REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CIVIL APPEAL NO. 2 OF 2014

BETWEEN

MARTIN ONYANGO ……..…….…... APPELLANT

AND

INVESCO ASSURANCE COMPANY LIMITED … RESPONDENT

(Being an appeal from the Judgment and Decree of Hon.P.K. Rugut, Ag. SRM in Senior Resident Magistrates Court at Rongo in Civil Case No. 103 of 2013 dated 15th July 2014)

JUDGMENT

1. The appellant successfully sued Josiah Osero in ***Rongo SRMCC No. 111 of 2011, Martin Onyango v Josiah Osero*** where he was awarded the sum of Kshs. 124,432 being general and special damages, costs and interest as a result of a road traffic accident.

2. Following the judgment, the appellant filed a declaratory suit seeking to compel the respondent to satisfy the judgment against its insured. He averred that Josiah Osero was the holder of the respondent's policy number 055/84/1/000071/2010/3 issued under the ***Insurance (Motor Vehicle Third Party Risks) Act (Chapter 405 of the Laws of Kenya)*** (hereinafter "the ***Act***"). He further averred that before the institution of the declaratory suit he issued a notice dated 30th August 2011 which was served upon the respondent on 5th September 2011.

3. The respondent in its statement of defence denied the contents of the plaint. More particularly, it denied that it was served with any demand and notice to satisfy the judgment rendered in ***Rongo SRMCC No. 111 of 2011***.

4. After hearing the matter, where only the appellant testified, the learned magistrate dismissed the case. The learned magistrate dealt with three issues in the judgment as follows. On whether the subject motor vehicle was covered by the defendant at the time of the accident, she held that appellant did not prove the relationship between the respondent and the subject motor vehicle. She observed that, *"he ought to have tendered documentary evidence at least the police abstract and the insurance certificate would have sufficed."*

5. The second issue was whether there was privity of contract between the defendant in the parent suit and the insurance company at the time of the accident. The court found, *"[In] view of the fact that the relationship between the defendant herein and the judgment debtor in the parent case was not proved, the claim cannot be sustained."* The third issue was whether the statutory notice was served and on this she held that, *"Section 10(2) of Cap 405 … makes it mandatory for the*

defendant to be served with a statutory notice before institution of suit. No such notice for the institution of the current suit was shown to the court."

6. Following dismissal of the suit, the appellant lodged an appeal to this court and in the memorandum of appeal the appellant contends that the learned magistrate erred in law and in fact in failing to appreciate that the appellant had proved his case on the balance of probabilities by shifting the burden of proof to the plaintiff in the absence of evidence from the defendant. That the learned magistrate erred in finding that the statutory notice was not issued in accordance with the ***Act*** and that she disregarded all the evidence tendered by the plaintiff. Mr Ojala, learned counsel for the appellant, reiterated the grounds of appeal during the hearing.

7. Although the respondent was served with a hearing notice, it was not represented at the hearing.

8. As this is the first appeal, this court is called upon to analyse and re-assess the evidence on record and reach its own conclusions bearing in mind that it neither saw nor heard the witnesses testify (see ***Selle v Associated Motor Boat Co.*** **[1968] EA 123**). In ***Kiruga v Kiruga & Another*** **[1988] KLR 348**, the Court of Appeal observed that;

> *An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but this is a jurisdiction which should be exercised with caution*.

9. The fact that there was a judgment in the primary suit was not disputed. The main issue for determination is whether the appellant proved the conditions necessary for judgment to be entered against the respondent.

10. The respondent asserted in the court below that it had not been served with Statutory Notice which is the notice required to be served **section 10(2)(a)** of the ***Act*** and therefore the respondent, as insurer, was not under a legal obligation to satisfy the judgment. The section provides thus: -

> *"... no sum shall be payable by an insurer under the foregoing provision of this section in respect of any Judgment, unless before or within 14 days after the commencement of the proceedings in which the Judgment was given, the insurer had notice of the bringing of the proceedings, ..."*

11. I have considered the evidence and it shows that prior to instituting ***Rongo SRMCC No. 111 of 2011*** the appellant served upon the respondent a notice dated 30th November 2011. The notice produced in evidence as Exhibit No. 2 shows that it was received by the respondent on 5th September 2011. The learned magistrate therefore erred in holding that the statutory notice was issued in accordance with **section 10(2)(a)** of the ***Act*** as the provision refers to, *"the proceedings in which judgment was given"* and not the declaratory suit as the learned magistrate held. The purpose of giving notice in the primary suit is to enable the insurance company defend takes steps to defend its insured or to file a declaratory suit to avoid liability under the ***Act***.

12. The second issue is whether the judgment debtor was insured by the respondent. The insurance company was not party to the primary suit and thus the only evidence pointing to the respondent as the insurer was the statutory notice bearing the insured's policy number. In the court below the respondent insisted that the certificate ought to have been produced. A similar issue arose in ***APA Insurance Company Limited v George Masele*** **NRB HCCA No. 170 of 2012 [2014]eKLR** where Mabeya J., stated as follows;

> *[20] As to the Certificate of Insurance which Ms Akonga insists should have been produced, I am of the contrary view. The Certificate of Insurance is usually issued to the insured and not the road accident victim. It is a document in the special knowledge and possession of*

both the insured and the insurer. The road traffic accident victim cannot access it. The details in the Police Abstract as to the details of insurance are in the ordinary cause of events obtained by the police from the Certificate of Insurance affixed to the motor vehicle or are supplied by the insured. In this regard, I am unable to agree with Ms. Akonga that the Respondent should have produced the Certificate of Insurance ……. in order to prove who the insurer was.

13. I agree with the holding of Mabeya J., and I hold that the appellant need not have produced the certificate of insurance. But was the statutory notice sufficient proof in the circumstances of this case that the judgment debtor was insured? In his evidence, the appellant did not state how he obtained the insurance policy number nor did he produce the police abstract. The appellant therefore failed to prove that on the balance of probabilities the respondent was the insurer of the judgment debtor. The learned magistrate was therefore correct in finding that the nexus between the judgment debtor and the insurer had not been proved in order to found liability as against the insurer.

14. The appeal is therefore dismissed. Since the respondent did not attend court for hearing the appeal I make no order as to costs.

DATED and **DELIVERED** at **MIGORI** this **23rd day of March 2015.**

D.S. MAJANJA

JUDGE

Mr Ojala instructed by P. R. Ojala and Company Advocates for the appellant.