



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CIVIL APPEAL NO. 98 OF 2016

APA INSURANCE LIMITED.....APPELLANT

-versus-

GABRIEL OPONDO OGENGA (Suing as the legal

representative of JANE AKINYI SAIDA - Deceased).....RESPONDENT

(Being an appeal arising from the judgment and decree by Hon. R. Odenyo, Senior Principal Magistrate in Migori Chief Magistrate's Civil Case No. 2367 of 2015 delivered on 31/08/2016)

JUDGMENT

1. One of the main issues for determination in this appeal is the effect of a judgment in favour of an insurance company (insurer) not to satisfy judgments and/or claims arising from suits against an insured who acted in contravention of fundamental terms and conditions of an insurance policy.
2. The background of this appeal is that the Respondent herein, **GABRIEL OPONDO OGENGA**, filed Migori **Senior Principal Magistrate's Civil Case No. 455 of 2014** (hereinafter referred to as '**the primary suit**') as a legal representative of the estate of his wife the late **JANE AKINYI SAIDA** (hereinafter referred to as '**the deceased**') who allegedly died out of a road traffic accident on 13/05/2014. The primary suit was filed on 14/11/2014 against one **GEOFFREY MEENE MATI** who was the owner of the offending motor vehicle registration KBG 967M make Toyota Corrola DX, Station Wagon (hereinafter referred to as '**the offending vehicle**') which offending vehicle was duly insured by **APA INSURANCE LIMITED**, the Appellant herein under Policy Number P/AL7010/0005526. I will henceforth refer to the said **GEOFFREY MEENE MATI** as '**the insured**'.
3. Judgment in favour of the Respondent herein as against the insured was entered in the primary suit on 22/07/2015 for Kshs. 725,300/= with costs and interests. A decree for Kshs. 853,560/= was eventually drawn. Since the decree remained unsettled, the Respondent herein instituted **Migori Chief Magistrate's Civil Case No. 2367 of 2015** against the Appellant herein for purposes of enforcing that judgment. That suit sought for a declaration that the Appellant was bound to satisfy the judgment in the primary suit being the insurer of the offending vehicle. The suit was filed on 09/10/2015. I will refer to that suit as '**the declaratory suit**'.
4. The declaratory suit was heard, and judgment delivered on 31/08/2016 in favour of the Respondent as against the Appellant. Pursuant to the judgment, the Respondent levied execution against the Appellant through Ssebo Intel Company Auctioneers. That execution was arrested by the consent order whereof the decretal sum was deposited in a joint interest earning account in the names of the Advocates for the parties herein. The Appellant however appealed the judgment in the declaratory suit hence this appeal.
5. On 21/03/2015 the Appellant herein filed **Migori Principal Magistrate's Court Civil Case No. 331 of 2015** against the insured and Equity Bank Limited. That suit sought for declarations effective that the insured was in breach of fundamental terms and conditions of the insurance policy instrument between the insured and the Appellant in carrying excess passengers; that the Appellant was not liable to compensate and/or indemnify the deceased/passengers/relatives from the accident which arose on 13/03/2014 involving the offending vehicle and in respect to any resultant claims or decrees; that the insured and Equity Bank Limited were to be held jointly and severally liable to settle any claims arising from the accident and/or bear the loss from the accident in issue; that the Appellant was entitled to full refund by the insured and Equity Bank Limited in respect to any and all settlements it made in claims that arose from the accident in the event that the Appellant is constrained under any circumstances to settle any such claims from the repudiated policy and costs thereof. Since Equity Bank Limited was a part-financier towards the purchase of the offending vehicle, it was registered as a co-owner of the offending vehicle hence a party. I will refer to the suit as '**the disclaimer suit**'.
6. The Appellant obtained judgment in its favour in the disclaimer suit on 21/01/2016. A decree was extracted and signed on 26/01/2016.
7. As above said, this appeal was preferred against the judgment in the declaratory suit. That was on 11/11/2016 with the leave of this Court obtained vide **Migori High Court Misc. Civil Application No. 53 of 2016**. The Appellant preferred five grounds which were tailored as

follows: -

1. **THAT the learned magistrate erred in law and fact when the same failed to appreciate that the Appellant had repudiated and/or rescinded liability to settle any claim premised on insurance Policy number AL710/0009311, vide the Judgment and Decree arising from disclaimer suit, to wit, MIGORI SPMCC NO. 331 OF 2015.**
2. **THAT the learned trial magistrate erred in law and fact in failing to appreciate the efficacy of the provisions of Section 44 of the Evidence Act, in respect of admissibility of Judgment and Decrees of Court.**
3. **THAT the learned trial magistrate erred in law and fact in failing to consider the Appellant's submissions on and authorities in support thereof.**
4. **THAT the learned trial magistrate misapprehended the principles applicable in the matters before him thus arriving at erroneous decision.**
5. **THAT the learned trial magistrate erred in law and in fact by failing to properly evaluate the evidence on record thus reaching an erroneous decision.**

5. Directions were taken, and the appeal was disposed of by way of written submissions where both parties filed their respective submissions. The Appellant framed four issues for determination as follows: -

- “(a) Whether the appellant herein was under any obligation to move to a higher court to quash the judgment in Migori S. P. C. C. No. 455 of 2014 (being the primary suit) as Contemplated and held by the Trial Learned Magistrate**
- (b) Whether the Appellant herein had repudiated and/or rescinded liability to settle any claim premised on insurance policy number AL710/009311, vide the judgment and decree arising from disclaimer suit, to wit MIGORI SPMCC NO 331 OF 2015.**
- (c) The principle of finality of court decisions as underpinned under the provisions of Section 44 of the Evidence Act, in respect of admissibility of Judgments and Decrees of Court.**
- (d) That to what extent is the contract of insurance binding upon the insurance company, if it were to be assumed that the same is effective.”**

6. On the first issue the Appellant submitted that the trial court erred in not finding that the Appellant was not a party in the primary suit and that it had obtained judgment against the insured in the disclaimer suit and as such it could not be held liable to satisfy the decree in the primary suit. That, the court was in clear error in holding that if the Appellant was aggrieved in the primary suit then it ought to have moved to a higher court to quash that judgment. The Appellant further stated that when it realized that the insured was in breach of fundamental terms and conditions of the insurance policy it withdrew its representation of the insured in the primary suit accordingly.

7. On the second issue, the Appellant further submitted that it could not be compelled to satisfy the decree in the primary suit since by the time judgment was entered in the declaratory suit the Appellant had long obtained its judgment in the disclaimer suit which exonerated it from any liability arising from the accident. On the third issue, the Appellant submitted that under **Section 44** of the **Evidence Act** the judgment in the disclaimer suit was a *judgment in rem* thereby conclusively settled the parties' rights with finality and that the judgment in the declaratory suit could therefore not impugn the judgment in the disclaimer suit. The decision in the case of **Silas Make Oluke v. Attorney General & 3 others (2014) eKLR** was cited in support of the submission. The Appellant however did not make any submissions on the fourth issue. The Appellant urged this Court to allow the appeal accordingly and order the dismissal of the declaratory suit with costs.

8. The Respondent opposed the appeal. He took the Court through what happened in all the three suits relating to this matter in demonstrating that the Appellant was bound by **Section 10 of Cap. 405 of the Laws of Kenya** to satisfy the decree. He referred to several decisions in support thereof. The Respondent urged this Court to dismiss the appeal with costs.

9. As the first appellate Court, my role is to revisit the evidence on record, evaluate it and reach my own conclusion in the matter. (See the case of **Selle & Ano. vs. Associated Motor Boat Co. Ltd (1968) EA 123**). This court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in **Mwanasokoni - versus- Kenya Bus Service Ltd. (1982-88) 1 KAR 278** and **Kiruga -versus- Kiruga & Another (1988) KLR 348**).

10. I have carefully and keenly read and understood the proceedings and the judgments of the lower court in the primary suit, the declaratory suit and the disclaimer suit as well as the Record of Appeal, the grounds thereof, the parties' submissions and the decisions referred thereto.

11. Since the appeal hinges on the effect of the judgment in the disclaimer suit, it is imperative that I first deal with the law on the subject. The relevant law is **Section 10** of the **Insurance (Motor Vehicles Third Party Risks) Act**, Chapter 405 of the Laws of Kenya (hereinafter referred to as '**the Act**'). For purposes of this discussion I will reproduce the relevant parts of **Section 10 verbatim**: -

“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.

(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; or

(b) in respect of any judgment, so long as execution thereon is stayed pending an appeal; or

(c) in connexion with any liability if, before the happening of the event which was the cause of the death or bodily injury giving rise to the liability, the policy was cancelled by mutual consent or by virtue of any provisions contained therein, and either

(i) before the happening of the event the certificate was surrendered to the insurer, or the person to whom the certificate was issued made a statutory declaration stating that the certificate had been lost or destroyed; or

(ii) after the happening of the event, but before the expiration of a period of fourteen days from the taking effect of the cancellation of the policy, the certificate was surrendered to the insurer, or the person to whom the certificate was issued made such a statutory declaration as aforesaid; or

(iii) either before or after the happening of the event, but within a period of twenty – eight days from the taking effect of the cancellation of the policy, the insurer has notified the Registrar of Motor Vehicles and the Commissioner of Police in writing of the failure to surrender the certificate.

(3)

(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 provisions 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.

12. The law therefore places various responsibilities on all parties in primary suits as well as in disclaimer suits in respect to the satisfaction of the judgments in primary suits. On one hand, a person having a judgment in its favour against an insured in a primary suit is called upon to avail proof of notice of institution of the primary suit upon the insurer before or within 14 days of such commencement of the primary suit. On the other hand, for an insurer to avoid liability arising from the policy it must satisfy the following: -

(a) There is a stay of execution of the judgment in a primary suit pending the determination of an appeal;

(b) That the policy was cancelled by mutual consent between the insured and the insurer or the policy stood cancelled by virtue of any provision contained in the policy before the happening of the event which was the cause of death or bodily injury giving rise to the liability;

(c) **Further to (b) above** there must be proof that: -

(i) **Either** before the happening of the event the Certificate of Insurance was surrendered to the insurer or the insured made a statutory declaration that the Certificate had been lost or destroyed;

(ii) **Or** after the happening of the event but before the expiration of a period of 14 days from the taking effect of the cancellation of the policy, the Certificate was surrendered to the insurer or the insured made such a statutory declaration;

(iii) **Or** either before or after the happening of the event but within 28 days from taking effect of the cancellation of the policy the insurer has notified the Registrar of Motor Vehicles and the Commissioner of Police (now the Inspector General of Police) in writing of the failure to surrender the Certificate.

(d) That the insurer instituted a disclaimer suit before or within 3 months after the commencement of the primary suit and obtained a declaratory judgment that the insurer is entitled to avoid any liability arising from the policy on the ground that the policy was obtained by non-disclosure of a material fact or by false representation of a material fact or a declaration that the insurer who has

already avoided the policy on the said grounds was entitled to do so notwithstanding any provision of the policy; and

(e) In a case where a party in a primary suit has already obtained judgment against an insured before the institution of the disclaimer suit, the insured must show that it gave notice of the institution of the disclaimer suit before or within 14 days of the institution of the disclaimer suit to the person having judgment against the insured in the primary suit which notice must specify the non-disclosure or false representation on which the insured proposes to rely on.

13. By placing the foregone with the facts in this case side by side it emerges that the Respondent herein through his Advocates gave the notice to the Appellant pursuant to **Section 10(2)(a)** of the **Act**. It is dated 17/11/2014 and was sent by way of registered post on 24/11/2014. There is no contention by the Appellant that it never received the said notice. Since the primary suit was filed on 14/11/2014 and the notice dispatched within the 14 days window period, I find and hold that the Respondent complied with **Section 10(2)(a)** of the **Act**.

14. The Appellant took the position that it is not liable to satisfy the decree in the primary suit because of the declaratory judgment it obtained against the insured in the disclaimer suit. Whereas the disclaimer suit was filed on 21/03/2015 and judgment delivered on 21/01/2016, the primary suit was filed on 14/11/2014 and judgment rendered on 22/07/2015. The disclaimer suit was therefore filed around 4 months after the filing and the requisite notification of the filing of the primary suit on the Appellant. The disclaimer suit was also filed before judgment in the primary suit. The filing of the disclaimer suit was hence in contravention of **Section 10(4)** of the **Act** which required that such a disclaimer suit be filed before or within 3 months after the commencement of the primary suit given that the Appellant had been duly notified of the institution of the primary suit within the legal timelines.

15. Whereas **Section 44** of the **Evidence Act** deals with the conclusive nature of judgments *in rem*, **Section 10** of the **Act** qualifies judgments obtained relating to liability in insurance policy contracts by insurers. Therefore, a judgment obtained pursuant to **Section 10** of the **Act** by an insurer is strictly subject to the conditions contained in the said section of the law. Such a judgment becomes conclusive once all the conditions in **Section 10** of the **Act** are in favour of the insurer. Unfortunately, that is not the position in this case. The Appellant cannot now benefit from the judgment in the disclaimer suit and it is bound to satisfy the judgment in the primary suit.

16. Looking at the provisions of **Section 10** of the **Act**, I agree with the Appellant's submission that the learned trial magistrate erred in law in taking the position that the only way the Appellant herein could avoid liability against the judgment in the primary suit was by quashing or setting-aside the judgment in the primary suit. One wonders how the Appellant would do so given that it was not a party in the primary suit. While an insurer could truly apply to quash or set-aside the judgment in the primary suit through the insured in a case where the insurance policy is not repudiated, that is not the only way out for an insurer. The obtaining position in law is that even in the pendency of a judgment in a primary suit against an insured an insurer can still avoid liability upon satisfying the conditions in **Section 10** of the **Act** without necessarily quashing or setting-aside the judgment in the primary suit.

17. The foregone analysis therefore addresses all the issues raised in the appeal and as such I must find, which I hereby do, that the appeal is not merited. The upshot is that the appeal is dismissed with costs.

18. Lastly, I wish to express my sincere and immense gratitude to all the Counsels who appeared in these proceedings for the well-researched written submissions and the authorities referred to which I have found truly useful. If I have not expressly referred to any authority cited, that it is not out of disrespect or lack of appreciation for their industry.

19. Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 12th day of April 2018.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

Mr. O. M. Otieno Counsel instructed by Messrs. O. M. Otieno & Associates Advocates for the Appellant.

Mr. Owade Counsel instructed by Messrs. Owade & Company Advocates for the Respondent.

Ms. Nyauke - Court Assistant