



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CORAM: D.S. MAJANJA J.

CIVIL APPEAL NO. 18 OF 2018

BETWEEN

GEMINIA INSURANCE COMPANY LIMITED.....APPELLANT

AND

EN (minor suing through his father and

next friend AAO).....RESPONDENT

(Being an appeal from the Judgment/ Decree of Hon. Onjoro (S.R.M) delivered on the 9th day of November, 2018 at the Magistrates Court in Kisii CMCC No. 626 of 2009)

JUDGMENT

1. The appellant seeks to set aside the decision of the subordinate declaring it liable to settle the decree entered against Sheikh Ahmed Taib & Sons in ***Kisii CMCC No. 304 of 2006***. The respondent had instituted a declaratory suit against the appellant seeking to compel it to satisfy the decree as insurer of motor vehicle registration number KAE 808 P under policy number PC/03/96326991 which had been involved in accident where he had sustained injuries.
2. In its memorandum of appeal dated 14th February 2019 the appellant complained that the trial magistrate erred by overturning a judgment of the High Court and departing from the doctrine of precedent. It stated that the decision was against the weight of evidence and that the trial magistrate erred by treating the appellant's submissions superficially thereby coming to the wrong decision.
3. Counsel for the appellant, Mr. Kibanga argued that the appellant had obtained a declaration in ***Nairobi HCCC No. 453 of 2001*** absolving it from paying claims arising out of the policy. He submitted that the respondents ought to have challenged the declaration issued by the High Court. He further argued that the trial court was bound by the decision of High Court and that it erred in making a finding contrary to that decision.
4. Ms. Kusa, counsel for the respondent, supported the decision of the trial court. She submitted that the decision was consistent with the interpretation of **section 10 (4) of the Insurance (Motor Vehicles Third Party Risks) Act (Chapter 405 of the Laws of Kenya)** ("the Act"). She stated that ***HCCC No. 453 of 2001*** had been filed 4 years as opposed to 3 months after commencement of the primary suit and had therefore been filed out of time. She added that notice of institution of that suit had not been served upon the respondent therefore the declaration obtained was not binding on the respondent.
5. Being a first appeal, this court is called upon to re-assess and analyse the evidence on record being mindful that it neither saw nor heard the witnesses testify. (See ***Selle v Associated Motor Boat Co. [1968] EA 123***).
6. At the hearing, AAO (PW 1) and VK (PW 2) testified on the respondent's side while Anthony Mwangi (DW 1) testified on the appellant behalf. The facts emerging at the trial were common ground. After an accident involving motor vehicle registration number KAE 808 P, the respondent filed ***HCCC No. 96 of 1998***. The suit to the subordinate court and it became ***Kisii CMCC No. 304 of 2006***. A police abstract produced in evidence showed that the appellant was the insurer of the motor vehicle hence prior to filing suit for compensation, the respondent served the appellant with a notice of intention to sue dated 19th February 1998. The appellant admitted that it had instructed an advocate to represent its insured, Sheikh Ahmed Taib & Sons, in the suit and went on to record a consent on liability with the respondent. The appellant does not deny that judgment was entered in the respondent's favour. Its case is that it is not entitled to satisfy any claims arising out of the policy in accordance with a judgment entered in its favour on 11th December 2009 in ***HCCC No. 453 of 2001 (Geminia Insurance Company Limited v Sheikh Ahmed Taid and Sons)***.

7. The issue arising in this case is really a matter of interpretation of the **Act**. The duty of an insurer to settle claims arising out of policies of insurance issued by it is provided for in **section 203(1) and (2)** of the **Insurance Act (Chapter 487 of the Laws of Kenya)** and **section 10 (1)** of the **Act**. The insurer, who is the appellant, sought to avoid the policy by relying on **section 10 (4)** of the **Act** which provides as follows;

10 (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. In considering the foregoing provision, the trial magistrate held as follows:

It is evidently clear that if the defendant intended to benefit from the provisions of the foregoing Act it ought to have filed a suit to repudiate the policy within the three months limit provided in the Act. The defendant filed the suit to repudiate liability after a period of 4 years since the primary suit was filed. The defendant cannot rely on the said provision in defence of its claim.

9. I agree with the trial magistrate that in order to rely on **section 10(4)** of the **Act** the insurer must file the declaratory suit before or within three months of commencement of the proceedings in the primary suit. In **Intra Africa Assurance Company Limited v Simon N Njoroge Avertana Da Costa NRB CA Civil Appeal No. 41 of 1996 [1997]eKLR** the Court of Appeal considered the same provisions and stated as follows:

[The] Plain meaning of s.10(4) is that no sum shall be payable by an insurer under the earlier provisions of s.10 if (a) he has filed an action either before, or within three months after, the commencement of proceedings in which the judgment for damages was given and (b) has obtained a declaration that apart from any provisions contained in the policy he is entitled to avoid it on the ground that the policy was obtained by the non disclosure of a material particular or by a representation which was false in some material fact. [Emphasis mine]

10. The same conclusion was reached by the court in **Britam General Insurance Co. (Kenya) Ltd v Josephat Ondiek KJD HCCC No. 14 of 2017 [2018] eKLR** where the court held that:

The procedure provided under Section 10(4) of the Act as I understand it presents the following scenarios, first, it creates an obligation on the part of the insurer to avoid the policy in respect of liability and anything arising from the accident which is in breach of the policy agreement. Secondly, it creates a condition precedent to the insurer right of action to the in breach by bringing an action within 3 months of the claim against the insured being instituted. Thirdly, the claim to indemnify the insured or third party insurance which falls within the exceptions provided in the policy of insurance. Fourthly, the proviso that Section 10(4) stipulates that the insurer shall not be liable in respect of the accident, loss or liability unless before or within the days he gives notice to the insurer in the said proceedings. [Emphasis mine]

11. An analysis of the above provision leads me to the inevitable conclusion that the appellant could not rely on the declaration issued by the court in **HCCC No. 453 of 2001**. The respondent filed the suit against the appellant's insured to avoid the policy on the grounds of material non-disclosure on 21st March 2001. On his part the respondent had filed the suit against the appellant's insured on 19th February 1998 therefore by the time the appellant's declaratory suit was filed, the statutory period of 3 months under **section 10(4)** of the **Act** had lapsed.

12. I understood the appellant to submit that the trial court was bound by the declaration issued by the High Court in **HCCC No. 453 of 2001**. Such a declaration under the **Act** is a specific cause of action that must comply with the conditions of the statute in order to take effect and be binding on claimant with a decree against the insured. It is not a judgment *in rem* which is binding on the trial court. That is why, the proviso to **section 10(4)** of the **Act** required the plaintiff in the primary suit to be served with a notice after the insurer files the declaratory suit. I therefore reject the appellant's submission that the respondent ought to have filed an application to set aside the judgment in **HCCC No. 453 of 2001**. In **Gateway Insurance Co., Ltd v Moses Jaika Luvai ELD HCCC No. 3 of 2008 [2008]eKLR**, the court stated as follows:

The aforesaid provision is clear and speaks for itself. The Plaintiffs in the suits which the Insurer seeks to avoid liability under Section 10 (1) by way of declaratory suit must be notified of the institution of the declaration suit and after which the said Plaintiffs are entitled to be made parties to the Insurer's suit if they think fit.

The provision is mandatory and the Court has no discretion on the matter. The discretion and election lies with the Plaintiffs who have sued the insured for damages and losses arising from motor accidents. It is a right which none of the parties or the Court can take away.

13. As regards the notice under the proviso to **section 10(4)** of the **Act**. The respondent stated that it was never served with a disclaimer of the insurance from the appellant. Although the appellant's witness stated that its advocate informed it that the notice had been served no notice was produced to prove that fact. I therefore find that the appellant failed to issue notice that to the respondent that it had filed **HCCC No. 453 of 2001** within 14 days as required.

14. The respondent proved that it had a valid decree against the appellant's insured, and that it had served the appellant with a notice of

intention to sue in line with **section 10 (2)** of the *Insurance (Motor Vehicles Third Party Risks) Act*. The appellant failed to comply with the provisions of **section 10(2)** of the *Act* hence it was duty bound to settle the claim in **Kisii CMCC No. 304 of 2006**. For the reasons I have given, I do not find any reason to depart from the trial court's decision and hereby dismiss the appeal.

15. The respondent shall have the costs of the appeal assessed at Kshs. 40,000.00.

DATED and DELIVERED at KISII this 30th day of MAY 2019.

D.S. MAJANJA

JUDGE

Mr. Kibanga instructed by Munga Kibanga & Co. Advocates for the appellant

Ms. Kusa instructed by Khan & Associates Advocates for the respondent