



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 271 OF 2010

OCCIDENTAL INSURANCE COMPANY LIMITED.....APPELLANT

- V E R S U S -

ABRAHAM NJAGI NJIRU & MORRIS W. NJIRU (*Suing as administrators*)

***ad litem of the estate of Jane Njoki Mathagu.....*RESPONDENTS**

(An appeal arising from the order/ruling and/or decree of Hon. Mrs. P. Gichohi, SPM delivered on 22nd June 2010 in Nairobi CMCC No. 2623 of 2009)

JUDGEMENT

1) Jane Njoki Mathagu, deceased, filed a compensatory suit before the Chief Magistrate's Court against Charles Waimira Kangangi for the injuries she sustained when she was knocked down by motor vehicle registration no. KAL 255Q along Juja road while she was lawfully walking as a pedestrian. The aforesaid suit proceeded for hearing *ex parte* and judgment was entered for the deceased and against Charles Waimira Kangangi for ksh.360,193 on 17.3.2009 together with costs and interest. When Jane Njoki Mathagu passed on, Abraham Njagi Njiru and Morris W. Njiru took out letters of administration in respect of her estate and the duo were subsequently substituted in place of the deceased. The duo (respondents) filed a declaratory suit against Occidental Insurance Co. Ltd, the appellant herein believing that the appellant was the insurer of motor vehicle registration KAL 255Q at the time of the accident. The appellant entered appearance and filed a defence whereof it denied that it was the insurer of the aforesaid motor at the material time. The respondent filed an application to have the appellant's defence struck out. The application was opposed by the appellant. The same was disposed of by written submissions. The application was heard and allowed by Hon. P. Gichohi learned Senior Resident Magistrate. Being dissatisfied by the aforesaid ruling the appellant preferred this appeal.

2) On appeal, the appellant put forward the following grounds:

1. THAT the learned trial magistrate erred in law and in fact in making a finding that the issues raised by the appellant herein in reply to the respondent's chamber summons dated 25th September 2009 ought to have been raised in the primary suit i.e Nairobi CMCC no. 9688 of 2004 Jane Njoki Mathatu –vs- Charles Waimira Knagangi when the appellant was not a party in the primary suit and would therefore have had no locus standi before the court.

2. THAT the learned trial magistrate erred in law and in fact in failing to consider that the appellant's statement of defence raised several triable issues and was not a suitable case for summary procedure/judgment chief amongst them being:-

- That the appellant had disowned the certificate of insurance number 2503767 relied upon by the respondent as not having been issued by themselves.

- That the appellant had denied being the insurer of motor vehicle registration no. KAL 255Q at the material time herein i.e on 21st October 2003.

3. THAT the learned trial magistrate erred in law and in fact in making a finding that the judgment in the primary suit where the defendant's name was given as CHARLES WAIMIRA KANGANGI was entered against the appellant's insured when documentary evidence before the court was that the person who had insured motor vehicle registration number KAL 255Q for two months was one RUTH N. MURIITH and so it could only be Ruth N. Muriithi or her authorized driver who could be described as appellant's insured.

4. THAT the learned trial magistrate erred in law and in fact in making a finding that CHARLES WAIMIRA KANGANGI was the appellant's insured whereas the pleadings on record particularly the plaint in the primary suit described the said CHARLES WAIMIRA KANGANGI as the owner of motor vehicle registration number KAL 255Q who was either by herself or through his driver driving motor vehicle registration number KAL 255Q and so Charles Waimira Kangangi was not an agent of Ruth N. Muriithi.

5. THAT the learned trial magistrate erred in law and in fact in making a finding that the only way the appellant could avoid liability under Chapter 405 was by obtaining a declaration to that effect in proceedings instituted with the time frame specified under Section 10(4) of the Chapter 405 of the Laws of Kenya.

6. THAT the learned trial magistrate erred in law and in fact in failing to consider, distinguish and/or at all address her mind to the appellant's written submission and the authorities therein cited or at all.

7. THAT the learned trial magistrate erred in law and in fact in failing to hold that the relationship between the appellant and its insured is governed not only by the provisions of Chapter 405 of the Laws of Kenya but also by the terms, conditions and/or exceptions contained in the policy document executed by the parties and in failing to find that such a document had not been exhibited to court for interpretation.

3) When the appeal came up for hearing, learned counsels recorded a consent order to have the same disposed of by written submission. I have re-evaluated the arguments made before the trial court. I have further considered the rival written submissions. In her ruling striking out the defence, Hon. Gichohi stated that the issues now being raised by the appellant ought to have been raised in the primary suit and not in the suit before her. She further opined that the only way the defendant can avoid liability under Cap 405 Laws of Kenya was by obtaining a declaration to that effect within the time frame specified under Section 10(4) of the Act. She found that there was no evidence that the appellant complied with the aforesaid provisions.

4) Though the appellant put forward a total of 7 grounds, it is apparent that one main ground commends itself for determination, that is to say whether or not the requirements set out under Sections 5 and 10 of Insurance (Motor Vehicle Third Party Risks) Cap 405 Laws of Kenya had been satisfied. The other issue is whether the defence on record was suitable for striking out. It is the submission of the appellant that it only issued a certificate of insurance for two months which was outside the period of the accident. The appellant also argued that the certificate of insurance attached to the affidavit in support of the application seeking to strike out the defence was a forgery and that had it been given an opportunity to defend the suit it would have tendered evidence to prove the assertion. In other words the appellant is of the submission that at the time of the accident, there was no valid insurance cover therefore the non compliance of Sections 5 and 10 of Cap 405 Laws of Kenya cannot arise. It is the submission of the respondents that the appellant had failed to raise the statutory defences with the primary suit therefore it lost the right to do so in the declaratory suit. After a careful consideration of the competing arguments I have come to the

conclusion that the learned Senior Resident Magistrate misapprehended the point when she struck out the appellant's defence. It is apparent on the face of it that the appellant's defence raised triable issues. One of the issues raised is that the appellant is a stranger to both the primary and declaratory suit. It is also stated that the appellant had no privity of contract with the deceased. In my humble estimation the learned Senior Principal Magistrate erred when she struck out the appellant's defence.

5) In the end, I find the appeal to be with merit. Consequently, the appeal is allowed. The order allowing the chamber summons dated 25.9.2009 is set aside and is substituted with an order dismissing the aforesaid summons. In the circumstances of this matter, I direct that each party meets its own costs. The suit to be heard on its merit by another magistrate of competent jurisdiction other than Hon. Gichohi.

Dated, Signed and Delivered in open court this 22nd day of September, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent