REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 232 OF 2014

CORNELIA ELAINE WAMBA

(Suing as the personal representative

of the estate of PHILLIPE WAMBA-Deceased).....PLAINTIFF

-VERSUS-

UAP INSURANCE COMPANY LIMITED.....DEFENDANT

JUDGEMENT

1. Cornellia Elaine Wamba who is the plaintiff herein and the personal representative of the estate of Phillipe Wamba ("the deceased") lodged a declaratory suit against the defendant by way of the plaint dated 9th July, 2014 and sought for the following reliefs:

(a) A declaration that the defendant herein do satisfy the

judgment entered against it as follows:

(i) Total special damages decreed Kshs.776,100/

Third party to pay 40% being Kshs.310,440/

(ii) Total general damages decreed

Pain and suffering Kshs.50,000/

Loss of expectation of life Kshs.150,000/

Total Kshs.200,000/

Third party to pay 40% being Kshs.80,000/

(iii) Total loss of dependency decreed USD 1,500,000

Third party to pay 40% being USD 600,000

(iv) Costs of the suit amounting to Kshs.5,007,306/

Third party to pay 40% being Kshs.2,002,922.40

Total Kshs.2,383,362.40

USD 600,000

(b) Costs of the suit.

(c) Any other or further reliefs that this Honourable

Court may deem fit and just to grant.

2. The 1st defendant is sued in its capacity as the insurer of Thuri B. Kamau ("the third party") through an insurance policy taken out by the third party.

3. The plaintiff pleaded in her plaint that she had previously instituted a suit on behalf of the estate of the deceased and against Sheerji Enterprises and James Matheka in HCCC no. 754 of 2005 and that the two (2) named persons then instituted third party proceedings against the third party in the said case.

4. The plaintiff further pleaded in her plaint that in the course of the afore-cited suit, the defendant appointed a lawyer who took over the conduct of the suit on behalf of the third party to its conclusion.

5. It was pleaded by the plaintiff that judgment was entered in the above-cited suit and which judgment has not been challenged on appeal or set aside, and yet the defendant has failed and/or neglected to settle the decretal amount.

6. Upon service of summons, the defendant entered appearance and filed its statement of defence to refute the plaintiff's claim.

More particularly, the defendant while admitting to the averments made in the plaint concerning the existence of an insurance relationship between itself and the third party vide Policy Number 020/087/1/004102/2001, and the existence of a judgment in HCCC NO. 754 OF 2005, states that it had indemnified the third party up to a limit of Kshs.3,000,000/ which the third party has already exhausted.

7. The defendant also averred in its statement of defence that since it has discharged its contractual duty towards the third party, no liability can arise against it in respect to the decretal amount pursued against the third party in HCCC NO. 754 OF 2005.

8. When the suit came up for hearing on 12th March, 2020 it was agreed by consent of the parties that the plaintiff's witness statement and list and bundle of documents be produced as evidence and P. Exhibit A respectively; that the witness statement of the third party be admitted as the defendant's evidence; and that the parties waive their respective rights to cross-examine. However, this court notes that at the time of writing this judgment, the witness statement of the third party was not available in the court file.

9. At the end of the hearing, this court invited the parties to file and exchange written submissions.

10. I have considered the pleadings, material and evidence availed by the parties, the contending written submissions and the authorities cited therein.

11. From the material presented in the case, I have identified three (3) key issues for determination.

12. Under the ***first*** issue on whether the plaintiff served the defendant with the statutory notice of intention to sue. The plaintiff pleaded that the notice of intention to sue was served upon the defendant. In contrast, the defendant pleaded in its statement of defence that the statutory notice was never served upon it as required under the provisions of Section 10(2) of the Insurance (Motor Vehicles Third Party Risks) Act Cap. 405 Laws of Kenya ("the Act").

13. In her submissions, the plaintiff argues that despite alleging that it never received any statutory notice, the defendant has not brought any evidence to support this allegation.

14. The plaintiff further argues that the defendant was aware of the proceedings at all material times and that the third party who was insured by the defendant was not enjoined in HCCC no. 754 of 2005 by the plaintiff herein but by Sheerji Enterprises and James Matheka who were the defendants in the aforementioned case.

15. It is therefore the contention of the plaintiff that she was not obliged to issue a statutory notice to the defendant.

16. In reply, the defendant submits that the burden falls on the plaintiff to prove service of the statutory notice pursuant to the provisions of **Sections 109 and 112 of the Evidence Act, Cap. 80 Laws of Kenya**. **Section 109** provides that:

> ***"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."***

While **Section 112** stipulates thus:

> ***"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."***

17. The defendant further cites the case of **Anne Wambui Ndiritu vs. Joseph Kiprono Ropkoi & Another [2005] 1 EA 334** in which the

Court of Appeal 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."***

18. According to the defendant, the action of instructing an advocate to enter appearance in a matter does not equate to receiving a statutory notice and hence the plaintiff ought to have served it with a statutory notice.

19. **Section 10(2)** of **the Act (Revised Edition 2012 [1989])** which the parties herein make reference to, expresses that:

> ***"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…"***

20. I also considered **Section 12** of **the Act (Revised Edition 2019)** which provides thus:

> ***"(1A) The insurer shall, upon being served with the statutory notice and documents, admit or deny liability for the claim or judgment by a notice in writing to the person or persons presenting the claim or judgment."***

21. Upon my perusal of the pleadings and material availed, it is noted that it is not in dispute that the original suit which gave rise to the instant declaratory proceedings (HCCC no. 754of 2005) was instituted by the plaintiff herein and against Sheerji Enterprises and James Matheka who were the defendants in the aforementioned case.

22. It is also not in dispute that it is the two (2) defendants in HCCC no. 754 of 2005 who enjoined the third party in the said case and that the defendant herein subsequently instructed an advocate to represent the third party in that case, to its conclusion.

23. In my view therefore, it was not the duty of the plaintiff to issue a statutory notice to the defendant in the original case since her claim was essentially against the aforementioned two (2) defendants in that case.

24. Be that as it may, it is clear that the instant declaratory suit involves the plaintiff and the defendant exclusively, the latter being the insurer of the third party who was found partially liable in the original case. The provisions of Section 12 of the Act which I have already cited above, are clear that a statutory notice shall be served upon an insurer for the purpose of admitting or denying liability under the claim.

25. From my perusal of the material and exhibits in the instant case, there is nothing to indicate that a statutory notice in the strict sense of the word was served upon the defendant herein by the plaintiff. However, I note from P. Exhibit A that the plaintiff served the defendant with the demand letter dated 14th February, 2014 in respect to the judgment delivered in HCCC no. 754 of 2005 and which letter was received by the defendant on the same date.

26. Furthermore, the record shows that summons to enter appearance were subsequently served upon the defendant, following which it entered appearance and put in its statement of defence.

27. From the foregoing, I am of the view that the defendant was made aware of the plaintiff's intentions to institute a suit to recover the decretal amount owing from the defendant through the third party, and that the defendant had an opportunity to participate in the instant suit.

28. To my mind, the mere fact that the plaintiff did not serve a statutory notice in the strict sense of the word does not disqualify her claim. Upon consideration of the fact that this is purely a declaratory claim and the defendant has not denied its awareness of the original suit, coupled with the interest of substantive justice, I am satisfied that the defendant was sufficiently notified of the intention by the plaintiff to lodge the instant suit.

29. The ***second*** issue touches on whether the defendant is liable to pay the sums sought in the plaint, be it in whole or in part.

30. In her witness statement, the plaintiff asserts that to date the defendant has not satisfied the part of the judgment entered against its insured (the third party) in HCCC NO. 754 OF 2005 and this has triggered the instant suit.

31. As earlier noted, the defendant avers that it is not liable to pay any of the sums arising out of the judgment and that any sums owing from the third party were satisfied by the defendant.

32. At the submission stage, the plaintiff contends that she is entitled to have the judgment satisfied by the defendant irrespective of the amount, since the same was partly issued against the third party.

33. The plaintiff further contends that though the defendant is arguing that its liability was limited to the sum of Kshs.3,000,000/ it did not adduce the Policy document to support this argument.

34. It is the contention of the plaintiff that following an amendment to the Act in 2006, **Section 5** extended the liability of an insurance company as follows:

> ***(b)In order to comply with the requirements of section 4, the policy of insurance must be a policy which—***
>
> ***insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of, or bodily injury to, any person caused by or arising out of the use of the vehicle on a road: Provided that a policy in terms of this section shall not be required to cover—***
>
> ***…***
>
> ***(iv) liability of any sum in excess of three million shillings, arising out of a claim by one person."***

35. It is further the contention of the plaintiff that the aforementioned amendment cannot have retrospective effect in terms of the Policy contract entered into between the defendant and the third party way back in 2002 so as to limit the liability of the defendant to the sum of Kshs.3,000,000/. To support her submission, the plaintiff cited inter alia, the case of **Overseas Private Investment Corporation & 2 others v Attorney General [2013] eKLR** where the court rendered the following decision:

> ***"The latin maxim lex prospicit non respicit encapsulates the cardinal principle that law looks forward not backwards but this principle is neither absolute nor cast in stone… A retroactive law is not unconstitutional unless it: (i) is in the nature of a bill of attainder; (ii) impairs the obligation under contracts; (iii) divests vested rights; or (iv) is constitutionally forbidden"***

36. In reply, the defendant submits that the Insurance Policy document in question constitutes part of the documents filed by its advocate and that according to that policy: namely Section 11(B) (i), liability attached to third parties is limited to the sum of Kshs.3,000,000/.

37. The defendant therefore submits that **Section 5(b)** of **the Act** (supra) echoes the provisions of the Policy document regarding the limited liability of the defendant as an insurance company.

38. The defendant reiterates that it has since exhausted the aforementioned amount and it would be improper and unjust to compel it to pay any sums above what is already stipulated in the Policy document and in the law.

39. Upon my examination of the pleadings and exhibits tendered, it is not in dispute that the third party took out an insurance policy with the defendant in relation to motor vehicle registration KTK 382 which was one of the motor vehicles involved in the material accident in HCCC no. 754 of 2005.

40. The plaintiff filed a further list and bundle of documents and attached a copy of the Policy document for policy number 020/087/1/004102/2001 between the third party and the defendant. Upon my perusal of the same, I observed that under Section II, Clause 1 (a) relates to indemnity to the insured in instances of death or bodily injury to any person and damage to property. Clause 2 under the abovementioned Section covers indemnity to other persons,

41. On the limits of liability under the Policy document, the liability under Section II, Clause 1(a) above is *unlimited* in nature. It is noteworthy that this liability is in respect to the insurer and its insured, in this instance, the defendant and the third party.

42. In respect to the limits of liability under the Policy document in relation to the death or bodily injury to any person, the same is indicated as being Kshs.3,000,000/.

43. From the foregoing, it is apparent that the two (2) aspects of liability under the Policy document are not contradictory as submitted by the plaintiff in her supplementary submissions; rather, they are distinct.

44. Moreover, prior to the amendment of the Act in 2006 as indicated by the plaintiff, it is apparent **Section 5** of **the Act** did not provide for the limit of liability in respect to insurance policies in the sum of Kshs.3,000,000/.

45. In my view, while I agree with the submission of the plaintiff that the law does not apply retrospectively generally, it is apparent that the Policy document in question set the limit at Kshs.3,000,000/ which limit is now supported by statute.

46. I therefore find that the defendant's liability to the plaintiff is to the limited sum of Kshs.3,000,000/as supported by the Policy document.

47. This brings me to the question on whether any payments have been made to the plaintiff by the defendant. Upon my study of the pleadings and exhibits, there is nothing to indicate that payment was made by the defendant.

48. The defendant, upon averring that it had exhausted the sum of Kshs.3,000,000/ under the Policy document, ought to have brought credible evidence to support this averment but did not. I therefore find on this issue that the plaintiff is entitled to receive payment of the sum of Kshs.3,000,000/ from the defendant.

49. Having determined so, I will now address the ***third*** and final issue for determination, which is who should bear the costs of the suit.

50. It is trite law that costs follow the event. The provisions of **Section 27(1)** of the **Civil Procedure Act** stipulate as follows:

"Subject to such conditions and limitations as may be prescribed, and to provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order."

51. In the end, judgment is entered in favour of the plaintiff and against the defendant. Consequently, an order of declaration is made to the effect that the defendant is bound to satisfy the judgment against the 3rd party limited to the sum of ksh.3,000,000/=. Each party to meet its own costs of the declaratory.

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 17th day of December, 2020.

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J. K. SERGON

JUDGE

In the presence of:

…….. for the Plaintiff

…….….. for the Defendant