



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIVASHA

CORAM: R. MWONGO, J.

CIVIL CASE NO. 10 OF 2018

BERNARD MUTISYA WAMBUA.....PLAINTIFF

VERSUS

KENYA ORIENT INSURANCE COMPANY LTD.....DEFENDANT

JUDGMENT

Background and evidence

1. By a judgment of Meoli, J, dated 3rd November, 2017, the plaintiff was awarded damages of Kshs 9,457,500/= in the High Court Case No 28 of 2015 (the Damages Suit) for injuries sustained in an accident along Nakuru –Gilgil road on 1st June, 2013. The accident involved bus registration number KBB 129S which the plaintiff was driving, and a lorry-trailer registration number KAZ 314J – ZC 3900 belonging to one Swaleh Hashil.
2. The court, after hearing evidence from the plaintiff’s three witnesses, and no evidence having been adduced by Swaleh Hashil, found the said Swaleh Hashil 100% liable. It is noteworthy that the suit against one Elias Dawood, who was described as the registered owner of the Trailer registration number ZC 3900, was withdrawn.
3. In the present suit, the plaintiff seeks a declaration that the defendant, who is stated to have been the insurer of the lorry found liable in the Damages Suit, is liable to satisfy the judgment award of Kshs 9,457,500/- plus costs and interest from 3rd November, 2017.
4. A hearing was held in this suit on 8th July, 2019.
5. PW1 PC Paul Komen of Gilgil Police Station, testified that the insurance particulars for Lorry KAZ 314J, were C/No 6244 362-44535. He stated that upon occurrence of an accident, the insurance sticker is removed to obtain the said particulars. The Policy No according to the insurance sticker was MSA/106/00 2163/2012, commencing on 6th April, 2013 and expiring on 2nd August 2013. These details were recorded in the Police Abstract produced as PExb 1 and OB extract.
6. In cross examination, PW1 stated that PC Kagendo, not he, was the investigating officer for the case; that his duties were general police duties including traffic; that there was no indication anywhere that the information on insurance was actually taken from the certificate; that he knew that insurance certificates have the name of the owner on them; he admitted that abstract did not show who the insured person was; that he himself did not see the insurance sticker; and that the evidence he was giving was from the police records. In re-examination he said that the name of the insurance company was indicated on the sticker, and that the information in the abstract is copied from the Occurrence Book.
7. PW2, the plaintiff, produced his bundle of documents PB 1-11, ad his witness statement was adopted as evidence. He claims the full judgment amount.
8. In cross examination he said he was relying on the Police Abstract to confirm that the defendant was the insurer; but did not know who was driving the accident lorry, and had not looked for him.
9. DW1, Jimmy Lorot, and employee of Kenya Orient, testified, and his witness statement was adopted as evidence in chief. He asserted that the insured person in respect of the accident lorry was one Brian Twinamasiko; that Salim Hashi had never been their insured or an agent of the company. He stated that, in any event, the company could only pay the statutory limit of a maximum of Kshs 3,000,000/=.

10. In cross - examination, DW1 confirmed that he joined the Defendant company in January, 2019; that he had nothing to prove his employment; that they had insured the lorry KAZ 314J to Brian Twinamasiko; that he was not sure whether they had defended HCCC No 28 of 2015 or whether they had issued instructions for the medical report in that case to be availed. He admitted that the stamp on the statutory notice dated 3rd November, 2014 and produced as PExb 2, belonged to the defendant. He also said that the defendant did not object to the vehicle being insured by them, but that Swaleh Hashil was not the insured. The trailer, he said was insured by the defendant

11. In re-examination, DW1 stated that he had not carried any file to show the insurance policies for the vehicles; and that he was not aware whether the defendant had instructed to act for the defendant in the Damages suit.

12. The issues for determination in this suit are:

- i. Whether the defendant in the Damages Suit was insured by the defendant herein;
- ii. If so, whether the defendant is liable beyond the statutory limit of Kshs 3,000,000/- in any event.

Analysis and Determination

Whether Swaleh Hashil was insured by the defendant

13. The plaintiff submitted that Swaleh Hasil and not Brian Twinamasiko was the person insured by the defendant. They argue that the fact that they could not produce the insurance certificate could not discredit to the evidence of PW1 the police officer who testified that the certificate was of the was used to obtain information on the insurer. They rely on **APA insurance Co. Ltd v George Masele [2014] eKLR**, where Mabeya J stated :

“As to the certificate of insurance which Ms Akonga insists should have been produced, I am of the contrary view. The Certificate of Insurance is usually issued to the insured and not the road accident victim. It is a document in the special knowledge and possession of both the insured and the insurer. The road traffic accident victim cannot access it. The details in the Police Abstract as to the details of 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.....”

14. The defendant’s submission on this issue is that in terms of section 10 (1) of the Insurance Act, judgment cannot only be “*obtained against any person insured by the policy*”. They argue that since the policy does not cover the judgment creditor, there is no liability on their part to pay anything. In their defence at paragraph 6 they pleaded that :

“That the said judgment was not against a person insured by the defendant and as such liability does not lie against the defendant herein as alleged or at all”

15. I agree with Mabeya J, that the insurance certificate is a document usually in the possession of the insurer and insured. The evidence by the police in the police abstract that such and such was the insurance policy, giving its number and the name of the insurer is, in my view, evidence of such a nature that that it must be controverted. If objected to by the insurance company, it would easily bring the correct policy to the attention of the court because it keeps copies of these.

16. In his testimony, DW1 readily stated that the lorry KAZ 314J is insured by them. However, he said, it was insured in the name of a different person. There was also no dispute that the vehicle was involved in the accident as found by Meoli, J in HCCC 28/2015. What the defendant denies is that the insured is Swaleh Hashil. No one but the defendant can ascertain who the insured was, and they are the only ones who can demonstrate that. If the question is one of double insurance or of a forged insurance, only the defendant can assert so. They did not file any document showing that the insured was not the person alleged by the plaintiff. To that extent the allegation an evidence of the plaintiff through the police abstract is uncontroverted.

17. The **Evidence Act section107(1)** requires that the legal burden of proof rests on the person asserting facts:

“Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove those facts exist”.

I accept that the plaintiff proved from the police abstract that the insurer was the defendant, which they have admitted. They however do not admit that the insured was Swaleh Hashil as found in HCCC 28 of 2015.

18. Sections 109-112 of the Evidence Act, however, also provide that there is an evidential burden of proof laid on the person who has especial knowledge of any fact in the following terms:

“109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

19. In **Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another [2005] 1 EA 334**, this issue was discussed by the Court of Appeal

where it held that:

“As a general proposition under section 107(1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the Court to believe in its existence which is captured in sections 109 and 112 of the Act.”

20. It follows that whilst the initial burden of proof lies on the plaintiff, the same may shift to the defendant, depending on the circumstances of the case. I think this is the position in this case.

21. Further, the plaintiff argues that the defendant was, under Section 4 of the Insurance (Motor Vehicle Third Party Risks) Act, entitled to avoid liability by obtaining a declaratory judgment to that effect under the policy and on the grounds that there was either non-disclosure or misrepresentation of a material fact. This the defendant did not do.

22. I am satisfied that the plaintiff here has shown from the evidence of the PW1 and the findings in HCCC 28 of 2015 that Swaleh Hashil was the insured and that the defendant the insurer. The defendant having not taken advantage of section 4 of the Insurance (Motor Vehicle Third Party Risks) Act, this court is entitled to find in favour of the plaintiff on this point, as we hereby do.

What, if any, is the defendant’s liability or exposure in damages

23. In the plaint, the plaintiff seeks a declaration that the defendant is liable to satisfy the judgment in HCCC No 28 of 2015 plus costs and interest at court rates from 3rd November, 2017 until payment in full.

24. The plaintiff in the last page of their submissions then went on to state:

“the Plaintiff is alive to the fact that under Section 5 (iv) of Cap 405, insurers of motor vehicles against third party risks are not legally bound to pay any amount in excess of Kshs 3,000,000/= in respect of a single third party claim. The plaintiff is aware of its option of pursuing the defendant’s insured for the recovery of the amount in excess of the Kshs 3,000,000/= we are entitled to receive from the defendant” (emphasis added)

25. On their part, the defendant argues, citing various authorities, that they are statutorily protected from paying any more than Kshs 3,000,000/= for any single claim under Section 5 (iv) of the Insurance (Motor Vehicle Third Party Risks) Act. They quoted the case of **Patricia Mona Antony & Another v African Merchant Assurance Company Limited [2019] eKLR**, High Court Nairobi, which stated that:-

“I therefore wholly concur with the defendant’s argument that it is only obliged to satisfy the decree by paying the plaintiffs the amount limited by the law in the sum of KShs.3,000,000. This does not however mean that the plaintiffs cannot recover the full decretal amount. They have the option of pursuing the defendant’s insured for recovery of the amount in excess of the KShs.3,000,000 they are entitled to receive from the defendant.”

26. They summarized their argument using the words of Odunga, J in **Gateway Insurance Co Ltd v Jamila Suleiman & another [2018] eKLR** where he stated:

“65. My understanding of the said section is that in respect of a claim by one person the insurer’s liability ought not to exceed Kshs Three Million. In other words the Court may only enter judgement against the insurer up to a maximum of Kshs Three Million. That however does not mean that a person who is entitled to file a declaratory suit against the insurer but to whom an award has been given exceeding Kshs Three Million is thereby prevented from filing a suit against the insurer. He can do so but his entitlement as against the insurer cannot exceed Kshs 3,000,000.00

66. In the premises a judgement of up to Kshs 3,000,000.00 is not a nullity.”

27. As the parties are in agreement on the amount that is payable by the defendant, I will allow that amount of Kshs3,000,000=.

28. However, I do agree with the plaintiff that the fact that they were forced to sue for that amount which both parties were aware was statutorily payable, renders it impossible for the defendant to escape liability for payment of interest and costs on that amount from the date of the award. The defendant ought to have paid said amount of Kshs 3,000,000/= upon the award being made.

Disposition

29. From the foregoing, the upshot is that the plaintiff is awarded the sum of Kshs 3,000,000/= being the amount statutorily payable under Section 5 (iv) of the Insurance (Motor Vehicle Third Party Risks) Act, in respect of the judgment debt in HCCC No 28 of 2015.

30. The defendant shall also pay interest on the said amount from the date of judgment in HCCC No 28 of 2015, being 3rd November, 2017.

31. The plaintiff shall also have the costs of this suit.

32. Orders accordingly.

Dated and Delivered at Naivasha this 27th Day of February, 2020

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. Oseko holding brief for Amboko for the Plaintiff
2. Mwithirania holding brief for Ochieng for the Defendant
3. Court Clerk - Quinter Ogutu