



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BOMET

CIVIL APPEAL NO. 9 OF 2017

CIC GENERAL INSURANCE GROUP LIMITED.....APPELLANT

-VERSUS-

GERALD OCHOKI alias MARUBE.....RESPONDENT

(Being an appeal from the Judgment of Hon. P. Achieng in PMCC NO. 98 of 2016)

JUDGMENT

INTRODUCTION

1. The Respondent Gerald Ochoki filed a civil suit No. 61 of 2015 against James Mwangi Macharia for damages arising from a road traffic accident that occurred on 28th February 2014.
2. A judgment was entered on 4th July 2016 in which the Respondent was awarded Kshs.9,548,757/=.
3. The Respondent filed a declaratory suit being Civil Suit No. 98 of 2016 against the appellant by dint of the provisions of the Insurance (Motor Vehicle 3rd Party Risk) Act 405 Laws of Kenya so as to satisfy the judgment in Civil Suit No. 61 of 2015.
4. Judgment was delivered on 27th March 2017.
5. Being dissatisfied and aggrieved by this judgment, the appellant has filed this appeal on the following grounds:-
 - (a) That the learned trial magistrate erred in law by misapprehending the provisions of Insurance (Motor Vehicles Third Party Risks) Act regarding the classes of persons covered under compulsory Insurance.
 - (b) That the learned magistrate erred in law and fact by failing to recognize that the insurance cover provided by the appellant being a private cover, did not cover passengers aboard the insured vehicle, including the Respondent therein.
 - (c) That the learned magistrate erred in law and fact by failing to consider in particular the provisions of Section 5(b) (ii) of the Insurance (Third Party Risks) Act the Insurance cover.
 - (d) That the learned magistrate erred in law by making an award of Kshs.9,548,757/= thereby contravening the provisions of S.5(b) (iv) of the Insurance (Third Party Risks) Act.
 - (e) That the learned magistrate erred in law and fact by failing to consider the authority cited by the appellants as well as the submissions of the appellants advocate.
 - (f) That the learned magistrate erred in law and fact by misapprehending the findings of Nairobi High Court Constitutional Petition No. 148 of 2014.
 - (g) That the learned magistrate erred in law and the fact by holding that the appellant failed to repudiate liability while there is evidence to the contrary.
 - (h) That the learned magistrate reached a wrong decision in law and fact contrary to the weight of evidence.
 - (i) That the learned magistrate did not appreciate the pleadings, evidence submissions and case law prosecuted by the Defendant and

arrived at a wrong conclusion.

This appeal is opposed

6. It is the contention by the Respondent that he was legally travelling in a private car registration KBR 269L – Toyota wish from Nairobi to Kisii which motor vehicle was involved in a road accident at Longisa trading centre upon which he was seriously injured.

Subsequently he wrote a Demand Notice to the Insured on 10/2/2015 so as to admit liability but there was no response.

7. A statutory Notice was served on the appellant on 26/3/2015. It is contended that the appellant failed to respond to this notice within the prescribed period.

Civil suit No.61 of 2015 was filed at PM's court Bomet against the insured and the driver. Subsequently judgment was entered in favour of the Respondent in the sum of Kshs.9,548,747/=.

8. It is the Respondents case that he notified the insured and the appellant of the entry of judgment against the insured. Notice of Intention to institute a declaratory suit and Notice of entry of Judgment were served upon the insured and the appellant.

The insured and the insurer did not settle the decree.

9. A declaratory suit was filed being civil suit No. 98 of 2016 in PMs Court Bomet under S.10 of the Insurance (Motor Vehicle Third Party Risks) Act for the enforcement of the judgment.

Judgment was entered on 27th March 2017 in favour of the Respondent.

10. It is the Respondents contention that the appellant did not make an application to set aside the exparte judgment entered against the insured in the lower court nor was there an application to be enjoined as a third party.

11. It is the Respondents case that the appellant did not attach the certificate of delay so as to explain the failure to file and serve the record of appeal within 30 days which is contrary to the provisions of S. 79(c) of the Civil Procedure Act.

12. On the issue of the provisions of S.5(b) (ii) of the Insurance Act. It is contended that the learned magistrate came to the correct finding that the Respondent was a third party in the said motor vehicle and therefore liable to be compensated under the Act.

13. It is the contention by the Respondent that in the lower court the defence called two witnesses, a private investigator and a claims manager who both gave hearsay evidence stating that the car was being used for hire and reward, further that

14. It is claimed by the Respondent that there was a deliberate move to exclude some documents from the record of appeal which documents had been produced before the lower court in particular a "Motor Insurance Claim Form" which in its questionnaire "for what purposes was the vehicle being used at the time of the accident", showed that it was being used for private purposes.

15. On the issue S.5(b) (11) of the Act and the limit of Kshs.3million. It is contended that courts have different pecuniary jurisdictions and the award granted was within the jurisdiction of the learned trial magistrate.

The case for the appellants

16. It is not in dispute that the motor vehicle subject matter of this suit was insured for private use. The appellant's contention is that at the time of the accident it was being used for hire and reward. This defence was rejected by the learned magistrate. It is the appellants contention that the learned magistrate did not appreciate the evidence of DW2 who testified that the Respondent was not a "third party" within the context of the provisions of the Insurance (third party risks) Act and in particular S.3(b) (ii) of the Act.

S. 5 of the Act provides:- in order to comply with requirements of S. 4, the policy of insurance must be a policy which (b) ensures such persons, persons or classes of persons as may be specified in respect of any liability which may be incurred by him or them in respect of death or bodily injury to any person caused by or arising out of the use of vehicle on the road, provided that a policy in terms of this section shall not be required to cover,

(i)...

(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 contract of employment, liability in respect of death or bodily injury to persons being carried in or upon or getting onto, or alighting from a vehicle at the time of the occurrence of the event out of which the claim arose".

It is the contention by the appellant that Respondents insistence that he was not a fare paying passenger was not enough as S.5 (b) (II) excluded him from cover for the reason that he was a passenger in a private car.

It is further contended that Cap 405 covers a pedestrian, fare paying passenger and passengers in third party vehicles but it does not cover a passenger who hikes a lift in a private car or a vehicle for carriage of goods.

That where the owner of a car who has insured the vehicle for private use only and not for carrying of passenger for reward and hire decides to carry persons in his vehicle, then liability for such a passenger falls squarely on the owner of the vehicle and liability cannot be passed to the insurer.

Counsel for the respondent places reliance on the court of appeal case No. 12 of 1998 Corporate Insurance Co. Ltd –VS- Elias Okinyi Ofire.

Gateway Insurance Co. Ltd –VS- Sudan Mathews (2003) eKLR

Solomon Okeny Okwana –VS- Kenya alliance Insurance Co. Ltd (2009) eKLR

Analysis and conclusion

It is noted that judgment in civil suit NO. 61 of 2015 was entered on 4/7/2016 in the sum of Kshs.9,548,757/=. There was no attempt on the part of the appellant to file an application to set it aside.

The respondent proceeded to file a declaratory suit being Bomet PMCC No. 98 of 2016.

Judgment was delivered on 27th March 2017. Stay was granted to the appellant on the 19th day of June 2017.

The respondent was served with the record of appeal on 15th November 2017 under S.79(c) of the Civil Procedure Act. The appeal was to be filed and served within 30 days. There is no proper explanation for that inordinate delay. There is no certificate of delay from the lower court.

Even after the appeal was filed on 7th April, 2017, no directions were sought for by the appellant till the firm of Okemwa for the Respondent listed the matter for direction on 30th October 2017 for 14/11/2017.

It is further noted that having been served with the ex parte judgment in PMCC No. 61 of 2015 the appellant did not file a declaratory suit to avoid satisfying the judgment.

I would at this juncture be inclined to dismiss the appeal, however having heard counsels for the appellant and the Respondent and more so on the issue of S.5(b)(II) of the Insurance Third Party Risks Act. I am of the considered view that the learned magistrate did appreciate the evidence of the investigator and DW2 the claims manager.

DW1's evidence was to the effect that the motor vehicle was being used for hire or reward. He testified to have interrogated several witnesses. These witnesses were not called to testify in court and his evidence remained largely hearsay evidence.

DW2 evidence largely echoed that of DW1 save for her contention that the Respondent was not covered by the Insurance Act Cap 405 Laws of Kenya by dint of S.5(b) (II) of the Act.

I have perused the judgment of the learned magistrate wherein she found that the Respondent was not a fare paying passenger hence not excluded by S.6(b)(ii) of the Act.

However, I am in agreement with the appellant's counsel that S.5(b) (iv) of the Act places a limit of Kshs.3,000,000/=.

In the case of Law Society of Kenya –VS- the AG petition No. 148 of 2014, the Judge declined to consider S.5(b) of the Act as null and void. To that extent, unless there is evidence of contrary holding, that section is still good law. This court makes a finding that the appellant is liable to the extent of Kshs.3 million plus costs and interest in the lower court and in this appeal. The appeal succeeds to that extent only.

Judgment delivered dated and signed this 30th day of May 2018 in open court and in the presence of learned counsel for the appellant Mrs. Chirchir learned counsel for the Respondent Mr. Okemwa, court assistant Mr. Rotich .

M. MU YA

JUDGE

30/5/2018

Miss Chirchir – We pray for stay of the decree in the lower court of 30 days.

Mr. Okemwa – We are opposed to that application. The accident took place in the year 2014. To grant a further stay would be prejudicial. The respondent is a cabbage. We pray that the amount deposited be released.

Miss Chirchir –This application is proper. The appellant has a right to be heard.

We pray that we be granted time to seek instructions.

Court –There will be stay but only for 14 days.

M. MUYA

JUDGE

30/5/2018

Mention on 15/6/2018.

M. MUYA

JUDGE

30/5/2018