REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CIVIL APPEAL NO. 29 OF 2018

APA INSURANCE CO. LTD.....APPELLANT

-VERSUS-

ESTHER KAVINDU MWONGO &

JONATHAN MWATHI (*Sued as the legal representative*

of the estate of **ISAAC WAMBA MUTISYA.....RESPONDENT**

(Being an Appeal from the Judgment of Hon. P. Wambugu (SRM) in the Senior Resident Magistrate's Court at Kilungu Civil Case No.5 of 2017, delivered on 9th March 2018)

JUDGEMENT

Introduction:

1. The respondent filed a declaratory suit to enforce a judgment delivered in Kilungu SRM Civil Case No. 11 of 2016 *(the initial suit)* where she was awarded Ksh 3,074,400/= plus cost and interest as compensation for losing her husband in a road traffic accident.

2. The appellant filed its response and after the preliminaries and hearing, judgment was eventually delivered. The learned trial magistrate found that the appellant was duty bound to satisfy the decree in the initial suit.

3. Aggrieved by the judgment, the appellant filed the instant appeal and listed 7 grounds as follows;

a) *That the learned magistrate erred in law and fact by finding the appellant liable which finding was against the law.*

b) *That the learned magistrate erred in law and fact by failing to appreciate that the insurance policy of the subject motor vehicle, being a commercial motor vehicle, was not under section 5(iv) of the Insurance (Motor Vehicles Third Party Risks) Act required to cover liability in respect of death or bodily injury to passengers in the motor vehicle in which the deceased is alleged to have been.*

c) That the learned magistrate erred in law and fact by failing to appreciate that section 10(1) of the Insurance (Motor Vehicles Third Party Risks) Act only applies in respect to such liability as is required to be covered by a policy under paragraph (b) of section 5 of the same statute and that passenger liability is not a liability that is required to be covered in respect of the subject commercial motor vehicle.

d) That the learned magistrate erred in law and fact by failing to appreciate that the plaint as drawn is defective and neither establishes a cause of action against the appellant.

e) That the learned magistrate erred in law and fact by ignoring the evidence of DW1 elaborating all the issues in dispute.

f) That the learned magistrate erred in law and fact by failing to appreciate that section 10(1) of the Insurance (Motor Vehicles Third Party Risks) Act was not applicable to the respondent with respect to the judgment in Kilungu PMCC No. 11 of 2016.

g) That the learned magistrate erred in law and fact by ignoring the appellant's written submissions.

4. Directions were given on 17/10/2018 that the appeal be canvassed by way of written submissions. The appellant was given 30 days to file and serve so as to afford the respondent an opportunity to respond. On 30/01/2019, three months down the line, the matter was mentioned to confirm filing of submissions but the appellant was yet to comply. It was given an additional seven days but still did not comply. At the time

of writing this judgment, only the respondent's submissions were on record.

5. It is now settled that the duty of a first appellate Court is to analyze and re-evaluate the evidence on record in order to reach it's own conclusions bearing in mind that it did not have the benefit of seeing or hearing the witnesses.

6. Having looked at the entire record, the grounds of appeal and the respondent's submissions, the only issue for determination is whether the appellant is duty bound to satisfy the decree in the initial suit.

Whether the appellant should satisfy the decree in Kilungu SRM Civil Case No. 11 of 2016:

7. There are several things which are clear. Firstly, that the appellant instructed the firm of M/S K. Macharia to represent it in the initial suit, secondly, a consent on liability was recorded in the ratio of 80:20 in favour of the respondent and the same has never been set aside.

8. Evidently, this was an acknowledgement by the appellant that the defendant in the initial suit was its insured. Thirdly, there was no appeal against the judgment on quantum. Essentially and as rightly found by the learned trial magistrate, the appellant was estopped from revisiting the issue of liability in the declaratory suit.

9. It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting aside a contract. In recording the said consent, the firm of K. Macharia acted with full instructions from the appellant as there is nothing on record to suggest otherwise.

10. If at all the firm had no such authority, I believe the appellant would have challenged the consent at the earliest opportunity. In ***Kenya Commercial Bank Ltd –vs- Specialised Engineering Co. Ltd (1982) KLR P. 485*** the Court of Appeal held that:

> ***"A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or by an agreement contrary to the Policy of the court or***
>
> ***where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement.***

11. Similarly in this case, the actions of K. Macharia & Co. Advocates were and are still binding on the appellant. Be that as it may, the appellant still seeks to avoid liability pursuant to some provisions of the Insurance *(Motor Vehicles Third Party Risks)* Act (the Act).

12. According to the appellant, the insurance policy of the subject motor vehicle was not under section 5 (iv) of the Act required to cover liability in respect of death or bodily injury to passengers. section 5 of the Act provides as follows;

> ***5. Requirements in respect of insurance policies***
>
> *In order to comply with the requirements of section 4, the policy of Insurance must be a policy which-*
>
> *a. is issued by a company which is required under the Insurance Act, 1984 (Cap 487) to carry on motor vehicle insurance business; and*
>
> *b. 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-*
>
> *i. Liability in respect of the death arising out of and in the course of his employment of a person in the employment of a person insured by the policy or of bodily injury sustained by such a person arising out of and in the course of his employment or*
>
> *ii. Except in the case of a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, liability in respect of the death of or bodily injury to persons being carried in or upon or entering or getting onto or alighting from the vehicle at the time of the occurrence of the event out of which the claims arose or*
>
> *iii. Any contractual liability;*
>
> *iv. Liability of any sum in excess of three million shillings arising out of a claim by one person. [Act No. 46 of 1960, s. 48, Act No. 10 of 2006, s. 34]*

13. The respondent submits that the quoted section has no relevance to the appeal as it is about amounts payable in particular instances and that the appellant neither raised an issue with regard to the amount payable nor offered to pay the supposed Kshs 3,000,000/= as prescribed in the section.

14. Further, she submits that the said section was the subject of litigation in ***Constitutional and Human Rights Petition No. 140 of 2014*** as

quoted in the case of ***Peter Gichihi Njuguna –vs- Jubilee Insurance Co. Ltd (2016) eKLR*** where the Court determined that;

> ***"section 5(b)(iv) was not unconstitutional and in particular did not interfere with judicial independence and authority of the Courts and that the Courts are at liberty to award damages over and above the limit of Kshs 3,000,000/= when circumstances demand"***

15. Clearly, Judicial officers have unfettered discretion to make awards over and above the limit of Kshs 3,000,000/=. The appellant's reliance on section 5(b)(iv) at this juncture is an attempt to appeal on quantum through the back door and should not be allowed.

16. The appellant also contends that the Insurance policy of the subject motor vehicle was not required to cover liability in respect of death or bodily injury to passengers. **DW1**, the appellant's legal officer testified that their insured, Francis Kinyanjui had taken a General Cartage Insurance cover which was meant to cover 3rd party pedestrians and people employed by the insurance. Further, he testified that the deceased was employed by the insured and was therefore not covered by the policy. He produced the schedule as DExh 1.

17. On cross-examination, he agreed that there were no names of employees in the policy and he wouldn't know Kinyanjui's employees. He also agreed that their insured, Kinyanjui, did not furnish them with a list of employment.

18. I have looked at DExh1 and the relevant section provides as follows;

Limits of the amount of the Company's liability under;

Section II- 1(a) Liability to 3rd parties-Death or bodily injury;

(a) In respect to any one person being carried in or upon or entering or getting into or alighting from vehicle

i. Passengers carried by reason of or in pursuance of a contract of Insurance (any one person) .....3,000,000/=

ii. in respect of a series of claims arising out of one event.....20,000,000/=

(b) In respect of any other person not being carried in or upon or entering onto or alighting from the vehicle;

i. Death or bodily injury.……..3,000,000/=

ii. Series of claims arising out of one event.……unlimited

19. The proviso to section 5b of the Act *(supra*) gives instances which an insurance policy can avoid covering and still be compliant. One such instance is liability with respect to employees of an insured person. In my view however, the proviso ceases to apply where an insurance policy expressly provides cover for all manner of persons. Accordingly, the liability in the initial suit was covered by the terms of the policy.

20. The question of whether the deceased was an employee of the insured was not proved on a balance of probabilities and even DW1 agreed that their insured had not furnished them with a list of his employees. Further, the policy in question does not put a restriction on the type of third parties to be covered. The learned trial magistrate interpreted the schedule properly and found that it only limited the amount payable but not the people to be paid.

21. As rightly submitted by the respondent the contract between the appellant and insured has never been repudiated as provided for in section 10(4) of the Act. In a nutshell, the section provides that, no sum shall be payable by an insurer who has obtained a declaration to avoid the policy, in an action commenced before or within three months, after commencement of the proceedings in which the judgment was given. It is evident that the statutory notices served upon the appellant were received and stamped and as such, it was aware of the claim even before the filing of the suit.

22. Having found that liability was covered by the terms of the policy, section 10(1) of the Act becomes automatically applicable to the appellant. The section provides as follows;

> *10) Duty of insurer to satisfy judgments against persons insured*
>
> *(1) 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.*
>
> *Provided that the sum payable under a judgment for a liability pursuant to this section shall not exceed the maximum percentage of the sum specified in section 5(b) prescribed in respect thereof in the Schedule.*

23. The upshot is that the provisions relied upon by the appellant do not entitle it to avoid liability.

Conclusion:

The appeal has no merit.Thus court makes the following orders;

i. Appeal is dismissed.

ii. Costs to the respondent.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKUENI THIS 31ST DAY OF MAY, 2019.

……

C. KARIUKI

JUDGE