



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO 50 OF 2015

OCCIDENTAL INSURANCE LIMITED.....APPELLANT

VERSUS

JOEL MASITA OGETONTO.....RESPONDENT

(Being an appeal from the judgment of Hon. J.M. Njoroge CM

delivered on the 31.3.2015 in Kisii CMCC No. 166 of 2012)

**JUDGMENT**

1. On the **15<sup>th</sup> May 2012** the Respondent filed a declaratory suit against the Appellant seeking declaratory orders that the appellant was obliged to satisfy the decree and costs and all other incidental costs arising **from Ogembo PMCC No. 168 of 2010**. He also sought interest at court rates from the 16/2/2012 on the sum of Kshs. 417,460/- until payment in full and interest on costs awarded in **Ogembo PMCC No. 168/2010** at 6% per annum from 16/2/2012 to date of payment. The Appellant filed a defence denying the respondent's claim that it issued a Policy of Insurance to one Peter Ontunche Nyangwono covering Motor Vehicle registration number KRG 111 Mercedes Benz, that allegedly caused the accident and put the Respondent to strict proof. The matter was heard and on the 31.3.2015 judgment was entered for the Respondent against the Appellant as prayed for in the plaint with costs.

2. On the **30<sup>th</sup> April 2015** the Appellant filed a Memorandum of Appeal being aggrieved by the judgment in **CMCC 166 of 2012**. The Appellant's grounds of appeal are as follows;

*i. The learned trial Magistrate erred in law and in fact in failing to appreciate that Peter Ontonche Nyangwono (defendant in the primary suit) was not an insured person as per the evidence adduced before the Court.*

*ii. The Learned Trial Magistrate erred in law and in fact by failing to isolate and determine the issue that emanated from the pleadings.*

*iii. That the learned Trial Magistrate erred in law and in fact by holding that the Appellant ought to have called Fairedoon Ali Shah [the insured] to adduce evidence when a sale agreement had already been tendered in evidence.*

*iv. That the Learned Trial Magistrate erred in law and fact by failing to appreciate the provisions of the Motor Vehicle Insurance Policy and contract as written thereby importing therein his own terms and conditions which guided his judgment in error.*

*v. That the Learned Trial Magistrate erred in law and fact by failing to appreciate the provisions of Section 4,5,8 and 10 of the Insurance [Motor Vehicle Third Party Risks ] Act.*

*vi. That in arriving at his decision, the Trial Magistrate did so in a cursory manner and failed to identify and address the correct issues properly realising to the contract of Insurance and he considered irrelevant issues in arriving at his findings which occasioned a serious miscarriage of justice an ought to be reversed.*

3. The Appellant seeks to have the appeal allowed, the judgment and all the orders of the subordinate court be set aside and the same be substituted with and an order dismissing the Respondent's suit with cost. The Appellant be awarded cost of the appeal.

4. Parties canvassed the appeal by way of written submissions. The Appellant submitted that at the hearing the Appellant's witness DW1 tendered a sale agreement between the insured *Syed Fareidoon Ali Swali* showing that the offensive vehicle had been sold on **10<sup>th</sup>**

September 2009 to one Yoban Akama Nyangwono. From clause 4 of the sale agreement the buyer was to take possession of the vehicle and to pay the transfer fees, road license fees, insurance and installation of alarm. That under Section 7 of the Insurance [Motor Vehicles Third Party Risks] Cap 405 (the Act) **“A certificate of Insurance shall be issued by the Insurer to the person by whom a Policy of Insurance is effected”**. The person to whom the Policy of Insurance was issued was one *Fareidoon Ali Shah* and not *Peter Ontonche Nyangwono* the defendant at Ogembo case. That the obligation or duty to satisfy judgments by the Act Cap 405 at Section 10 (i) are only limited to judgments obtained against any person insured by the policy. Peter Ontonche is not a person insured by the policy. For this argument the appellant relied on the decision in **Philip Kimani Gikogo vs Gateway Insurance Company Limited Nairobi HCC 746 of 2002**. It was submitted that to find out who is the person insured by the policy it was necessary to look at the policy itself, the part describing the **“Authorised driver”** and clause (c) which categorically states that **“this being a personal contract it is not transferable to other parties”**. It was submitted further that upon the sale and transfer of the suit motor vehicle to the purchaser one *Yoban Akama Nyangwono*, the insured *Fareidoon Ali Shah* ceased to have control of the vehicle and it became incumbent upon the purchaser to insure the said vehicle in his own name. That liability to satisfy the lower court decree should solely rest with the Defendant in the primary suit.

5. It was further submitted that on the failure on the part of the defendant to repudiate liability, Section 8 of the Act provides as follows;

**“Any condition in a policy of Insurance providing that no liability shall arise under the policy, or that liability so arising shall cease in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to a claim under the policy shall, as respects such liabilities as required to be covered by a policy under section 5, be of no effect”.**

That the situation contemplated by section is the transfer of a Motor vehicle among others reasons which informed the drafters of the insurance policy to include the words, **“this being a personal contract, it is not transferable to other parties”**. That the effect is that whether or not the defendant failed to repudiate liability, the Insurance Policy Cover automatically ceased to exist and came into an end upon sale of the vehicle, thus the defendant is not obliged to satisfy the decretal sum arising from the judgment in **Ogembo PMC No. 168 of 2010** because the judgment debtor was not the defendant insured as per the provisions of Section 10 (1) of the Act.

6. The Respondent submitted that the appeal raises no triable issues and should be dismissed. That the Appellant opted not to defend the suit despite having been served with a Notice of Institution of suit in **Ogembo PMCC No. 168 of 2010**. The Appellant only woke up after institution of suit **No. 166 of 2012** at Kisii Court. That in year 2009 the Appellant issued insurance cover No. **Certificate No. P/NO. TP/07/49/108/02** to the insured with the sole intention of indemnifying the insured against liability to third parties in the event of an accident. That at the time of the accident involving the Respondent the insurance cover was valid and the appellant was duty bound to file a disclaimer suit of not being liable to the Respondent. That the appeal is an afterthought as the Appellant waived his chance and right to defend the primary suit or file a disclaimer suit. That the Appellant cannot argue that they were not aware of the primary suit as they were served in both suits using the same address. That the Appellant in the declaratory suit at Kisii produced a photocopy agreement which stated that the motor vehicle which caused the accident had been sold to another person whom they had issued the policy number. It was against the Evidence Act to produce the photocopy hence the appeal should be dismissed.

7. This is a first appeal, and therefore the courts mandate is to re- evaluate, re-assess and reappraise the entire evidence with a view to coming to own conclusion while taking into account that this court did not take the evidence at trial, unlike the trial court, which did same and therefore had the benefit of listening to witnesses testify and observing their demeanour. See **Selle vs. Associated Motor Boat Company Limited [1968] EA 123**.

8. This appeal raises several issues but I must first make a determination of whether the appellant was served with an appropriate statutory notice in accordance to **section 10 (2) of the Act** as non-compliance with **section 10 (2) of the Act** will have adverse implications in this case. **Section 10 (2) (a) of the Act** provides as follows;

**“(2) 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;”**

9. **Thomas Muoka Muthoka & Another v Ernest Jacob Kisaka [2007] eKLR** the court observed as follows;

**“7. The Hon. Chief Justice Apaloo (as he then was) through his practice notice has clarified the position of insurance company. A notice is issued to the insurance company prior to the suit being filed to notify them of the dispute involving the insured. The insurance company is not made a party to the claim in the suit.”**

10. The appellant filed its statement of defence dated **4<sup>th</sup> July 2012**. The appellant in paragraph 6 of its statement of defence denied having been served with a statutory notice. The record before the **Principal Magistrate’s Court at Ogembo No. 168 of 2010** shows that the Respondent filed its plaint together with a verifying affidavit and the two documents were also accompanied by a notice of institution of suit. The notice of institution of suit on the face of it reads that it is given pursuant to the provisions of **section 10 (2) (a) of the Act**. The Notice of institution of suit bears the courts stamp but there is no indication that the said notice was served on the appellant. The Affidavit of service on record shows that the plaint and verifying affidavit were served on Peter Ontonche Nyangwono and W.S Bharns and no mention of the statutory notice.

11. In the case of **Directline Assurance Company Limited v Anderson Muindi & Peter Mbae Sebastian (Suing as the Legal Representatives of Joy Gitugi (Deceased) [2016] eKLR** the court stated that;

**“To the contrary, the Thomas Muoka Case (supra) reiterated what the law under section 10 of the Act was decreed to be by the Court of Appeal in *New Great Insurance Company of India Ltd .v. Lilian Evelyn Cross and Another [1966] EA 90* and by**

*Warsame J (as he then was) in **Edwin Ogada Odongo .v. Phoenix of E.A Assurance Company Ltd KSM HCCC NO. 132 of 2003 (UR)**. In the latter case, **Warsame J** set out the only four (4) defences open to an insurer under section 10 of the Act. These are:-*

- a. that no notice has been served upon the insurer before or within (14) days after commencement of the primary suit;*
- b. that there is a stay of execution;*
- c. that the policy was cancelled by mutual consent or by virtue of a condition precedent; or*
- d. that the insurer has obtained a declaration that he is entitled to avoid the policy within three (3) months after or before commencement of the primary suit.”*

12. I find that the appellant was not put on notice of the suit and it is therefore entitled to the defence under **section 10 (2) of the Act**. I therefore find that the appeal to have merit and set aside the trial court’s decision dated the 13/3/2015. The Respondent suit is dismissed. The appellant shall have the costs of the appeal.

**Dated, signed and delivered at Kisii this 14<sup>th</sup> day of August, 2019.**

**R. E. OUGO**

**JUDGE**

**In the presence of;**

<b>Appellant</b>	<b>Absent</b>
<b>Respondent</b>	<b>Absent</b>
<b>Rael</b>	<b>Court Clerk</b>