



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUSIA**

**CIVIL APPEAL NO.63 OF 2013**

**BETWEEN**

**CORPORATE INSURANCE CO. LTD..... APPELLANT**

**AND**

**VIOLET NABWIRE OUMA..... RESPONDENT**

*(Being an Appeal from the Judgment and Decree in Busia Principal Magistrate's Court Civil Case No.558 of 2010 by Hon. I.T. – Principal Magistrate).*

**JUDGMENT**

1. **Corporate Insurance Co. Ltd**, the appellant herein, was the defendant in the Busia Principal Magistrate's Court Civil Case Number 558 of 2010. This was suit seeking declaratory orders for the satisfaction of the decree in Busia PMCC NO. 426 of 2009.
2. In his judgment, the learned trial magistrate found the appellant liable and issued orders for the appellant to satisfy the decree in Busia PMCC NO. 426 of 2009.
3. The appellant was aggrieved by the judgment which was delivered on 20<sup>th</sup> November 2013 and filed this appeal. The appellant was represented by Peter M. Karanja, Advocate. The following eight grounds of appeal were raised:
  - a) The learned trial magistrate erred in law and in fact in finding that the appellant was not entitled to rely on section 10 (4) of the Insurance (Third Party Motor Vehicle Risks) Act CAP. 405.
  - b) The learned trial magistrate erred in law and in fact in holding that the appellant was required by law to issue a notice of institution of Busia HCCC 25/2007 to the respondent.
  - c) The learned trial magistrate erred in law and in fact in failing to hold that Busia HCCC 25/2007 was instituted before Busia PMCC 426 of 2007 and therefore, no notice was required to be given by the appellant to the respondent of the filing of Busia HCCC 25/2007.
  - d) The learned trial magistrate erred in law and in fact in holding that a statutory notice under section 10 (4) of the Insurance (Third Party Motor Vehicle Risks) Act CAP. 405 was required to be given upon the respondent by the appellant in the circumstances of this matter and erred in further holding that by failing to serve such notice the appellant could not avoid the policy of insurance.
  - e) The learned trial magistrate erred in law and in fact in failing to interpret and apply the law, especially section 10 (4) of the Insurance (Third Party Motor Vehicle Risks) Act CAP. 405 correctly to the facts of the matter before him.
  - f) The learned trial magistrate erred in law and in fact in failing to hold that the appellant was entitled to avoid liability under the policy in terms of judgment and decree of Busia HCCC 25/2007.
  - g) The learned trial magistrate erred in law and in fact in finding the appellant liable to satisfy the decree in Busia PMCC 426 of 2007.
  - h) The judgment of the learned trial magistrate is based on a misapprehension and misapplication of the applicable laws and principles and has occasioned grave injustice to the appellant.

4. The respondent was represented by the firm of Bogonko, Otanga & Company Advocates. She opposed the appeal on grounds that the appellant did not comply with the proviso to section 10 (4) of the Insurance (Third Party Motor Vehicle Risks) Act CAP. 405.
5. This Court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of **Selle vs. Associated Motor Boat Co. Ltd. [1965] E.A. 123**, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.
6. After considering the grounds of appeal and the reasons for the opposition and the submissions by both parties it emerges that there is only one issue in contest; whether the appellant can avoid liability under the provisions of section 10 (4) of the Insurance (Third Party Motor Vehicle Risks) Act CAP. 405.
7. Section 10 (4) of the Insurance (Third Party Motor Vehicle Risks) Act CAP. 405 provides as follows:

**(4) No sum shall be payable by an insurer under the foregoing provisions of this section if in an action commenced before, or within three months after, the commencement of the proceedings in which the judgment was given, he has obtained a declaration that, apart from any provision contained in the policy he is entitled to avoid it 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:**

**Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not thereby become entitled to the benefit of this subsection as respects any judgment obtained in proceedings commenced before the commencement of that action, unless before or within fourteen days after the commencement of that action he has given notice thereof to the person who is the plaintiff in the said proceedings specifying the non-disclosure or false representation on which he proposes to rely, and any person to whom notice of such action is so given shall be entitled, if he thinks fit, to be made a party thereto.**

8. Section 10 of the Insurance (Third Party Motor Vehicle Risks) Act elaborates the duty of the insurer to satisfy judgments against persons insured. This obligation can be avoided as provided for under section 10 (4) of the Act. This is where the insurer has obtained a declaration that he is entitled to avoid the policy before the commencement of an action in which a judgment has been obtained or within three months of commencement of such proceedings. There is a proviso however which the insurer must satisfy in order to benefit from the declaration.
9. In cases where the declaration was obtained before the commencement of the action, the insurer has an obligation either before or within fourteen days after the commencement of the action give notice to the plaintiff in the said proceedings that he would avoid the policy specifying the non-disclosure or false representation on which he proposes to rely.
10. It has been argued for the appellant that a notice before the commencement would not have been possible. This may in some instances be true if the notice envisaged under section 10 (2) of the Act is not given before the commencement of the proceedings, but a notice after commencement cannot be avoided unless the notice to the insurer under the aforementioned section was not given.
11. The plaint in respect of the judgment that the appellant is disputing liability was filed on 11<sup>th</sup> November 2010. A judgment in favour of the appellant to avoid liability in respect of motor vehicle KAC 640 E against Peter Major Wanga, the policy holder was delivered in Busia High Court Civil Case No. 25 of 2007 on 1<sup>st</sup> December 2009. It therefore means that at the time of filing of the suit that gave rise to the disputed judgment the appellant had obtained the declaratory order.
12. I have looked at the original file and I have noted that the firm of Bogonko and Company advocates issued a notice dated 20<sup>th</sup> June 2007 of the intention to institute legal proceedings against Peter Wanga, their insured. There is a postal certificate of postage dated 20<sup>th</sup> June 2007. When the appellant obtained the orders in their favour to avoid the policy, they had notice that the plaintiff intended to file a suit. The appellant was under an obligation to notify the respondent that they were going to avoid the policy. They did not do so. The appellant did not therefore comply with the proviso to section 10 (4) of the Insurance (Third Party Motor Vehicle Risks) Act and cannot therefore benefit from the declaration issued by the High Court.
13. From the foregoing the appeal is dismissed with costs.

**DELIVERED and SIGNED at BUSIA this 30<sup>th</sup> day of April, 2019**

**KIARIE WAWERU KIARIE**

**JUDGE**