



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO.21 OF 2007

BETWEEN

INVESCO ASSURANCE CO. LTD APPELLANT

AND

JANET GAITA MURIUKI RESPONDENT

(Being an Appeal from the Judgment and Decree of Hon. G Oyugi, SRM, in Tigania RMCC No.95 of 2005 dated 13th February 2007).

JUDGMENT

The appellant herein, **INVESCO INSURANCE CO. LTD**, was the defendant in the Tigania Resident Magistrate's Court Civil Case Number 95 of 2005. This was a declaratory suit where the respondent was seeking orders to compel the appellant who was liable in law to satisfy the decree obtained in Meru CMCC No. 533 of 2000.

The respondent entered appearance and filed defence. There was a defence alleging that the insurance certificate relied upon was a forgery. The learned trial magistrate made a finding that the appellant was under an obligation to satisfy the said decree.

The appellant was aggrieved by the judgment of the learned trial magistrate and filed this appeal. In the Memorandum of Appeal the appellant set out seven grounds of appeal that I have summarized as follows:-

The learned trial magistrate erred in law and in fact by reaching a judgment against the weight of the evidence.

The respondent prayed that the judgment and decision of the trial magistrate be upheld.

When the matter came for directions, it was agreed by both counsel that the appeal be canvassed by filing and exchanging submissions. The submissions were duly filed and exchanged.

This Court is conscious of its role as the first appellate court as stated in **SELLE vs. ASSOCIATED MOTOR BOAT CO. LTD. [1965] E.A. 123**, has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter. This court must, however bear in mind the fact that it neither saw nor heard the witnesses and to make due allowance for that.

At the trial in the magistrate's court, the respondent adduced evidence that on 11 February 2006, motor

vehicle KAL 087 L was involved in a self involving accident. A decree was obtained but the appellant failed to honour it.

The appellant called Charles Muriuki Nyaga as the only witness. He testified that the cover of Agnes Muthoni was a forgery. He relied on an investigator's report. The investigator was not available for he was said to be out of the country. No documents were produced from the appellant's company to support the contention that the certificate was a forgery. The learned trial magistrate was entitled to make a finding that the claim of forgery was not proved.

The appellant relied on the decision of Meru **HCCA 19 OF 2007 INVESCO ASSURANCE CO. LTD vs. REBBECA MAKANDI**. The issues are not similar to the ones in the instant case.

In the course of the trial it was established that the respondent gave notice to the appellant before the suit was filed. If the contention of the appellant was that the cover was a forgery, then nothing would have been easier than moving under section 10 (4) of **Insurance (motor Vehicles Third Party Risks) Act** which provides as follows:

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 provision 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.

Having not obtained a declaration that the policy was a forgery, the appellant is estopped from saying so now.

From the foregoing analysis of the evidence on record, I find that the appeal lacks merit. The same is dismissed with costs to the respondent.

DATED at MERU this 28th day of April, 2017

KIARIE WAWERU KIARIE

JUDGE