REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL SUIT NO. 130 OF 2006

DOMINIC MUTUA MAWEU ……..…….PLAINTIFF

VERSUS

OCCIDENTAL INSURANCE CO. LIMITED……DEFENDANT

J U D M E N T

1 Almost 16 years ago the plaintiff, DOMINIC MUTUA MAWEU, was a passenger in motor vehicle registration KAM 280 L which vehicle had a self-involving accident. The plaintiff was seriously injured which left him paraplegic.

2 That vehicle was registered in the name of BESTWAYS PLUMBERS LIMITED (herein after referred to as Bestyways) and was insured by the defendant OCCIDENTAL INSURANCE COMPANY LIMITED.

3 The circumstances of the accident were that while the subject vehicle was been driven by an authorized driver of Bestways from Mtito Andei township to Kilanguni Serean Lodge a wild animal run across the path of the vehicle and in an attempt to avoid hitting the animal the vehicle overturned.

4 The plaintiff obtained judgment in respect of the injuries he suffered in Mombasa HCCC No. 255 of 2001, against BESTWAY BLUMBERS LIMITED on 9th June 2005. The judgment amount was for Ksh 3,421,200.

5 It is that judgment the plaintiff seeks by this declaratory suit to recover from the defendant.

6 In this suit the plaintiff pleaded that the defendant was the insurer of the subject vehicle. That accident occurred while the plaintiff was travelling in the subject vehicle in the course of his employment with BESTWAYS. That accordingly the defendant is statutorily obligated to settle the judgment amount in Mombasa HCCC No 255 of 2001.

7 The defendant by its defence pleaded that the plaintiff was voluntary passenger who was not covered by the insurance policy issued to Bestwasys that is a commercial vehicle insurance. The defendant also pleaded that the plaintiff's claim was defeated by his failure to serve on the defendant a valid notice as required under section 10(2) of the Insurance (Motor Vehicles Third Party Risk) Act Cap 405. Based on those pleading the defendant further pleaded that the plaintiff was not entitled to judgment as sought.

8 The plaintiff's evidence was tendered before Justice Mohamed Ibrahim Case he then was, now a judge of the Supreme Court) while the defence evidence was tendered before Justice John Mwera (as he then was, now a judge of the court of Appeal). The duty of writing the judgment fell on my shoulders.

9 There are only two issues that presented themselves for consideration in this judgment. They are:

a) was the plaintiff an employee of Bestways thereby a person entitled to judgment as sought; and

b) did the plaintiff serve upon the defendant the requisite notice required under Cap 405.

10 On the first issue the plaintiff's evidence was that he was a casual labourer with best ways. This is what the plaintiff stated in examination in chief:

"I was a casual labourer with the owner Bestways of the vehicle who had a contracted with Kilaguni Serana Lodge".

On being cross examined the plaintiff stated:

"I was instructed to wait for the employer at 8.00 am. They were to take me to the Lodge to do work. On the day, I was not going to work I was going to collect my money for work done as (sic) to negociate for the next phase".

11 The defendants' learned counsel in their written submissions stated the above evidence went to show that the plaintiff was contracted by Bestways as an independent contractor to carry out wood carving decorations at Kilaguni Serana Lodge. Bestways had been contracted to carry out renovations at that lodge.

12 The defendant additionally referred to the evidence of Dw 1 which it was submitted showed the plaintiff was not an employee of Best ways. Dw 1 Jared Wiginah was appointed by the defendant to carry out an investigation on the subject accident and the plaintiff's claim. The plaintiff was right to submit that it is important to note, as one considers that investigative report, that Dw1 carried out the investigation 19 months after the accident. He therefore was not an eyewitness of the accident.

13 By his report Dw1 stated that the plaintiff was a wood carver and curio seller at the gate of Tsavo East National park. Contrary to defendant's learned counsels submissions, that he had been given woodcraft work by Kilaguni lodge. That he had a close relationship with people working for Bestways. On the material date he got a lift in the subject vehicle which was to take him to Kilaguni lodge to claim his due for work done on behalf of the lodge. That it was then the accident occurred.

14 Dw 1 failed to state the basis upon which he formed the opinion that the plaintiff was contracted by Kilaguni lodge to do wood craft work. He was after all not there when the accident occurred nor did he have firsthand knowledge of the work the plaintiff was engaged in. That observation becomes critical when one notes that Dw1 in his investigative report stated that Bestways confirmed that the plaintiff was their employee. Dw1 however critised that statement by Bestways by stating in his report that Bestways did not have anything to prove the plaintiff was their employee, such as Labour card.

15 Pw 2, the plaintiff wife did confirm and corroborate the plaintiff's evidence when she stated in evidence in chief that the plaintiff was employed by Bestways. She went even further by saying that someone who went to the hospital where the plaintiff was admitted who she referred to as "Asian" stated that they wanted to pay the plaintiff. That person gave the plaintiff Ksh 2,000 and Pw2 Ksh 500. That payment was confirmed by Dw1 in his investigative report. That report confirmed that it was an official of Bestways who made the payment.

16 In as far as the issue of whether the plaintiff was an employee of Bestways is concerned, I find the answer in the positive. It will be noted that the plaintiff and his wife (Pw2) confirmed he was an employee of Bestways. The officer of Bestways Mr. Inder Singh Bhogla confirmed the plaintiff was an employee of Bestways.

17 In the light of that overwhelming evidence, I reject the defendant's submission that the plaintiff was

not an employee of Bestways. In my considered view the investigative report of Dw1 in respect to the first issue was not only self-serving bias but was based on hearsay evidence. It was self-serving because it failed to state the source of information which led to the conclusion that the plaintiff was an independent contractor and in making that conclusion it served the purpose of the defendant repudiating or denying liability to the plaintiff for the accident. The report relied on hearsay evidence because it can be presumed that Dw1 in compiling his report spoke to some persons, but such persons were not called as witnesses in this case. A passage in the book Principles of Evidence, by Alan Taylor, aptly describes a report such as Dw1's report as follows:

> ***Hearsay in its non- legal sense means gossip or rumour. It conveys the idea that what is being reported is somehow second hand, adulterated, at a remove from the original. This sense underlies the inadmissibility of hearsay in the law of evidence, which demands the originality of testimony, so that its reliability can be properly tested.***

18 Considering that Dw1's investigative report dealt with the very central issue of this case the statements therein that the plaintiff was an independent contractor cannot be accepted. A case that perhaps elucidates this finding is the judgment of Privy Council in **SUBRANANIAM-V- PUBLIC PROSECUTOR (1956)** where it was stated:

> ***Evidence of a statement made to a witness by a person who is not himself called a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made.***

19 Having found that the plaintiff has proved on a balance of probability that he was and employee of Bestways it follows that the comprehensive insurance issued by the defendant to Bestways covers the plaintiff's liability. To that end Sections and 5 of Cap 405 are applicable. In the case **NEW GREAT INSURANCE COMPANY OF INDIA LTD-VS- LILIAN EVELYN CROSS AND ANOTHER** (1966) E.A 90 the court in reference to those Sections stated:

> ***The effect of Section 4 and Section 5 was that a statutory duty was imposed upon, inter alia, the owner of the vehicle to cover by insurance any liability which the owner might incur in respect of injury to third parties arising from the use of the vehicle on the road by such person, persons or classes of persons as may be specified in the policy.***

The plaintiff falls within the category of people contemplated in Section 5 where there is compulsory obligation to insure a category of people as employees.

20 Once it is established the plaintiff is covered by Section 5 it follows that the provision of Section 10 (1) of Cap 405 are applicable, which provides:

> ***If, after a policy of insurance has been effected, judgment in respect of any such liability as is required to be covered by policy under paragraph (b) of Section 5 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this Section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of enactment relating to interest on judgments.***

21 The second issue identified above arose because of the defendant's pleadings in its defence. The defendant denied that the plaintiff served on it a notice as required under section 10 (2) of Cap 405. That Section provided that no sum shall be payable under Section 10 (1) as stated above, unless the insurer as in this case the defendant had notice before the bringing of the proceedings. The proceedings in this case means HCCC No. 25 of 2001.

22 In regard to the provisions of Section 10 (2) the plaintiff stated in his evidence in chief that his advocate did serve the notice on the insurance company. It is interesting to note that the learned counsel for the defendant did not cross examine the plaintiff on that evidence. It follows that the defendant did not contest the truth of that evidence. Much more perhaps is that the defendant did not adduce any evidence to the effect that the plaintiff did not serve the notice. The burden of proof clearly was on the defendant to prove that no such service was effected. Amongst the plaintiff's documents is that notice dated 23rd May 2001 which has a receiving stamp of the defendant.

23 It follows that the defendant's contention that the plaintiff did not serve the notice as required under Section 10 (2) of Cap 405 must and does not fail.

CONCLUSION.

24 Bearing the above findings the judgment of the court is as follows:-

a) A declaration is hereby made that the defendant is statutorily bound to settle the decretal sum in Mombasa HCCC No. 255 of 2001 and to that end. Judgment is hereby entered for the plaintiff against the defendant for Ksh 3,421,200 with interest from 10th June 2005 until payment in full.

b) The plaintiff is awarded the costs of this suit.

DATED and DELIVERED at MOMBASA this 24th day of September 2015.

MARY KASANGO

JUDGE

24.9.2015

Coram

Before Justice Mary Kasango

C/Assistant -

For the Plaintiffs:

For the defendants:

Court

Judgment delivered in their presence/absence in open court.

MARY KASANGO

JUDGE