



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CIVIL APPEAL NO.19 OF 2018

BETWEEN

THE HERITAGE INSURANCE CO. LTD.....APPELLANT

AND

MOSES SANDE OUMA.....RESPONDENT

(Being an Appeal from the Judgment and Decree in Busia Principal Magistrate's Court Civil Case No.178 of 2017 by Hon. M.A Odhiambo. – Resident Magistrate).

JUDGMENT

1. **The Heritage Insurance Co. Ltd**, the appellant herein, was the defendant in the Busia Principal Magistrate's Court Civil Case Number 178 of 2017. This suit was seeking declaratory orders for the satisfaction of the decree in Busia CMCC NO. 215 of 2012.
2. In her judgment, the learned trial magistrate found the appellant liable and issued orders for the appellant to satisfy the decree in Busia PMCC NO. 215 of 2012.
3. The appellant was aggrieved by the judgment which was delivered on 7th December 2018 and filed this appeal. The appellant was represented by Kibichy & Company advocates. The following four grounds of appeal were raised:
 - a) The learned trial magistrate erred in law and in fact in failing to appreciate or take into account the appellant's evidence as well as submissions or at all.
 - b) The learned trial magistrate erred in law and in fact in basing her finding on irrelevant matters.
 - c) The learned trial magistrate erred in law and in fact in failing to properly apply and/or failed in completely ignoring the provision of Section 10 of the Insurance (Motor Vehicle Third Party Risks) Act in particular with respect to non-involvement of policy holder in the judgment that was subject to enforcement.
 - d) The learned trial magistrate erred on all points of fact and law in as far as the award of damages in concerned.
4. The respondent was represented by the firm of Omondi & Company Advocates. He opposed the appeal on grounds that there was sufficient evidence on record to support the finding of the learned trial magistrate.
5. This Court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of **Selle vs. Associated Motor Boat Co. Ltd. [1965] E.A. 123**, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.
6. After considering the grounds of appeal and the reasons for the opposition and the submissions by both parties it emerges that there is only one issue in contest; whether the appellant can avoid liability under the provisions of section10 (4) of the Insurance (Third Party Motor Vehicle Risks) Act CAP. 405.
7. Section 10 (4) of the Insurance (Third Party Motor Vehicle Risks) Act CAP. 405 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, 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.

8. In cases where the declaration was obtained before the commencement of the action, the insurer has an obligation either before or within fourteen days after the commencement of the action to give notice to the plaintiff in the said proceedings that he would avoid the policy specifying the non-disclosure or false representation on which he proposes to rely. The appellant herein did not give such a notice to the respondent and cannot be heard to say that the policy was unenforceable.

9. At the trial, the learned trial magistrate made a finding that the purported sale was mere hearsay and that it was not established. I concur with her finding. Even if the same was proved, the appellant having not notified the respondent the intention to avoid the policy, it would have been some effort in futility.

10. Though the appellant contended that the insured was not involved in the suit, this is not borne out by the evidence on record. The appellant was notified by a letter dated 21st June 2012 about the institution of the suit. There are, therefore, no sufficient reasons as to why they can avoid satisfying the judgment in Busia PMCC NO. 215 of 2012.

11. From the foregoing, the appeal is dismissed with costs.

DELIVERED and SIGNED at BUSIA this 11th day of March, 2020

KIARIE WAWERU KIARIE

JUDGE