REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CIVIL APPEAL NO. 28 OF 2016

JUBILEE INSURANCE CO. LTD.....APPELLANT

VERSUS

WALTER TONDO SOITA.....RESPONDENT

(Arising from the judgement and Decree of Hon. I.T Maisiba SRM in Bungoma CMCC No. 832/2010 delivered on 4/12/2016)

JUDGEMENT

The respondent (plaintiff in the lower court) instituted a Declaratory Suit seeking *inter alia* a declaration that the defendant (appellant herein) is bound to settle the decree on behalf of their insured in Bungoma CMCC No. 303/2009, (primary suit).

The facts leading to the institution of the declaratory suit are; the respondent Walter Tondo Soita was the owner of Motor Vehicle Registration Number KVR 644 which was hit and damaged by Motor Vehicle Registration Number UAG 211X/UAG 840Q owned by Handwares ACAL Ltd at Lwandeti Area along the Eldoret-Webuye Road.

Subsequently, the respondent instituted the primary suit against one Handwares ACAL Limited and the court made an award of Kshs 149, 653/=. When the respondent tried to execute the decree, the said defendant could not be found thus the suit against the appellant on the ground that it had insured the said Motor Vehicle.

The appellant filed its statement of defence denying having insured the said Motor vehicle and that Hand Wares ACAL Limited was a total stranger to it.

At the hearing, the respondent testified as PW1. It was his testimony that he had sued Hand Wares ACAL Ltd and judgement given on 14/7/2010. He urged the trial court to compel the appellant pay him on behalf of its insured as it could not be traced.`

The defence never called any witness and opted to close their case.

By a judgement of that court, the respondent's claim was allowed entirely as against the appellant who has now appeals to this court on the following grounds;

1. The learned trial magistrate erred in law and in fact in failing to appreciate that the respondent's claim in the original suit was for material damages and that material damage claims are not covered under the provisions of Insurance (Motor Vehicles Third Party Risks) Act.

2. The learned trial magistrate erred in law and in fact in failing to find that the insurance (Motor Vehicles Third Party Risks) Act only applied/applies to claims for damages for personal injury or death.

3. The learned trial magistrate erred in law and in fact in failing to appreciate that the statutory notice under cap 405 was never issued and served on the appellant.

4. The learned trial magistrate grossly misdirected himself in treating the evidence and submissions and the law pertaining thereto before him superficially and consequently came to a wrong conclusion on the same.

5. The learned trial magistrate misdirected himself in ignoring the evidence and written submissions presented and filed by the appellant in its entirety.

6. The trial magistrate erred in not taking into account the fact that the plaintiff's case failed to meet the threshold of proof required and hence the finding of liability and the award thereto offends trite legal principles and is untenable.

7. The learned trial magistrate failed to apply himself judiciously and to adequately evaluate the appellant's evidence and submissions thereto and the applicable law and thereby arrived at a decision unsustainable in law.

Directions for the disposal of the appeal by way of written submissions were taken and each party filed its respective submissions. The appellant represented by Mr. Otieno Yogo and Mr. Bw'Onchiri for the respondent.

The appellant in its submissions filed on 28th September, 2020 submits that it never insured Motor Vehicle Registration Number UAG 211X. That the policy produced by the respondent only served the owner of the insured Motor Vehicle and not the respondent. That a material damage claim is not covered by the provisions of Cap 405.

The appellant submits that the respondent did not serve it or Handwares ACAL Limited with the notice of institution of suit in the primary suit as required by the provision of Section 10(2) of Cap 405 and as such, the respondent is legally estopped from executing the decree. That if any notice was served, it was served way after the suit had commenced and therefore not compliant with the law. Reliance has been placed on the case of ***Kenindia Assurance Co. Ltd Vs Laban Idiah Nyamache (2011)eKLR***

Finally, it is submitted that the appellant was not served with Summons to Enter Appearance and that it was not party to that suit as well as the fact that it did not insure the motor vehicle that caused the accident.

The respondent raised the following issues as central to the appeal;

1. Whether or not material damage claims are covered under the provisions of the Insurance (Motor Vehicles Third Party Risks) Act.

2. Whether or not Statutory Notice under Cap 405 was issued and served upon the appellant.

3. Whether or not the respondent proved his case against the appellant on a balance of probability.

On the first issue, the respondent's counsel submitted that Section 10(1) of Cap 405 imposes mandatory duty upon an insurer to satisfy judgment against persons insured and that material damage claims are covered therein. Reliance has been placed in the case of ***Joseph Mwangi Gitundu Vs Gateway Insurance Co. Ltd (2015)eKLR***

On the second issue, it is submitted that the notice was duly issued and served upon the appellant. That during trial, certificate of posting was produced as 5, forwarding letter and notice of institution of suit. The appellant did not object to the production.

The third issue rests on whether the respondent proved its case on a balance of probability. The respondent submits that he met the threshold as the evidence therein was cogent.

The duty of this court being a first appellate court were stated in ***Abok James Odera t/a A.J Odera & Associates v John Patrick Machira T/a Machira & Co. Advocates*** **(2013) eKLR**, where it was held;

"This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way"

At the centre of this appeal is an accident where the respondent's Motor Vehicle was hit by a Motor Truck bearing a Ugandan Registration Number and allegedly insured by the appellant. The record shows the respondent instituted Bungoma CMCC 303 of 2009 and judgement entered in his favour. When he sought to execute against the appellant's insured, he could not trace it. The respondent therefore filed a declaratory suit in the trial court seeking to compel the appellant satisfy the decree. The appellant denied ever issuing any policy to the said insured and that since the claim was basically material damage, the damage was not covered by the policy.

Section 10 (1) of Cap 405 provides:

If, after a policy of insurance has been effected, 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) 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."

Section 5(b) of the said Act provides;

In order to comply with the requirements of section 4, the policy of insurance must be a policy which 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 death of, or bodily injury to, any person caused by or arising out of the use of the vehicle on a road.

The provisions of Sections 107 and 108 of the Evidence Act come into play. If the appellant wanted the court to believe that material damage is not covered by the policy, it was duty bound to adduce evidence for the court to find in its favour.

The respondent did produce police abstract in evidence. The same was Pexh 2. The abstract under paragraph 1(b) indicates that Motor Vehicle Registration Number UAG 211X was insured by the appellant. The appellant did not adduce evidence that the policy given therein belongs to a different insured. The appellant merely denied ever insuring the said Motor vehicle. That is not enough. A mere denial of a fact is no defence, cogent evidence ought to be adduced in line with the provisions of sections 107 and 108 of the Evidence Act.

The appellant contends that the insurance policy was not issued in favour of the respondent. The law of insurance is such that privity of contract is not adhered to in its strict sense. Under insurance law, especially Third Party policies, the beneficiary of the cover is the person who has been injured by the insured.

Black's Law Dictionary defines **"third Party"** as;

> ***"A party who is not a party to a lawsuit, agreement or other transaction but who is somehow implicated in it; someone other than the principal parties."***

This definition clearly contemplates existence of a class of persons who are not principally parties to the contract but by the very existence of the Insurance Contract, their interests and rights are covered. This class in no doubt covers the respondent.

The appellant filed defence to the declaratory suit denying that they insured Motor Vehicle Registration Number UAG 211X Make Trailer UAG 840Q Mercedes Benz and even issued Motor Ins. Cover No. P/KLA/1257/2047/06/57 issued to Hardwares ACAL Ltd.

Upon perusal of the proceedings, the plaintiff and his witnesses testified and closed the plaintiff's case on 27th July, 2012. Mr. Anyumba, counsel for the defendant/appellant prayed for a defence hearing to be heard on 19th October, 2012. The defendant sought for and were granted 7 adjournments. On 27th June, 2014, Mr. Omondi again sought for an adjournment and the proceedings were hereunder;

> ***The matter is for defence but my witness Wilfred Wanjala has not shown up though I informed him today. He tells me he mis-diarised the date and he is not present. It is now 12.00.***

The application was opposed and the court proceeded to order thus;

> ***I am not persuaded that there is any good reason for adjournment. Court gave a last adjournment. I order the defendants to proceed.***
>
> ***The defence is deemed closed.***

The defendant/appellant the filed an application dated 8th July, 2014 seeking to set aside the order of closure of the defence. The application was dismissed on 27th July, 2014. By consent of 24/7/2015, the order of closure of the defence case was set aside and the defendant given opportunity to produce his witnesses on 23rd October, 2015 to testify.

On the 23/10/2015, the date of defence hearing, Mr. Maganga for the defendant again applied for adjournment, which rightly in my view was rejected and the defence case once again was deemed closed.

From the proceedings, it is clear that the defendant/applicant were granted 9 adjournments to enable them tender their evidence. They did not. The plaintiff/ respondent's evidence therefore remained unchallenged.

The defendant/appellant did not tender evidence to show how they did not insure the Motor Vehicle or that the insurance indicated was not issued by them or that even if it was issued by them it did not cover this sort of claim lodged against the insured by the respondent.

In the absence of such evidence, evidence, I find that the trial magistrate on the evidence before him correctly found the appellant liable to pay the claim.

I therefore find not merit in this appeal which is hereby dismissed with costs.

DATED and **DELIVERED** at **BUNGOMA** this **22nd** day of **June,** 2021

S. N RIECHI

JUDGE.