REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 60 OF 2014

MVURIA MAGWABI CHANDAGO……APPEALLANT

VERSUS

AFRICAN MERCHANT ASSURANCE CO. LTD.....RESPONDENT

J U D G M E N T

1. On the 4th day of April 2014, the trial court, L.T. Lewa Resident Magistrate, in Mombasa SRMCC No. 610 of 2013 delivered a judgment and held as follows:-

> **"I have at a great length, considered the arguments and wish to categorically differ with the plaintiff's position that, the Notice referred to under section 10(2) of the Act is the one for entry of judgment which, in his view, was promptly served, just before the commencement of the declaratory suit"**

2. If I may reiterate and quote paragraph (a) of section 10(2) in verbatim, it states :-

> **"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 bringing the proceedings; or ……**
>
> **This provision, in my view, is plain and simple that and weed not be expounded. The Notice in this case, ought to be given "before or within 14 days after commencement of the proceedings in which, judgement was given" ….and not "before or within 14 days after the commencement of the proceedings in the declaratory suit**
>
> **The upshot therefore, I find that, since no statutory notice was served on the defendant as required by section 10(2)a of Cap 405, this suit is out-rightly not merited. As such, I go ahead and dismiss the same but direct that the parties bear own costs"**

3. 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 demeanor. See ***Selle vs Associated Motor Boat Company Limited [1968] EA 123***. In effect, in a first appeal, the appellate court proceeds by way of a retrial and has the power and duty to exhaustively reavaluate the evidence and come to own conclusion. In ***Attorney***

General vs Small Wonder Ltd [2015] eKLR the Court of Appeal stated:-

> **"This is a first appeal. A first appeal to this court is by way of a retrial. The court has power to re- examine and re-evaluate the evidence when it becomes necessary. Further, this court is not bound to follow the lower courts judges findings of fact if it appears, inter alia, that he failed to take into account particular circumstances or probabilities or took into account factors of circumstances which he should have not have"**

4. Despite the five(5) grounds of appeal set out in the memorandum of Appeal, the only factual position in this appeal the trial court was called upon to determine was whether or not a Notice pursuint to section 10(2) a Cap 405 was issued. I say that is the only factual position in dispute because, at trial Mr Adhoch Advocate for the appellant, told the court that:-

> **"Having read the section 10(2)a of Cap 405, we wish to abandon our argument on service of Notice but concentrate on the question of whether failure to serve the Notice made the suit totally defective. I therefore abandon ground 3 of the memorandum of Appeal".**

I heard and continue to hear the advocate say that indeed no notice was never served but, that was a procedural requirement that should be overlooked in favour and for the purposes of achieving the substantial justice of the case.

6. To this court, the provisions of section 10(2)a are substantive legal provisions and not procedural requirements. I regard the provision to stand at a pedestal above the rules of procedure as the same to this court vest upon the insurer a complete defence and the right to decline to meet a decree given prior in a suit in which notice given before or within 14 days after the commencement of a suit later sought to be enforced by a subsequent declaratory suit.

7. That provision of section 10(2) Cap 405 is clear, simple and unambiguous. It's true and only meaning is that a victim of a road traffic accident who wishes to enforce a resultant decree against the insurer must serve on such insurer a notice of the primary suit not later than 14 days after the suit is filed. Where the notice is not served, the insurer is by statute absolved from any liability. It matter not that the insurer come to learn about the suit by its own. The law mandates that it shall be served with a notice. That to this court is a legal requirement upon the plaintiff/claimant and therefore an obligation. That obligation upon the plaintiff/claimant has the flip side of an vested right upon the insurer and a vested right, particularly that vested by a statute cannot be wished away or just ignored not even on the basis of article 159 which has been held not to upset all known legal requirements in litigating disputes. That would be to perpetuate illegality for to breach a provision of the law is to act unlawfully and this court is exceedingly reluctant to read article 159 as rendering every statutory provision setting obligations on a party who approaches the court otiose.

8. As was apptly enunciated by ***Muchelule J in the John Langat vs Kipkomoi Terer & 2 Others, Kisumu HC Civil Appeal No. 21 of 2013***:-

> **"The court is enjoined to not only to protect the constitution but all laws enacted by parliament".**

9. In this case, the court is enjoined to protect and enforce the provision's of The Insurance (Motor Vehicle Third Party Risks) Act.

10. The foregoing inevitably lead this court to come to the only conclusion that flows from it that, the trial court correctly interpreted the provisions of section 10(2)a, Cap 405, and this court has no otherwise but to uphold that decision.

11. I therefore dismiss and order that the appellant shall pay to the Respondent the costs of this appeal.

Dated and delivered at Mombasa on this 24th day of February 2017.

HON. P.J.O. OTIENO

JUDGE