



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BOMET

CIVIL APPEAL NO.10 OF 2018

M/S FIDELITY SHIELD INSURANCE CO.LTD.....APPELLANT

VERSUS

PETER MBUGUA KIMOTHO.....RESPONDENT

(Being an appeal from the Judgment Sotik PMCC Civil Case No.1 of 2016 – Hon. Omwansa, PM)

JUDGMENT

1. The Respondent had sued the appellant to satisfy the decree and costs arising from Sotik PMCC No.23 of 2014.
2. The Appellant had denied liability for the accident on the grounds that the Respondent was in breach of express, implied and explicit terms and conditions of the policy document. Thereafter upon hearing the case Judgment was entered on 25.5.2017 against the appellant and in favour of the Respondent.
3. Being dissatisfied with the said Judgment the appellant lodged this appeal seeking to set aside the judgment and orders thereon. The grounds are -:

- i) THAT the learned trial magistrate erred in fact and law in failing to dismiss the Respondent’s claim in view of the evidence adduced.**
- ii) THAT the learned magistrate erred in law and facts in failing to hold that the subject number KAT 544E was not covered by the appellant at the time of the alleged accident which was the subject matter in Sotik PMCC No.23 of 2014.**
- iii) THAT the learned trial magistrate erred in law and fact in failing to hold that the Respondent did not serve the statutory notice as provided under section 10(2)(a) of the Insurance (Motor Vehicle Third Party Risk Act (Cap 405) Laws of Kenya.**
- iv) THAT the learned trial magistrate erred in law and fact in failing to hold that no notice of institution of suit was ever issued to the appellant.**
- v) THAT the learned trial magistrate erred in law and fact in failing to hold that there was no contract subsisting between the Appellant and the Respondent and therefore the Appellant was under no duty to settle and/or make good any claim arising from any accident in respect to motor vehicle registration number KAT 544E.**
- vi) THAT the learned trial magistrate erred in law and fact in holding that a police abstract was conclusive evidence on the Insurance Contract/Agreement between the Appellant and the Respondent.**

4. This is a first appeal, it is the duty of this court to re-evaluate and reconsider the evidence on record so as to arrive at its own conclusions. **Peter vs. Sunday Post Limited 91958)EA 424**

Appellants Submission

5. It is the appellant’s contention that the Respondents motor vehicle was not covered by the appellants nor did there exist a contract between the appellants and the Respondent at the time of the alleged accident.
6. It is the appellant’s case that it was the Respondent to prove that the appellant had the legal liability to satisfy the Respondents claim. Counsel for the appellant places reliance in the case of **Statpack Industries Limited vs. James mbithi Munya (Nairobi HCC No.1152 of**

2003) held,

“The duty of the of the insurer to satisfy Judgment against persons insured stem from s.10(1) and (2) of the Insurance Act Cap 405 Laws of Kenya.”

7. Counsel also relies on the case of **RICHARD MAKAU NGOMBI – VS- CANNOT ASSURANCE CO. LTD NO 419 of 2014** where it was held -:

“It is worth noting that the liability of the appellant arises only if it was the insurer of the offending motor vehicle and if no nexus is proved between the insurer and the insured then a cause of action by way of declaratory suit such as this one that is before the trial court could hardly succeed.”

8. It is submitted that the trial magistrate failed to consider that there did not exist a valid certificate of insurance issued by the appellant to the alleged insured in his judgment. Further that the Respondent did not avail evidence to the effect that the appellant had insured the vehicle in favour of one ELLY OWOUR.

9. It is submitted that the Respondent did not notify the appellant of any intended ad or ongoing proceedings against them. It is conceded that the learned trial magistrate failed to dismiss the Respondents claim due to lack of evidence of proof connecting the suit motor vehicle, the alleged insured with the appellant. The appellant further submits that by virtue of S.10(2) (a) of Cap 405 the Respondent has a duty to serve a statutory notice within 14 days after filing a declaratory suit.

10. Reliance is placed on the case of **BEM KARIUKI IN SHADRACK AMAKOBE TACHER VS UNITED INSURANCE CO. LTD (2005)eKLR** where it was held:-

“At the time of the institution of the suit, the plaintiff had given the defendant notice dated 8/8/1997. As it valid and in conformity with section 10(2) of the Insurance Act. The act requires the insurer to have had notice of the institution of the suit. Section 10 (2) focuses on receipts of the notice by the insurer. It requires the notice to have been received by the insurer”

11. It is further submitted that a police abstract is not conclusive proof of evidence on the insurance contract. Counsel has cited the case of **DR. JAMES NG’ANGA MUNGAI V UNITED INSURANCE CO. LTD NO.1860 of 2000** where it was held:-

“For an insurance to be liable under S.10 (2) of the act, firstly, it must be proved that the insurance actually covered the insured’s car in which the plaintiff was travelling when he was injured and a police abstract does not help as that document only shows that the police had recorded the accident with the details as they found and noted.

RESPONDENTS SUBMISSIONS

12. The Respondent narrows down the issues for determination to two.

i) Whether the motor vehicle registration number KAT 544E was insured by the Appellant at the time of the accident;

ii) Whether the appellant was served with notice.

13. As to whether motor vehicle registration No.KAT 544E was insured by the appellant, it is submitted that a police abstract was produced as exhibit. It indicated that the motor vehicle was insured by the appellant certificate number 136171971 and policy No.MC4011067090 which evidence was not rebutted.

14. That the policy of insurance issued to the vehicle was to commence from 21st March 2013 and expire on 20th March 2014. Thus on 30th April 2013 there was a valid policy of insurance. Counsel for the Respondent relies on the case of **APA INSURANCE COMPANY LTD V GEORGE (2014)eKLR** where the court held:-

“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 details in the police abstract on the insurance are in the ordinary case of business obtained by the police from the certificate of insurance offered to the motor vehicle or supplied by the insured.”

15. Whether statutory notice was served? It is submitted that the demand notice issued to the insured was copied to the appellant and served by registered post. It is further contended that even if there was no evidence of receipt by the appellant there is evidence that the letter was received by the appellant on 25/7/2013 (page 39 of the Record of appeal)

The respondent contends that after filing the current suit he notified the appellant as evidence by notice of institution of suit which notice was received by the appellant (page 40 of the record of appeal). That the plaint was filed on 13th February 2014 and notice was served on the appellant on 19th February 2014. Therefore there was compliance with the provisions of s.10 (2) (a) of the Insurance Act. Reliance is place in the case of **OGADA ODONGO – VS – PHOENIX OF EAST AFRICA INSURANCE(Kisumu Hccc No.132 of 2003** where it was held -:

“By an insurer issuing a policy of insurance, it automatically assumes the rights of third parties. It simply means, the right/obligation of the insured automatically transferred to the insurer unless it proved otherwise. By covering third party rights, the insurance was in essence performing a statutory duty imposed by an Act of Parliament”.

16. Analysis and conclusion in his judgment dated 25/5/2017 at paragraph 2 of the last page (not paginated) the learned magistrate had this to observe:

“I have considered the evidence as adduced and scrutinized the exhibits and I have no reason to hold that the defendant was never served. The postage slip is proof of service on a balance of probability. There is no evidence rebutting the averments of the plaintiff and his witness....It seems clear that the policy document was subsisting at the time of the accident.”

17. From the above, it is apparent that the learned trial magistrate did find that motor vehicle registration No.KAT 544E was insured at the time of the accident and secondly, that the appellant was served with statutory notice as provided under S.10 (2) (a) of the Insurance Act.

18. From the onset it is noted that the appellant did not call any evidence to rebut that of the Respondent. The Respondent did not testify that motor vehicle registration No. KAT 544E had been insured vide policy no.MCA011067090.

19. A police abstract was produced which showed that the subject vehicle was insured by the appellant vide certificate no.136171971 vide policy no MC4011067090. This evidence was not challenged and remains unassailable.

20. The same police abstract showed that the policy of insurance issued to the motor vehicle registration No.KAT 544E was commencing on 21st March 2013 and expiring on 20th March 2014. Meaning, therefore that as at 30th April 2013 there was a valid insurance policy issued by the appellant in favor of the insured.

21. These facts were not challenged and in the absence of evidence to the contrary the police abstract provided sufficient evidence as regards the insurance policy and its validity at the time of the accident.

22. On the issue of whether the Respondent had complied with the provision of S.10 (2) (a) of the Insurance Act. The Respondent did testify that a demand notice was issued copied to the appellant and served by registered post. The letter was received by the appellant (page 40 of the record of appeal)

23. There is also evidence that after filing the current suit the appellant was notified of the institution of the suit. Plaintiff was filed on 13/2/2014 and notice served on 19th February 2014 against the applicant. I am satisfied that there was compliance.

24. Upon a careful analysis of the evidence on record, I find no good reason to fault the findings of the trial magistrate.

25. This appeal has no merit and is dismissed with costs to the Respondents.

26. Any party aggrieved by this judgment has a right of Appeal within 28 days of this date.

Delivered, dated and signed at Bomet this 6th day of August 2020.

A. N. ONGERI

JUDGE