



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KISUMU**

**CIVIL APPEAL NO. 47 OF 2008**

**BETWEEN**

**APA INSURANCE COMPANY LIMITED .....APPELLANT**

**AND**

**MARY OBADO ODONGO ..... RESPONDENT**

*(Being an appeal from the Judgment and Decree of Hon.J. M. Nangea, SRM at the Senior Resident Magistrates Court at Maseno in Civil Case No. 291 of 2005 dated 29<sup>th</sup> May 2008)*

**JUDGMENT**

1. This is an appeal against a judgment by the subordinate court declaring that the appellant is liable to satisfy the judgment entered against Kenya Bus Services Limited in **Maseno Civil Suit No. 46 of 2004** for the aggregate sum of Kshs. 311,335/= being general damages, costs and interest.

2. The respondent's case against the appellant was that it was the insurer of an Isuzu Bus registration number KAN 821 owned by Kenya Bus Services Ltd under insurance policy No. 010/810/1/000004/2001/04. On 11<sup>th</sup> December 2003, the respondent was injured while travelling in the said bus after it was involved in an accident. She filed suit against Kenya Bus Services Ltd for damages and obtained a judgment of Kshs. 311,335/- in **Maseno PMCC No. 46 of 2004**. As the judgment was not satisfied, the respondent sued the appellant under the **Insurance (Motor Vehicle Third Party Risks) Act (Chapter 405 of the Laws of Kenya)** seeking a declaration that it was liable to satisfy the judgment.

3. The plaintiff testified and after hearing the matter, the trial court was satisfied that the respondent had proved her case. In finding the appellant liable, the trial magistrate held as follows;

*However, the statutory notice of filing the original suit was received by the Defendant. Although the plaintiff herself did not seem to be capable of distinguishing between the two insurance companies, the fact that the Defendant received the Notice corroborates the Plaintiff's case that it insured the bus in question. However, the Defendant did not call evidence to rebut the plaintiff's evidence.*

4. The thrust of the appellant's case contained in the memorandum of appeal dated 30<sup>th</sup> May 2008 is that the trial magistrate misapprehended the evidence and found the appellant liable yet it was not the insurer of the bus. Counsel pointed out that the evidence was clear that the bus was insured by Pan Africa Insurance Company Limited which had no relationship with the appellant. Neither the respondent nor her advocate appeared at the hearing despite being served with process.

5. I have reviewed the evidence before the trial court as is required by the first appellate court and I find as follows. There is no dispute that the respondent obtained a judgment in her favour against Kenya Bus Services Co., Ltd. The respondent produced a certificate of insurance which proved that the subject bus was insured by Pan Africa Insurance Company Limited. She further produced a statutory notice dated 16<sup>th</sup> January 2004 issued by her advocate under **section 10(2)** of the **Insurance (Motor Vehicle Third Party Risks) Act (Chapter 405 of the Laws of Kenya)**. The notice was served on the appellant on 19<sup>th</sup> January 2004. The respondent did not establish any nexus between Pan Africa Insurance Company Limited and the appellant as the two are separate legal entities.

6. The fact that the appellant did not call evidence in rebuttal did not assist the appellant. As the Court of Appeal held in *Kirugi and Another v Kabiya & 3 Others* [1987] KLR 347, “*The burden was always on the plaintiff to prove his case on the balance of probabilities even if the case was heard on formal proof.*” All in all, the respondent failed to prove that the subject bus was insured by the appellant and thus the trial magistrate erred in granting the declaration.

7. This appeal is allowed. The suit in the subordinate court is dismissed with costs. The appellant shall have the costs of the suit.

**DATED and DELIVERED at KISUMU this 28<sup>th</sup> day of March 2017.**

**D.S. MAJANJA**

**JUDGE**

Mr Maganga instructed by L. G. Menezes and Company Advocates for the appellant.

No appearance for Kuke and Company Advocates for the respondent.