



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL NO. 100 OF 2012
AFRICAN MERCHANT ASSURANCE.....PLAINTIFF
V E R S U S
JANE ATIENO.....DEFENDANT

JUDGMENT

1. This is an appeal against the judgment of the lower Court in the case Mombasa CMCC No. 387 of 2006. That judgment was delivered on 9th February 2011. This appeal should have been filed within thirty (30) days from that date of judgment as provided under Section 79G of the Civil Procedure Act. That Section provides-

“Every appeal from a Subordinate Court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower Court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

2. On 16th February, 2012 parties consented to the appeal being filed out of time but within 45 days from the date of consent. Appellant filed this appeal on 8th June 2012. As correctly submitted by the Respondent the 45 days period within which the appeal should have been filed ended on 1st April 2012. It indeed therefore follows that the present appeal filed on 8th June 2012 was filed out of time and without leave. There is therefore no valid appeal before Court and on that basis alone this appeal fails.

Parties did however submit to the merits of the appeal and will therefore consider some of the issues raised in their submissions.

Background

3. The Respondent herein was a passenger in motor vehicle registration number **KAP 799A** which was involved in an accident with motor vehicle registration number **KAN 074N** (hereinafter “the subject motor vehicle”). The Appellant suffered injuries and subsequently filed **MOMBASA HCCC NO. 47 OF 2003, JANE OTIENO –Vs- MOMBASA LINERS LIMITED AND W.K.G TRANSPORTERS LIMITED** (hereinafter “**HCCC No. 47 of 2003**”). On 26th August 2005, judgment was entered in HCCC No. 47 of 2003 against the 1st Defendant at 25% and against the 2nd Defendant at 75% on the issue of

liability.

4. The Respondent subsequently filed **MOMBASA CHIEF MAGISTRATE CIVIL CASE NO. 387 OF 2006** (hereinafter “**the lower court case**”) in which she sought a declaration that the Appellant is liable to satisfy the decree obtained against the 2nd Defendant in **HCCC No. 47 of 2003**. Judgment was delivered by R. Kirui, P.M in the lower court case on 9th February 2011 in which the learned magistrate allowed the Respondent's prayers in the Plaint. Aggrieved by the learned magistrate's said judgment, the Appellant filed this appeal against the same.

The Appellant's Case

5. The Appellant's case is that it had insured **Tropical Imperial Cars Limited** with Policy Number **AM2/080/1/05028/01/02** and Certificate of Insurance number **1746395** and not **W.K.G Transporters Limited** who was the 2nd Defendant in **HCCC No. 47 of 2003** in which the subject judgment was entered. The Appellant contends that there was no privity of contract between it and W.K.G Transporters Limited who was found liable in **HCCC No. 47 of 2003**. That since the judgment was against a distinct legal entity, W. K. G Transporters Ltd, from the Appellant's insured, Tropical Imperial Cars Limited, declaratory orders should not have been issued against the Appellant.

6. The Appellant submits that there were glaring contradictions on the identity of the motor vehicle in question as the Respondent's case relates to motor vehicle registration number **KAN 074N** and not **KAN 674N** as stated in the judgment in HCCC No. 47 of 2003.

7. The Appellant further argued that it was not a party to the suit in the lower court and therefore declaratory orders should not have been issued against it. The Appellant avers that it was not made aware of the proceedings leading to the subject judgment.

The Respondent's Case

8. The Respondent's case is that the Appellant confirmed in a letter dated 3rd April 2003 that it had insured W.K.G Transporters Limited. The Respondent submits that a declaratory suit is not about ownership or the insured but whether there is a valid insurance cover as provided for in law. The Respondent submits that the Appellant was entitled to satisfy the judgment as provided for in section 10 (1) of the Insurance (Motor Vehicles Third Party Risks) Act

Analysis

9. I wish to start with the issue of contradiction in the registration number of the subject motor vehicle as contained in the judgment in **HCCC No. 47 of 2003**. I have looked at the High Court record in **HCCC No. 47 of 2003**. It is clear that the error on the registration number of the subject motor vehicle was a typographical one which the learned judge subsequently corrected from **KAN 674N** to **KAN 074N**. The Appellant's contention that there were glaring contradictions on the registration number of the vehicle therefore has no basis.

10. The Appellant does not dispute the fact that it had insured the subject motor vehicle under Policy Number **AM2/080/1/05028/01/02**. There is no dispute that liability was entered in respect of the subject motor vehicle. The Appellant's dispute is that its insured was Tropical Imperial Cars Limited and not W.K.G Transporters Limited against whom the judgment was entered. The Appellant produced in evidence before the lower court, a proposal form and a certificate of insurance to back its position.

11. The question that the court must answer is, should the Appellant, who does not deny insuring the subject motor vehicle that was found liable for the accident, be exempted from satisfying the judgment because the same was entered against an entity that was not the policy holder?

12. Section 4 (1) of the Insurance (Motor Vehicles Third Party Risks) Act provides that:

“Subject to this Act, no person shall use, or cause or permit any other person to use, a motor vehicle on a road unless there is in force in relation to the user of the vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third party risks as complies with the requirements of this Act.”

13. The Preamble to the Insurance (Motor Vehicles Third Party Risks) Act describes the Act as follows:

“An Act of Parliament to make provision against third party risks arising out of the use of motor vehicles.”

14. The Preamble of the Act shows that the objective of the Act is to make provision against third party risks arising out of the use of motor vehicles. That Preamble as read together with Section 4 (1) of the Act indicates that the overriding objective of the Act is to protect third parties against the risks that may arise as a result of the use of a motor vehicle. The emphasis therefore, as the name of the Act itself suggests, is on protection of third parties who may suffer risks as a result of use of motor vehicles on the road.

15. The Appellant does not deny that the subject motor vehicle was involved in the accident as claimed. It **(the Appellant)** does not also deny that as at the time of the accident, there was a valid insurance policy issued by itself in accordance with Insurance (Motor Vehicles Third Party Risks) Act and which therefore protected any third parties who might have suffered injury as a result of use of the said motor vehicle. Since the Respondent was a third party who suffered injury as a result of the use of the subject motor vehicle, it is my considered view that she was entitled to be protected and covered by the insurance policy which was valid. In my view, it would defeat the aforesaid purpose and objective of the Insurance (Motor Vehicles Third Party Risks) Act if the Appellant were allowed to escape liability simply on the basis that the person sued was not the policy holder. The insurance policy was issued to cover risks caused by the vehicle and the Respondent did suffer such risk. She is therefore entitled to compensation by the Appellant.

16. W.K.G Transporters Limited is described in the Plaint as the registered owner of the subject motor vehicle. This was in accordance with record obtained from the Registrar of Motor Vehicles. I take judicial notice that on many instances where a registered owner of a motor vehicle sold such vehicle to another person but that other person delayed or totally failed to change registration details with the Registrar of Motor Vehicles. That buyer would then take insurance cover for the vehicle and proceed to use it on the road. In case of an accident by such a vehicle, the insurance details would reflect the new owner who had taken the cover but the details from the Registrar of Motor Vehicle would reflect the previous owner. In such instances, the original owner remains the registered owner and the new owner becomes what has been described in judicial practice as the beneficial owner. The insurance policy is not repudiated just because the registered owner is different from the person who took up the policy.

17. Further Appellant did indeed by its letter dated 3rd April 2003 confirm that it had not only insured the subject motor vehicle but had insured under the name of W.K.G Transporters. Their said letter is as follows-

“03/04/2003

MOKAYA OGUTU & CO. ADVOCATES

MOMBASA

RE: W. K. G TRANSPORTERS

The above client is insured with us for Vehicle Reg. No. KAN 074N but the accident was involved to trailer No. ZB 4202 which is ensured with KENYAN ALLIANCE INSURANCE CO. Kindly note that we are not accepting your summons.

Yours faithfully,

DAVID N. KARIUKI

CLAIMS DEPT. MOMBASA”

18. Bearing in mind the content of that letter and in view of the Court’s finding above this appeal is hereby dismissed with costs to the Respondent.

DATED and DELIVERED at MOMBASA this 19TH day of JUNE, 2014.

MARY KASANGO

JUDGE