



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT HOMA BAY**

**CIVIL APPEAL NO.13 OF 2020**

**ICEA LION GENERAL INSURANCE CO. LTD.....APPELLANT**

**VERSUS**

**PENINA ATIENO OBEL..... RESPONDENT**

*(Being an appeal from original conviction and sentence in Civil case No.61 of 2018 of the Principal Magistrate's Court at Oyugis dated 30/01/2020 by Hon. J.P.Nandi, PM)*

**JUDGMENT**

[1] **Penina Atieno Obel**, was the plaintiff in a suit she instituted against **ICEA LION GENERAL INSURANCE CO. LTD** (the defendant) vide a plaint filed at the Magistrate's court at Oyugis on 21<sup>st</sup> June 2018, in which she prayed for a declaration that the defendant was bound to pay the decretal amount in **Oyugis PMCC No. 129 of 2015**, in which the plaintiff sued Unicet Insurance Company Ltd, Gideon Sereti Ongeru and Abel Ongeru Ocharo.

[2] The defendant denied the claim and filed its statement of defence on the 23<sup>rd</sup> July 2018, praying for the dismissal of the suit with costs.

Apparently, the claim arose from a road traffic accident involving a **Motor vehicle Reg. No. KBM 015H**, in which the plaintiff was traveling as a lawful passenger and was injured in the process. The accident occurred on **18<sup>th</sup> December, 2013** along the Kadongo Murram road due to the negligence of the vehicle's driver. As a result, the plaintiff filed the aforementioned suit (i.e. Oyugis PMCC No. 129 of 2015) against the vehicle's driver and owners and was eventually awarded general damages for pain, suffering and loss of amenities in the sum of kshs.230,000/- together with costs assessed at kshs.132,610/-.

[3] The plaintiff contended that prior to the filing of the suit (Oyugis PMCC No.129 of 2015), she issued the necessary statutory notice dated 30<sup>th</sup> March 2015. She also contended that the ill-fated vehicle was at the material time insured by the defendant herein under the provisions of the **Insurance (Motor Vehicle Third Party Risks) Act (Cap 405 LOK)**. She therefore filed the present suit against the defendant insurance company for a declaratory order that the company is bound to pay the decretal amount in Oyugis PMCC No.129 of 2015 together with costs and interests and an order that the said decree be executed against the defendant company.

[4] After a full hearing of the suit, the trial court rendered its judgment on **30<sup>th</sup> January 2020**, in favour of the plaintiff. A declaratory order was issued against the defendant insurance company.

Being dissatisfied with the judgment, the defendant company filed the present appeal on the basis of the grounds set out in the memorandum of appeal dated 18<sup>th</sup> February 2020, praying for setting aside of the judgment and/or order dismissing the plaintiff's suit against itself.

[5] The appeal was canvassed by way of written submissions. In that regard, the defendant/appellant's submissions were filed on **2<sup>nd</sup> November, 2020** by **Onyinkwa & Co. Advocates**, while those of the plaintiff/respondent were also filed on **2<sup>nd</sup> November, 2020**, by **Maubi Muyeya & Associates**.

After having given due consideration to the appeal in the light of the supporting grounds and the rival submissions for and against the appeal, this court was required to revisit the evidence availed at the trial and draw its own conclusions bearing in mind that the trial court had the benefit of seeing and hearing the witnesses (see, **Selle Vs Associated Motor Boat Co. Ltd [1968] EA 123**).

[6] In that regard, the respondent(PW1) testified that the ill-fated vehicle was on hire when it was involved in the accident which was reported to the police at Oyugis police station and police abstract (PEx1) issued. She obtained a copy of the vehicle's insurance certificate (PEx2) No.B6146294 for the period 17<sup>th</sup> September, 2013 to 16<sup>th</sup> September, 2014 and issued through her advocates the necessary statutory notice (PEx3) stated 30<sup>th</sup> March 2015 to the appellant in respect of policy No.980/A1/113183/12. A postage certificate (PEx4) was produced to confirm that the notice was served upon the appellant.

[7] In cross examination, the respondent stated that she was seated in the front cabin of the vehicle which was carrying her and others who had hired it. She also stated that the vehicle was a commercial vehicle rather than a public service vehicle(PSV) or “matatu” and that the insurance police had some limitations over its usage, such that the vehicle was not permitted to carry fare paying passengers or any passenger.

[8] **Isaac Ochola(PW2)**, the Executive Officer at Oyugis Law courts produced the relevant civil case file No.129 of 2015(PEX9) and related documents (PEX5, 6 and 8) and confirmed that the judgment in respect therefore was delivered on 11<sup>th</sup> December, 2017 for the sum of ksh.230,000/- general damages and costs. His evidence marked the closure of the respondent’s case.

[9] The appellant led evidence through its Kisumu Branch Manager, Samuel Otieno Ogola(**DW1**) who stated that the insurance policy for the ill fated vehicle(**DEx1**) was a commercial motor vehicle comprehensive police and not a motor vehicle hire policy and therefore, the respondent was not a third party but rather a fare paying passenger who could not be compensated by the appellant company as the insurer but by the insured.

[10] In cross-examination, the witness(**DW1**) acknowledged that the appellant received the necessary statutory notice from the respondent before this suit was instituted. He indicated that the actual contractual documents was the proposal form between the insured and the insurer but the same was not tendered in evidence. He admitted that the policy document(**DEx1**) was rather signed by the insurer not the insured.

The witness(**DW1**) further indicated that the policy was actually processed on behalf of the appellant by its agent, **Wiseland Insurance Agency** and that what actually captured the terms of the insurance contract between the insured and the insurer was the proposal form.

[11] In essence, the appellant through its witness(**DW1**) implied that the primary documentary evidence for the purposes of spelling out the insurance contract between the insured and the insurer respecting the ill-fated vehicle which linked the respondent to the appellant was the proposal form rather than the actual policy documents(**DEx1**). Further that, the primary witness or key witnesses in the circumstances was the appellant’s aforementioned insurance agent.

[12] However, the said agent was never available to testify in court on behalf of the appellant whose case was thus closed without the input of the agent.

Basically, from all the foregoing evidential facts, it was apparent that the emerging key issue for determination was whether the appellant was entitled to disclaim liability as against the respondent on the basis of the policy document(**Dex1**) rather than the proposal from which was never tendered in evidence by either party.

[13] Trial court, in arriving at its impugned judgment did not address that key issue and concentrated more on the credibility of the appellant’s witness(**DW1**) and the documents he produced as exhibits. In so doing, the trial court rendered itself in paragraph 10, 11, 12 and 13 of the judgment thus:-

*“DW1 adopted his witness statement dated 22/1/2019 as his evidence in which he has stated that he is a Legal Officer with the defendant. During cross examination he said that he is employed as an insurer and not as a legal officer, this means that DW1 lied in his statement that he is a legal officer. There is no statement written by DW1 as the Branch Manager on record which leads to the adverse conclusion that the defendant witness DW1 adopted a statement of a legal officer when he is not a legal officer, the end result is that there is no evidence on record by DW1 as he did not record any statement.*

*- Secondly, the exhibits he produced as the legal officer were improperly produced by him meaning that there are no exhibits produced by DW1.*

*- Thirdly, since DW1 testified as branch manager and not as the legal officer of the defendant it means that DW1 is effectively saying that he never recorded the statement, filed in court. A witness who contradicts any earlier statement said to have been recorded by him, loses critical elements of credibility. The evidence of DW1 therefore becomes discredited and worthless which leads to the conclusion that the evidence of the plaintiff is not controverted and disputed.*

*- The defendant witness having been found to have lied to the court and the court having found his evidence on record to be worthless, it means that the defendant has not produced any policy document showing the limitation as to the use of the motor vehicle. In conclusion, I find that the defendant is under obligation to satisfy the claims arising from the accident”.*

[14] It was on the basis of the foregoing findings that the trial court concluded that the respondent had proved her case on balance of probabilities and entered judgment in her favour together with costs and interest. This appeal was provoked by those findings which are directly challenged in grounds one(1), two(2), four(4), five(5) and eight(8) of the grounds of appeal. The rest of the grounds argument complement these five grounds.

[15] From a careful perusal of the record of the trial court it became apparent to this court that the basic issues or issue arising for determination in the entire suit which formed the subsistence of the dispute were ignored and/or disregarded by the trial court in favour of form and procedural technicalities.

With due respect, the trial court elevated form and technicality above substance and proceeded to render a judgment in favour of the respondent in total disregard of the appellant’s defence born by the oral and documentary evidence availed by itself through its Branch Manager(**DW1**) notwithstanding the fact that he had earlier erroneously indicated that he was a legal officer with the appellant company rather than a branch manager.

**[16]** Any human being is bound to err. Therefore, the error created and/or attributable to an officer of the appellant ought not to have been drastically visited on the appellant which is a separate legal person from its officers as happened herein when the trial court disregarded the appellant's witness and its evidence in defence of the respondent's claim against itself. By so doing, the trial court in effect denied the appellant the opportunity on right to be heard in defence of its case.

**[17]** The denial of that right or opportunity may offer explanation why the actual issue or issues for determination were disregarded for the trial court to evolve a judgment which was one sided and purely based on procedural technicality and/or form rather than substance of the suit.

In the circumstances, it would be unnecessary for this court to delve deeply into the specifics of the appellant's grounds of appeal which invariably would lead this court to make its own determination based on the evidence presented by both parties at the trial which evidence deals with the substance of the case and which was not considered its totality by the trial court in arriving at its impugned judgment.

**[18]** Its not the intention of the court to resolve neither is it in the interest of both parties for the dispute to be resolved at this stage on the basis of form and/or procedural technically at the expense of merit and/or substance. The alluded errors of the trial court aught not and cannot be sanitized at this stage as that would be tantamount to condoning and/or encouraging the abdication of tasks or duty b a trial court.

Therefore, it is only fair and in the interest of justice for the appeal to be and is hereby allowed by this court to the extent that the impugned judgment be and is hereby set aside with orders that there shall be a re-trial of the suit in the Magistrate's court at Oyugis before a different magistrate of competent jurisdiction. Each party shall bear own costs of appeal.

Ordered accordingly.

*(Delivered and signed this 30<sup>th</sup> day of November, 2020 )*

**J.R. KARANJAH**

**JUDGE OF THE HIGH COURT**