



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CIVIL CASE NO. 4 OF 2017

MARTIN MWANGI NDIRANGU.....PLAINTIFF

VERSUS

INVESCO ASSURANCE CO. LIMITED.....DEFENDANT

JUDGEMENT

1. The plaintiff Martin Mwangi Ndirangu has come to this court through a plaint filed on 13th November 2017 claiming that on or about 2nd January 2012 while the plaintiff was lawfully driving his motor vehicle reg. No. KBH 536L along Nairobi Garissa Road a motor vehicle Reg. No. KBH 059C which was insured by the defendant Invesco Assurance Co. Limited under Policy No. 015/084/9/00148/2010/08, was so negligently and carelessly driven by its driver or agent that it lost control and collided into the plaintiff's motor vehicle thereby causing the plaintiff severe bodily injuries, loss and damages. That the plaintiff thereafter filed a civil suit No. 11 of 2013 (at Garissa High Court) and the case was concluded, judgment obtained against the defendants on 30/6/2017 and a decree issued for the total sum of Kshs.5,150,404/= and duly presented to the defendant on 11/7/2017, but todate remained unpaid. That the insurance policy covering vehicle No. KBH 059C was an insurance policy within the meaning of Cap. 405 of the Laws of Kenya, the Insurance (Motor Vehicles Third Party Risks) Act, section (1) (b) of which bound the defendant to satisfy the judgment. That though the defendant made verbal undertakings to settle the decree, the promises had remained unfulfilled. That the plaintiff herein issued notices of intention to sue but same had been neglected. The plaintiff therefore sought the following orders –

(a) A declaration that the defendant is bound to pay or satisfy the judgment in the sum of Kshs.5,150,404/= entered in Garissa HCCC No. 11 of 2013 arising out of the accident which occurred on 2/1/2012 along the Nairobi – Garissa Road near Siokathenge or thereabout involving the defendant's insured motor vehicle reg. No. KBH 059C.

(b) Costs of this suit.

(c) Interest on the judgement sum in (a) above and costs of the suit at court rate.

2. In response to the plaint, the defendant filed a statement of defence on 18/12/2017 in which they denied generally the averments about the accident and the motor vehicles involved and stated that the said judgment was not entered against its insured and therefore they were not under statutory or contractual obligation to satisfied the alleged decretal amount in Garissa HCCC No. 11 of 2013. They also averred that they were not served with the statutory notice under section 10 (2) of the Insurance (Motor Vehicles Third Party Risks) Act, and therefore they were not liable to satisfy the alleged judgement. They prayed that the plaintiff's suit be dismissed with costs.

3. When the case came up for hearing, Margaret Mueni Mwangi the wife of the plaintiff testified as PW1. She relied on the witness statements of Martin Mwangi Ndirangu the plaintiff and a list of documents filed and adopted all the exhibits and produced them as exhibits. She was not challenged or cross examined by Mr. Kinyua who was present for the defendant.

4. When it came to the turn of the defence, Mr. Kinyua stated that he had instructions to ask for the adoption of the statement of defence of the defendant filed on 18/12/2017 and informed the court that the defendant was not going to call any witnesses.

5. Parties counsel then agreed to proceed by way of filing and serving written submissions which they did and elected not to highlight the same but to leave the matter to the court to make the decision.

6. I have considered the pleadings, the evidence on record, the exhibits filed and adopted, as well as the submissions of counsel on both sides together with the authorities cited.

7. In my view, the issues are whether the plaintiff's suit is controverted. Secondly, whether the plaintiff has proved his case against the defendant on the balance of probabilities. Thirdly, what reliefs the plaintiff is entitled to. Fourth, costs of the suit.

8. Whether the plaintiff's suit is controverted. Having considered the evidence on record, though the defendant's counsel has maintained in

submissions that they adopted the defence to controvert the plaintiff's evidence, that cannot be the position. The averments in the defence statement of a factual nature are mere allegations and do not constitute evidence. Therefore, the defendants having elected not to tender evidence did not controvert the evidence of the plaintiff to the extent that the same related to evidence on what happened, the vehicles involved, the insurer and the insured and the judgment of the court and the amount awarded therein. The defendants however in my view still had a right to controvert the allegations relied upon by the plaintiff on points of law.

9. The only one serious point of law argued was about the limitation on a single claim to Kshs.3,000,000/= by virtue of statutory limitation of the liability under the Insurance (Motor Vehicles Third Party Risks) Act. That complaint of the defendants does not mean that the judgment in HCCC No. 11 of 2013 was not valid for the amount of Kshs.5,150,404/=. It only means that what can be enforced against the defendants legally is the maximum amount that the statute provides. It is not however for this court to decide in these proceedings the maximum amount to be paid by the defendants, as that is determined according to the statutory provisions applicable.

10. I now go to the second issue, whether the plaintiff's suit has been proved on the balance of probabilities. In my view, with the evidence on record, it is clear to me that the plaintiff's case has been proved sufficiently against the defendants on the balance of probabilities. It was proved by uncontested evidence and not controverted through contra evidence. It was proved that the defendant was the insurer of the offending motor vehicle KBH 059C. It was proved that the defendant knew about the claim as they were served with the requisite notice. They did not join those primary proceedings in Civil Case No. 11 of 2013 as an Interested Party, but I am sure with the practice in this country, they must have appointed the lawyer for the defendant who was the same lawyer in these proceedings that is, J. G. Gitonga & Co. Advocates. The judgment given by the court is clear. It is thus in my view proven by the plaintiff on balance of probabilities that the client of the defendant is a liable party, and the defendant herein is liable to pay the decretal amount, of course subject to any existing statutory limitation on the amount payable by an insurer.

11. What reliefs can this court grant? This court has found that the plaintiff has proved his case on the balance of probabilities. I thus enter judgment for the plaintiff against the defendant herein for the whole amount claimed, but subject to any existing statutory limitations if any on maximum amount payable by the insurer. It is thus declared that the defendant is bound to pay or satisfy the judgment of Kshs.5,150,404/= entered in Garissa HCCC No. 11 of 2013, arising out of the accident which occurred on 2/1/2012 along Nairobi – Garissa Road near Siokathenge or thereabout involving the insured motor vehicle Reg. KBH 059C subject to any statutory limitation of liability on the decretal amount, payable by an insurer.

12. The costs of this suit are also awarded to the plaintiff. The defendant also will pay interest on the decretal amount and costs at court rates, till payment in full.

Dated and delivered at Garissa this 26th Day of February, 2019.

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George Dulu

JUDGE