



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 203 OF 2009

APA INSURANCE COMPANY LTD.....APPELLANT

VERSUS

PATRICK MUSEE MASILA.....RESPONDENT

J U D G M E N T

1. **Patrick Musee Masila** *alias* **Musee Masila**, the Respondent, sued **Salim M. Yumen** in **Kitui SRMCC NO. 165 OF 2005** seeking damages following a Road Traffic Accident that occurred on the **14th November, 2000**. Judgment was entered in his favour in the sum of **Kshs. 194,855/=**. Consequently the Respondent filed a declaratory suit against the Appellant to satisfy the decree and judgment entered in the primary suit.
2. It was averred by the Respondent that the Defendant was the insurer of motor-vehicle registration number **KAB 808W Mitsubishi Canter** that was involved in the accident and prior to filing the suit a notice was issued and served upon the Appellant.
3. The Appellant on the other hand denied liability. It denied having been served with any notice as required by **Section 10(2)** of the **Insurance (motor-vehicles Third Party Risks) Act, Cap 405 of the Laws of Kenya**.
4. The learned trial magistrate considered evidence adduced and noted that the issue of non-service of the statutory notice ought to have been raised at the earliest opportunity, at the hearing of the primary suit. Consequently judgment was entered for the Respondent.
5. Being dissatisfied with the judgment of the Lower Court, the Appellant appealed on the grounds that:
 - There was no proper statutory notice issued.
 - The holding that the Appellant should have raised the issue of non-service of the notice under **Cap 405** as a preliminary objection and not in the main suit was erroneous.
 - The finding that the Appellant was liable to settle the judgment in **Kitui SRMCC No. 165 of 2005** was erroneous.
 - Judgment was entered against the weight of evidence.
6. The appeal was canvassed by way of written submissions that I have taken into consideration alongside filed authorities.
7. This being the first appeal I must re-consider the evidence adduced at trial and come to my own findings and conclusions (**See Peters vs. Sunday Post Limited (1958) EA 424**).
8. Basically, the critical point to be resolved in this appeal revolves around the issue whether or not service of the requisite statutory notice was made upon the Appellant prior to institution of the primary suit. This question arises because of the provision of the law – **Section 10(2)(a)** of the **Insurance (motor-vehicle) Third Party Risks) Act Cap 405, Law of Kenya** which provides thus:

“(2) No sum shall be payable by an insurer under the foregoing provisions of this section.

a. ***In respect of any judgment, unless before or within fourteen days after commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings.”***

9. It is argued that notice of the primary suit was not brought to the Appellant’s knowledge. The Respondent produced in evidence a statutory notice that was to be served upon the Claims Manager, **Apollo Insurance Co. LTD** dated **11th May, 2005**. An in-depth look of the original document, shows that it bears some writing at the back which reads thus:

“Served on 13th May, 2005 upon Apollo Insurance Co. LTD at their Hughes House, 6th Floor Offices. Accepted service.”

10. Ordinarily, an endorsement of an acknowledgement by the recipient of the document would be proof of service. The document is not signed by the recipient. It ought to have been served upon the Claims Manager of **Apollo Insurance Co. LTD**. Being a representative of the Company, a stamp impression on the document would have sufficed as a signature of the recipient. That was lacking.

11. Secondly, the statutory notice dated **11th May, 2005** is in respect of an accident that occurred on **6th February, 2005**. The accident, the subject matter of this suit occurred on the **14th November, 2000**.

12. In the case of **Phillip Kimani Gikonyo vs. Gateway Insurance Co. LTD (2007) eKLR** an issue arose whether a statutory notice was served. In considering what the purpose of a notice is, the court stated that its purpose is to alert the insurer of the potential claim and liability.

13. In this case, assuming that indeed the statutory notice adduced in evidence was served, it would have been meant to serve the purpose of alerting the Appellant of the existence of a claim in respect of an accident that occurred on the **6th day of February, 2005** but not on the **14th day of November, 2000**.

14. The primary suit was commenced on **11th May, 2005**. The existence of the matter should have been brought to the attention of the Appellant within fourteen days thereof. There is indeed evidence of correspondence having been exchanged between the Appellant and Respondent’s Counsel. A letter dated **9th February, 2006** was in reference to a letter dated **23rd January, 2006** written by the Respondent’s Counsel in respect of the matter. In the letter the Appellant denied having received any notice. **23rd January, 2006** was approximately **Seven (7) months** after the suit was instituted.

15. From the foregoing it is apparent that the Appellant did not receive notice of proceedings within the stipulated time. Therefore the Appellant having not been a party in the declaratory suit could not have raised any preliminary objection at that point in time.

16. For reasons given the appeal has merit and is allowed. The judgment of the Lower Court is set aside with costs to the Appellant.

17. It is so ordered.

Dated at Kitui this 19th day of January, 2016.

L. N. MUTENDE

JUDGE

Dated, Signed and Delivered at Machakos this 17th day of February, 2016.

P. NYAMWEYA

JUDGE