REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CIVIL APPEAL NO. 7 OF 2019

GERALD NJURUGNA MWAURA.....APPELLANT

VERUS

AFRICA MERCHANT ASSURANCE CO. LIMITED.....RESPONDENT

(Appeal from the judgment and decree of Hon. SN Mbungi, (CM) dated 25th January 2019 in CMCC No. 90 of 2017 in the Chief Magistrate's court at Ngong)

JUDGMENT

1. The appellant was the successful plaintiff in CMCC No. 5502 of 2015. He has sustained injuries in a road traffic accident involving Motor Vehicle KAM 660D and motorcycle registration No. KMCZ 351U which occurred on 1st December 2013. The defendant in that suit had been insured by Africa Merchant Assurance Company Ltd, the respondent in this appeal. The appellant obtained a decree for Kshs. 2,328, 010.63 inclusive of costs and interest.

2. Thereafter, the appellant filed declaratory suit against the respondent as the insurer of the offending motor vehicle before the Senior Principal Magistrate's court at Ngong. The trial court dismissed the declaratory suit on grounds that the appellant did not prove on a balance of probabilities that the respondent was the insurer of the motor vehicle.

3. Following this turn of events, and aggrieved with the trial court's decision, the appellant lodged a memorandum of appeal dated 29th January, 2019 and raised the following six grounds of appeal, namely:

> ***1. The learned Magistrate erred in his appreciation and application of the provisions of the Insurance (Motor Vehicle Third Party Risks) Act, Chapter 405 Laws of Kenya.***
>
> ***2. The learned magistrate erred in dismissing the appellant's suit as not proved.***
>
> ***3. The learned magistrate erred in his appreciation and application of the case law cited by parties.***
>
> ***4. The learned magistrate failed to appreciate and therefore to find and hold that the appellant's evidence was not controverted.***
>
> ***5. The learned magistrate misunderstood the burden and standard of proof.***
>
> ***6. The learned magistrate misunderstood the evidence materially.***

4. The appellant urged this court to set aside the trial court's decision and substitute it with judgment in his favour against the respondent as was prayed for before the trial court.

5. The court gave directions that parties file written submissions. However, only the appellant filed his submissions. The respondent's representatives never attended court at all and never filed written submissions despite being served.

6. When this appeal came up for hearing on 14th October 2020, Miss Kirera appeared for the appellant but again there was no attendance on the part of the respondent. The appellant's counsel had filed an affidavit of service which showed that a hearing notice had indeed been served on the respondent's advocates and therefore the appeal proceeded to hearing.

Appellants' submission

7. Miss Kirera relied on their written submissions dated 15th August, 2019 and filed on 18th September 2019. She urged the court to allow the appeal.

8. In the written submissions, the appellant submitted that he had addressed the trial court through his written submissions before it on the salient provisions of the law especially section 10 of the Insurance (Motor Vehicle Third Party Risks) Act which makes it mandatory for an insurer to satisfy the judgment sum and costs on behalf of the insured.

9. He argued that the insurer is exempted from liability under section 10(2) only where there is stay of execution; where the policy has been cancelled and the certificate of insurance surrendered; where no notice of institution of the suit giving rise to the judgment sought to be enforced was served either before institution of the suit or within 14 days after institution of the suit; or where the insurer has obtained a decree entitling it to avoid liability under the policy.

10. According to the appellant, these exceptions are the only basis upon which the respondent as insurer, could avoid liability. He relied on ***Blue Shield Insurance Co. Ltd; Raymond M'Rimberia*** [1998] **eKLR; *Edwin Ogada Odongo v Phoenix of East Africa Insurance co. Ltd*** (Kisumu-HCCc No.132 of 200***; John Karanja Njenga v Invesco Assurance Co. Ltd*** (Kiambu HCCC No. 84 of 2016) and ***African Merchant Assurance Co. Ltd v Confas Maranga Ntabo*** [2016] eKLR.

11. The appellant argued that although the above decisions were cited to the trial court, it did not consider them though binding on it. The appellant also argued that none of the statutory defences under section 10(2) of the Act were pleaded by the respondent before the trial court and the respondent did not adduce evidence to bring itself within the statutory defences.

12. The appellant submitted that it adduced evidence before the trial court namely; police abstract and called a police officer who confirmed the contents of the police abstract showing that the respondent was the insurer of the offending motor vehicle. The police abstract also showed the certificate of insurance as that issued by the respondent.

13. According to the appellant, the respondent did not also offer evidence controverting his evidence before the trial court. He submitted that the trial court was referred to the decision of ***Isaac Katambani Iminya*** on the effect of failure by a respondent to adduce rebuttal evidence, but the trial court never considered it. He relied on several decisions to argue that contents of a police abstract are sufficient proof of its contents unless and until the contrary is proved.

14. The appellant further relied on ***Ann Ayuma Harrison Nderi v Simon Githure Marungo*** [2014] eKLR; ***Dorcas Wangithi Nderi v Samuel Gikuru Mwaura & Another; Kaluki Mwendwa & Mwende Tsika v Abdfinazil Hassan Abdirehman & Another*** [2017] eKLR**; *Securicor Kenya Ltd v Kyumba Holdings Ltd*** (CA No.73 of 2002) and ***Joel Muna Opija v East Africa Sea Food Ltd*** [2013] EKLR for the submission that where the abstract is not challenged and is produced in court without any objection, its contents cannot later be denied.

15. The appellant argued that it was wrong for the trial court to hold that he should have produced either the policy document or the certificate of insurance to prove that the respondent was the insurer. The appellant relied on the observation by the court in the ***Edwin Ogada*** case, that it is impossible for a road traffic accident victim to access such documents which are a contract between the insurer and its insured who keep them, a position that was adopted in ***APA Insurance Co. Ltd v George Masele*** [2014] eKLR.

16. The appellant further faulted the trial court's view that the Insurance Regulatory Authority has a database for policies issued and such information should have been obtained from the regulator as not supported by evidence.

Determination

17. I have considered the appeal and submissions by the appellant and the decisions relied on. I have also perused the record of appeal and the impugned judgment. This being a firs appeal, it is by way of a retrial, and parties are entitled to this court's reconsideration, reevaluation and reanalysis of the evidence on record in order to reach its own conclusions on that evidence. The court should however bear in mind that the trial court had the advantage of seeing the witnesses testify and give due allowance for that.

18. In ***Williamson Diamonds Ltd and another v Brown*** [1970] EA 1, the court held that:

> ***"The appellate court when hearing an appeal by way of a retrial, is not bound necessarily to accept the findings of fact by the trial court below, but must reconsider the evidence and make its own evaluation and draw its own conclusion."***

19. Further, in ***PIL Kenya Limited v Oppong*** [2009] KLR 442, it was held that:

> ***"It is the duty…of a first appellate court to analyze and evaluate the evidence on record afresh and to reach its own independent decision, but always bearing in mind that the trial court had the advantage of hearing and seeking the witnesses and their demeanor and giving allowance for that".***

20. Similarly, in ***Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates*** [2013] e KLR, the Court of Appeal stated;

> ***"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"***

21. The appellant who testified as PW1 told the court that he was hit by motor vehicle registration No. **KAM 660D** while riding motor cycle **KMCZ 351U.** He reported the accident at Kiserian Police Station and was issued with a police abstract which showed that the motor vehicle was insured by the appellant. He produced the police abstract as exhibit 1. He also produced a copy of the plaint in **CMCC 5502 of 2015** as exhibit 2 and a copy of the decree in that suit as exhibit 3. He told the court that the appellant was served and acknowledged service of the statutory notice and produced the letter of acknowledgement as exhibit 4. A demand letter was issued to the owner of the vehicle and he produced the statutory notice as exhibit 5. He further told the court that judgment was given in his favour and produced a copy of the judgment as exhibit 6.

22. PW2 **No. 587885 PC Rashid Mohammed, a police officer** attached to Kiserian Police Station, told the court that Occurrence Book No. 1/12//17 had a report for a road traffic accident involving motor vehicle **KAM 66D** and motor cycle **KMCZ 351U**; that the accident occurred near Kajiado Plaza along Magadi road and the rider sustained injuries. He told the court that the occurrence book did not contain the details of the insurance but the police abstract contained the details of the motor vehicle insurance policy. He testified that the insurance policy No. **ANI/7/070/078018/3013** was valid. According to the witness, the insurance certificate was on the windscreen of the motor vehicle. He produced the Occurrence book as exhibit 7.

23. At the close of the appellant's case counsel for the respondent did not offer any witness and closed their case without calling evidence. Parties then agreed to file written submissions and left the trial court to determine the matter on the basis of the appellant's evidence and submissions by the parties.

24. In a brief judgment delivered on 4th January 2019, the trial court dismissed the appellant's case on grounds that he had not proved on a balance of probabilities that the respondent was the insurer of the motor vehicle, prompting this appeal.

25. The issue that arises for determination in this appeal is whether the trial court was right in dismissing the appellant's suit as it did. The appellant had obtained a judgment and decree in **CMCCC No. 5502 of 2015** against **Clement Gakure,** the registered owner of motor vehicle **KAM 66D** which was insured by the respondent. He then filed a declaratory suit before the trial court under section 10(1) of the Insurance (Motor Vehicle Third Party Risks) Act Cap 405 to enforce that decree.

26. In his suit, the appellant pleaded as follows:

> ***"5. Judgment was entered on 6/10/2016 for the plaintiff against the defendant's insured for Kshs. 2,254,754.99 plus costs and interest which came to Kshs. 2470, 815.63, per decree and certificate of costs issued on 17/2/2017***
>
> ***6. The defendant had a statutory notice of the previous proceedings as is required under the provisions of The Insurance (Motor Vehicle Third Party Risks) Act under which the policy was issued.***
>
> 7…..
>
> ***8. The plaintiff prays for a declaration that the defendant is bound to satisfy the decree in Nairobi CMCC No. 5502 of 2015 under section 10 of the said Act(Cap 405)."***

27. The respondent filed a statement of defence to that suit denying that it had insured the subject motor vehicle at the time of the accident. It also stated that it was a stranger to the appellant's averments at paragraph 4 of the plaint. Paragraph 4 stated that the accident occurred on 1/12/2013 along Magadi road while the policy of insurance was in force; that the appellant was injured in that accident and that he filed CMCC No. 5502 of 2015.

28. The respondent also denied knowledge of the judgment that had been entered against the insured; the "primary suit" and generally denied the averments in the plaint. The respondent then pleaded at paragraph 10 of the defence that the case was not ***a Cap 405 matter and that the suit was incompetent***. The respondent also denied that it was notified prior to or after institution of the suit.

29. As already adverted to, whereas the appellant testified and called a witness who produced the Occurrence book, the respondent did not lead any evidence. The trial court considered the matter but dismissed the suit stating;

> ***"The plaintiff produced a police abstract as evidence that the motor vehicle KAM 660D was insured by the defendant thus liable to satisfy the decree issued in Nairobi CMCC 5502/2015.***
>
> ***The defendant denies insuring the motor vehicle KAM 660D. The question to answer now is a police abstract sufficient proof in conclusive proof (sic) that motor vehicle KAM 660D was insured by the defendant. I say no because; proof that a motor vehicle or any item is insured by an insurance (sic) is done through production of certificate of insurance cover or production of policy document…In a nutshell, I do not find that the plaintiff has not on a balance of probabilities proofed(sic) his case against the defendant."***

31. In dismissing the suit, the trial court cited the decision of ***Richard Makau Ngumbi & another v Cannon Assurance Co. LTD*** [2011] eKLR, that proof of insurance is through a policy document or certificate of insurance. He also cited the decision of ***Kasereka vGateway Insurance Co. LTD*** [2013] eKLR, that a police abstract is not sufficient proof of existence of policy of insurance, decisions he said were binding on him.

32. I have considered this appeal and the nature of the case before the trial court. The appellant had a decree in his favour issued by a court of competent jurisdiction. He filed a declaratory suit under section 10(1) of the Insurance (Motor Vehicle Third Party Risks) Act to enforce that judgment. So the issue before the trial court was not about liability but rather whether the respondent was bound to settle the decree.

33. Section 10(1) 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."*** (Emphasis)

34. The section is clear that where judgment is obtained against an insured after an insurance policy has been issued covering the liability, the duty of the insurer is to satisfy the judgment and decree even if it had subsequently cancelled the policy or has reason to repudiate the cover.

35. The Act affords an insurer certain statutory defences in section 10(2) of the Act which provides:

> (2) ***No sum shall be payable by an insurer under the foregoing provisions of this section—***
>
> > ***(a) in respect of any judgment, unless before or within fourteen days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings;***
> >
> > ***or***
> >
> > ***(b) in respect of any judgment, so long as execution thereon is stayed pending an appeal; or***
> >
> > ***(c) in connexion with any liability if, before the happening of the event which was the cause of the death or bodily injury giving rise to the liability, the policy was cancelled by mutual consent or by virtue of any provision contained therein, and either—***
> >
> > > ***(i) before the happening of the event the certificate was surrendered to the insurer, or the person to whom the certificate was issued made a statutory declaration stating that the certificate had been lost or destroyed; or***
> > >
> > > ***(ii) after the happening of the event, but before expiration of a period of fourteen days from the taking effect of the cancellation of the policy, the certificate was surrendered to the insurer, or the person to whom the certificate was issued made such a statutory declaration as aforesaid; or***
> > >
> > > ***(iii) either before or after the happening of the event, but within a period of twenty-eight days from the taking effect of the cancellation of the policy, the insurer has notified the Registrar of Motor Vehicles and the Commissioner of Police in writing of the failure to surrender the certificate."***

36. The plain reading of the subsection is that an insurer is exempted from satisfying the decree obtained against an insured if the insurer is able to come within those exceptions. I have read the respondent's defence filed before the trial court. It did not plead any of the defences in section 10, including subsection (4) which states that the insurer may not pay any sum if in an action commenced before, or within three months after, commencement of the proceedings in which the judgment was given, he has obtained a declaration that, he is entitled to avoid the policy 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.

37. The respondent did not claim that it had avoided the policy or that it had obtained stay of execution of that decree. Rather, its argument was that it was not the insurer of the motor vehicle. That argument, in my respectful view, could not be made in the declaratory suit. Even where it is made, it is the duty of the respondent, as the person making it, to adduce evidence and show that indeed it was not the insurer. The respondent did not call evidence to show that it was not the insurer and that the insurance policy of the motor or the certificate of insurance did not belong to it.

38. I must point out that cases are decided on the basis of evidence and the law. If the respondent argued that it was not the insurer, it had the duty to show that it did not issue the subject policy to cover the vehicle and that the certificate of insurance on the vehicle was not hers. That was a question of fact to be proved by evidence and not through submissions.

39. The appellant complained that he referred the trial court to several decisions to the effect that the respondent is liable to satisfy the decree and that it is not his duty to produce documents such as the policy document or policy certificate but it did not refer to them or comment about them in its judgment.

40. In ***Blueshield Insurance Co. Ltd v Raymond Buuri M'rimberia*** (supra), the Court of Appeal dealt with the issue of a declaratory suit under section 10(1) of the Act and stated;

> ***"Although the appellant did not plead in its defence in the enforcement suit, that it had already sued the insured in H.C.C.C.***

No.2976 of 1986 for a declaration that it was entitled to avoid the policy and that the said suit was still pending, Mrs. Kiarie did say that in her replying affidavit hereinabove mentioned. Can that allegation in itself be a friable issue? We think not: Under s.10(4) the liability of the insurer to satisfy the judgment under s.10(1) is excluded only if, not only that the insurer had commenced an action within the time scale prescribed thereunder, but also that <u>it has obtained a declaration that it is entitled to avoid its liability under the insurance policy</u>.

No declaration has been so far obtained although the declaratory suit was filed some 12 years ago by the appellant. Mrs. Kiarie's vague explanation for this delay "although the suit has been fixed for hearing a few times it has never taken off" smacks of gross lack of diligence on the part of the appellant in prosecuting the declaratory suit. Moreover, there is no evidence that a mandatory notice as envisaged by the proviso to s.10(4) had been ever given. The effect of that omission is that even if the appellant has obtained the said declaration which it has not so far, it may still not be entitled to the benefit of that declaration as against the respondent."

31. The Court of Appeal was clear under what circumstances an insurer can avoid liability. If the respondent's case was that it could not pay because it was not the insurer, then it failed to adduce evidence and it was wrong for the trial to hold instead that it was the appellant who failed to prove that the respondent was the insurer.

32. This is so because the record contains notices served on the insured and the respondent as the insurer. There was evidence that the statutory notice was served and there was evidence to the contrary from the respondent. To hold as it did, the trial court fell into error.

33. In the circumstances, having considered the appeal, submissions and the law, I am satisfied that the appeal has merit. Consequently, this appeal is allowed, the judgment and decree of the trial court set aside, and in place therefor, an order is hereby issued allowing the appellant's suit as prayed before the trial court. Costs of the appeal to the appellant.

Orders accordingly

Dated, signed and delivered in open court at Kajiado this 27th day of November, 2020.

E. C MWITA

JUDGE