the insurer that this section only applies where the liability is covered by the terms of the policy and that in this case no liability arose under the policy for any injury caused by a disqualified driver. I accept that this section only applies where both the liability is required under Section 5(b) to be covered by a policy and the liability is in fact covered by the terms of the policy."***

Requirement to file a Declaratory Suit under Section 10 (4) of the Act

26. To counter the foregoing provisions, which in this Court's view, would entitle the Appellant to avoid the liability, the Respondents argue that the Appellant ought to have sought for a declaration in order to avoid settling the decretal amount and therefore cannot avoid liability. The Respondents submit that the instances when an insurer is required to file a suit for a declaration are not limited to the instances of non-disclosure of a material fact or of misrepresentation of a material fact.

27. The real bone of contention in this Appeal therefore is not whether or not the deceased was an employee of the insured and therefore not eligible to benefit from the said cover, but rather whether there was a duty on the Appellant to repudiate liability by way of filing a declaratory suit upon receipt of notice of the primary suit and/or intention to institute the primary suit pursuant to the provisions of Section 10 (4) of the Act.

28. In order to determine whether there was any such duty, this Court has considered the provisions of Section 10 (4) of the Act which provides as follows: -

> ***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, <u>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:</u>***
>
> ***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.***

29. The Respondent argues that having served the Appellant with a statutory notice as required by Section 10 (2) of the Act, if the Appellant deemed that it was not liable for the said accident, it ought to have sought for a declaration indicating as much. According to the Respondent, such a declaration has to be sought even where the insurer is entitled to avoid that liability by the express provisions of an insurance policy. Essentially, the Respondent argues that the obligation to file a suit for a declaration that an insured is not liable is mandatory, irrespective of the source and/or nature of the entitlements for avoidance of liability.

30. The learned magistrate in her wisdom found that the Appellant was time barred from raising the contestation it so raised as to the lawfulness of its liability. The Court did not belabor on the provisions of law that prescribe for this limitation. However as conceded by the Appellant, it is Section 10 (4) aforementioned that provides for this limitation.

31. The Appellants case is not that it did not receive any notice of the institution of the primary suit and therefore had no opportunity to comply with the provisions of Section 10 (4) of the Act, but rather that by dint of Section 5 (b) (i) as read together with Section 10 (1) of the Act, the requirement to repudiate liability by way of filing a declaratory suit does not apply since the liability in issue was not one that was covered by the policy and/or one required to be covered under the Act. They argue that the obligation of an insurer to settle any liability arising out of a Judgment only arises if the Judgment was entered with respect to such liability that is required to be covered. Since in the instant case, liability with respect to an employee of an insured is not such that can be covered, then the requirement to obtain a declaration does not apply. The Appellant is firm that the liability that accrued was neither covered under the Act nor in the policy and as such, there was no need for it to seek the declaration envisaged in Section 10 (4). In essence, the Appellant argues that the point on limitation which the Learned Magistrate used to make her finding was a non-starter in view of the nature of liability arising out of the Judgment.

32. This Court has analyzed the provisions of Section 10 (4) of the Act. According to this Court, the said section requires of an insured who wants to deny liability to obtain a declaration either before or not more than three (3) months following commencement of the primary suit. The way to obtain such declaration is by filing a declaratory suit in Court. Furthermore, this action would only be valid if the said insured had within fourteen (14) days of the filing of the primary suit, had given notice to the Plaintiff in that matter that it was not liable. In essence, repudiation of liability is two-fold, first, by way of giving notice to the Plaintiff in the primary suit, and secondly, by way of filing a declaratory suit. However, the said repudiation is not a blanket one, requiring to be done whenever an insurer has been served with a notice. This Court finds that the requirement for an insurer to file a declaratory suit is intended for only those liabilities for which the insurer is entitled to repudiate and/or avoid for reasons beyond the express provisions of the policy, specifically being that there was non-disclosure of

material facts or a misrepresentation of a material fact. The liability in issue in this case is not one such contemplated by the said Section.

33. Furthermore, this Court finds that in the present case, the nature of liability attaching to the Judgment in issue has been expressly outlawed and is also expressly excluded from the provisions of the Act. In this Court's view, this implies that the provisions of the Act, in entirety (including Section 10 (4)) do not apply for the nature of liability in issue.

34. In the aforementioned case of ***The Great Insurance Company of India Ltd –vs- Lilian Everlyn Cross and Another [1966] E.A 90*** while expounding further on the instances when Section 10 is applicable, Newbold V. P held as follows: -

> ***A liability may be required under Section 5(b) to be covered by a policy and yet the liability may not in fact be covered by the particular policy. An example of this is where a policy is taken out relating to the use of the vehicle by the insured only but in fact the vehicle is used by another person. Another example would be where the insured obtained the policy by non-disclosure of a material fact. This would enable the insurer to take action in accordance with the appropriate provisions of Section 10 and to obtain a declaration that although the policy apparently covered the liability, never the less in fact it did not do so as there was never in existence a contract of insurance."***

35. The above implies that the entitlement for repudiation must be for reasons beyond the express provisions of the policy. That is not the case herein.

36. This Court further observes that pursuant to Section 12 (1A) of the Act the insurer has an obligation to respond to a statutory notice. It states as follows: -

> ***(1 A) The insurer shall, upon being served with the statutory notice and documents, admit or deny liability for the claim or judgment by a notice in writing to the person or persons presenting the claim or judgment.***

37. It is said to be an offence to fail to so respond to such notice served. In the present case, the Respondents have argued that despite being served with the statutory notice in compliance with Section 10 (2) of the Act, the Appellants did not respond to the same. This assertion has not been controverted. Indeed, it would have been good practice to respond to the statutory notice and state why it deemed it was not liable. This would have saved the Respondent the trouble of filing the declaratory suit it so filed and this would also have saved judicial time and resources. But as to whether or not failure to respond implies that liability would be attached against the said insurer for all such claims against persons it has insured, this Court finds in the negative. Notably, under Section 12 (2), failure to respond to the statutory notice attracts liability for an offence. The Section does not say that failure to do so would make one automatically make one liable for settlement of Judgments entered against their insureds. Had the drafters of this law intended so, they would have expressly provided for the same.

38. This Court therefore finds that there was no obligation to file a declaratory suit as per Section 10 (4) of the Act, in view of the fact that the liability in question is not one covered by the Act and further that the avoidance of liability was on account of an express provision of the policy. This Court ultimately finds that the Appellant was indeed exempted from the requirement to obtain a declaration pursuant to the provisions of Section 10 (4) of the Act by virtue of the provisions of Section 5 (b) (i) of the Act as read together with Section 10 (1) of the Act.

Whether it is the Appellant who settled the part payment of Ksh 1,278,606/=.

39. In the primary suit, Judgement was entered for the sum of Ksh 3,126,175/= plus costs and interests. In the Judgment of the lower Court in the declaratory suit, it was held that that the Appellant had made a part payment of the decree being a total of Ksh 1,278,606/= leaving behind a balance of Ksh 2,413,048/= and that there was no counter-claim for the same.

40. The Appellant has however denied that it paid any such amount. The question of who paid this amount is a factual one. Parties have miserably failed to assist the Court easily make a finding of this issue. In this Court's view, upon receipt of the monies it confirms so receiving, it was within the Respondent's power to make enquiries as to the circumstances under which this money had been paid into its account. For the Respondent to assert that it is for the Appellant to call its insured to indicate as to who paid this amount is to shift the burden of proof to a party who did not allege the facts. This is not the purpose of Section 107 of the Evidence Act. This Court has however perused the record and observes that from the Notice to Institute Declaratory Proceedings addressed to the Appellant at page 33-34 of the Record of Appeal, it is said that a sum of Ksh 1,278,606 had been paid by Saham Insurance. This insurance company, Saham Insurance is not a party to these proceedings. The circumstances under which this insurance company came to make this payment is unclear. This Court however finds that there is reason good enough to believe that the Appellant is not the one who made the part payment. It is also not clear why Soham Insurance made a part payment and did not pay for the entire amount. In the end, this Court finds that the Appellant is not the one who made the part payment. But even if the Court had found otherwise, that it was the Appellant who had made the part payment, this Court expresses doubt as to whether this would be reason good enough to order the Appellant to make the payment in the face of numerous provisions of law stating otherwise. There can be no waiver or acquiescence of statutory provision.

41. The question that begs is whether the Respondent would consequently have to forego the fruits of its Judgment. This is a matter which the Respondent would benefit from the counsel of its legal advisors.

ORDERS

42. In the end, this Court finds merit in the appeal and makes the following orders: -

> ***i) The Appellants Appeal herein succeeds.***

ii) The Judgment entered in favour of the Respondent and against the Appellant in Meru CMCC No. 76 of 2018 is hereby set aside.

iii) The Respondent's Suit against the Appellant in Meru CMCC No. 76 of 2018 is dismissed.

iv) Each party shall bear its own costs of the Appeal.

Order accordingly.

DATED AND DELIVERED ON THIS 29TH DAY OF APRIL, 2021.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S C. N. Nguci & Associates Advocates for the Appellants

M/S Wangai Nyuthe & Co. Advocates for the Respondent.