REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 177 OF 2011

F B (suing thro')

L B (his next friend) ……….............……………..… APPELLANT

V E R S U S

PHOENIX E.A. ASS. ASSURANCE ..……………… RESPONDENT

J U D G M E N T

The appellant filed Civil Case No. 328 of 1998 before the Kakamega Chief Magistrate's Court seeking damages arising from a road traffic accident on the 14.4.1997. He was awarded damages and costs totaling KShs.298,080/=. The appellant then filed Civil Suit No. 61 of 2010 before the Chief Magistrate's Court against the respondent who he alleged to have been the insurer of the accident vehicle. The subsequent suit was dismissed leading to the filing of this appeal.

The grounds of appeal are that the case was proved on a balance of probabilities, the various correspondences showed that the respondent had notice of the suit, the respondent had not repudiated the claim, the evidence was not properly evaluated and that the burden of proof was shifted. Parties agreed to determine the appeal by way of written submissions. Only counsel for the appellant complied with that consent. I have gone through the submissions of the appellant and they expound on the grounds of appeal. Counsel maintains that there is no prescribed format of a statutory notice. The respondent was aware that a claim had been filed against its insured and therefore the provision of section 10 of Chapter 405 Laws of Kenya was satisfied. There was no need to recall fresh evidence in the subsequent suit as already a judgment had been delivered in the appellant's favour by the court. The respondent is entitled to avoid the policy but that has to be done within the law. In the current case the respondent had not repudiated the policy. The policy was in the hands of the respondent and therefore the appellant could not have produced it.

The record of appeal shows thattwo witnesses testified in Civil Case No. 328 of 1998. **PW1 L B** is the father of the accident victim. He told the court how the accident occurred and that he filed a suit against the owner of the vehicle and was awarded damages. The accident vehicle was registration number KYY 406 Nissan Pick-up. **PW2 F B** was the accident victim and a student at [particulars withheld] Primary School. He too explained how the accident occurred and he was hospitalized for 10 days. That was the evidence in Civil Case No. 328 of 1998. The defence did not call any evidence and the case was closed. With regard to Civil Case No. 61 of 2010 two witnesses testified. L B informed the court that he filed Civil Suit No. 328 of 1998 and was awarded damages. The driver of the accident vehicle was charged before the Kakamega Court in Traffic Case No.368 of 1998 and he was convicted. He was fined KShs.5,000/= or six (6) months imprisonment in default. He further testified that the vehicle was insured by the respondent as there were several correspondences between his advocate and the respondent. The respondent sent one witness NGAIRA MBAGAYA who was its Assistant Legal officer. He testified that the policy that had been issued for the accident vehicle expired and the same was not renewed. They called for their client to renew the insurance but he did not respond. He further contended that they were not served with the statutory notice or got the demand letter that was copied to them. The respondent was not on cover when the accident occurred on 14.4.1997.

The main issue for determination is whether the respondent was the insurer of the accident vehicle. The record shows that the driver of the accident vehicle was charged in court and convicted of the offence of careless driving. I have gone through the record of both courts but I have not seen the police abstract.

The record in case number 61 of 2010 shows that no police abstract was produced, the plaint in case number 61 of 2010 does not give the policy number. No police officer was called in both cases to confirm whether the vehicle was insured by the respondent. I have seen the correspondences produced as exhibits. These are three letters dated 16.7.1997 (demand letter), 29.8.1997 and 11.12.1997. These letters are copies of the appellant's advocate. There is no single letter bearing the respondent's letter head that can make the court evaluate as to whether it acknowledged that it was the insurer of the accident vehicle. The exhibits produced cannot make the court conclude that indeed the respondent was the insurer of the accident vehicle. These letters were written in 1997 before the suit was filed. Section 10 of Cap 405 requires that before or within 14 days after the commencement of proceedings the insurance company should be given notice otherwise the insurer shall not be liable. The suit was filed in 1998 and there is no evidence that 14 days before the filing of the suit or after a statutory notice was served upon the respondent. I have perused the record of appeal and the plaint for suit no. 328 of 1998 was not included to enable me know when the suit was filed. Judgment was delivered on 30.7.2003. I will therefore find that no statutory notice was served upon the respondent as required by the law and that the correspondences produced before the trial court do not amount to statutory notice.

Counsels for the appellant did not handle the two cases seriously. The trial court had no evidence to confirm that indeed the respondent was the insurer of the accident vehicle. There was no shifting of the burden of proof. All what the appellant could have done was to call the investigating officer and produce the police file. That could have enabled the court confirm that it was the respondent that had insured the vehicle. That evidence could also have negated the respondent's evidence that the policy had lapsed. Although civil cases are proved on a balance of probabilities, claimants have to prove to the satisfaction of the court that they have convinced the court as required by the law. Balance of probabilities is not simply indicating that one was involved a road traffic accident and the respondent was the insurer of the vehicle. There is need to adduce evidence to show that indeed the respondent was the insurer. There is also need to serve upon the respondent a statutory notice 14 days before or after filing the suit. The appellant did not discharge that requirement. His only recourse is to pursue the owner of the vehicle. Counsel for the appellant could have even requested for the production of the old policy that had lapsed by the respondent. That was not done and the appellant cannot contend that there shifting of the burden of proof. The law allows for the issuance of notice to produce a certain document. Given the evidence on record I do find that the case was not proved on a balance of probabilities and the trial court was correct in dismissing the suit. The appeal lacks merit and the same is dismissed with no orders as to costs.

Delivered, dated and signed at Kakamega this 17th day of October 2014

SAID J. CHITEMBWE

J U D G E