



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL NO. 184 OF 2009

AFRICA MERCHANT ASSURANCE CO. LTD.
.....APPELLANT

VERSUS

PILI KANINI MWANZIA

(Legal representative of the Estate

of SALIM PILI MWANZIA.

.....RESPONDENT

JUDGMENT

This is an appeal from the decree and order in SRMCC No. 301 of 2009 wherein Judgment was delivered on 25th September, 2009.

Vide a chamber summons application dated 28th May, 2009 the magistrate struck out the Appellants defence and entered Judgment for the Respondent.

The gist of the appeal is whether the trial magistrate was correct in holding that the defence did not raise any triable issues and whether the laid down procedures were followed.

It is submitted by Counsel for the appellant that a defence was filed on 12th March, 2009 denying the allegations raised by the Respondent in the plaint and in particular paragraph 4 which reads,

“By a policy of Insurance No. AM1/070/1/00 5975/2006/02 issued by the Defendant as authorized Insurer within the meaning of the Insurance Motor Vehicle (Third Party Risks) Act Cap 405 Laws of Kenya to Dan Gichuhi, it agreed to insure him in respect of any liability for the death or bodily injury to any person caused by or arising out of the use on a road accident of their Motor Vehicle Registration Number KAC 585K as required to be covered by a policy of Insurance under the said Act”.

It is contended that paragraph 3 of the defence specifically denies the above averment and that this is not a mere denial. Further that in the Respondents application giving rise to the Appellants defence being struck out, the Respondent annexed a police abstract and a copy of the certificate of insurance to prove that the appellant had insured the Respondents Motor Vehicle Registration Number KAC 585K. That the

certificate of insurance did not give the details of the policy holder and the Respondent had fixed such details by hand. It is further contended that the trial magistrate wholly relied on the copy of the certificate of insurance and this is a weighty issue which ought to have been decided in a full trial.

The other issues raised in the defence were whether the Respondent was covered by the policy of insurance allegedly issued by the Appellant.

Whether the Appellant was served with a Statutory Notice as required by section 10 of the insurance motor vehicle (Third Party Risks) Act 405 Laws of Kenya and lastly whether the Appellant was liable to pay the Respondent the amount awarded by the trial magistrate.

Counsel for the Respondent submits that the chamber summons application dated 20th August, 2009 was supported by an affidavit and a supplementary one. The supplementary affidavit annexed a certificate of insurance in respect of the suit motor vehicle and was served upon the appellant on 18th June, 2009. That the appellant had the opportunity to challenge the said annexure upon being served. Secondly that if the appellant alleges that the Policy Holder could only be established from the policy Number AM1/070/1/005975/2006/02 the Appellant ought to have produced the said policy to Court but chose not to.

It is contended that mere denial of the issuance of the said certificate of insurance No. C3908509 should not assist the Appellant as it is a statement from the Bar.

Further it is contended that the Appellant in response to the application filed an affidavit sworn by one Daphine Kemunto on 15th June, 2009 wherein it was deponed that since it was not a party to the primary suit, it was not obliged to satisfy the decree emanating there from.

That this offends the Statutory obligation of the insurance companies to satisfy Judgments issued against their insured.

The Respondents has cited the case **Kenindia Assurance Company Ltd. - Vs- Otiende (1990 – 1994) 1EA 200** where the Court of Appeal held,

“The Requirement that section 10 (1) of the Insurance (Motor Vehicle Third Party Risks) Act that Judgment is obtained against the insured before the insurer becomes liable under the act is an essential pre-condition of liability under the act without it the insured has no jurisdiction to order the insurance to pay damages for injuries to the Respondent”.

Further that the Appellant in paragraph 6 of its defence denied having received Statutory Notice when the Respondent in its supporting Affidavit to the application annexed and marked as 'F' a copy of the Said Statutory Notice which was acknowledged by the same Appellant.

That the Appellant did not produce any evidence that motor vehicle Registration Number KAC 585K registered in favour of Dan Gichuhi was not at the time of the accident insured by them.

The insurance policy was not avoided or cancelled at the time of the accident and that it was not proved that liability under section 10(2) of Cap 405 did not arise.

Upon perusal of the record of proceedings I am satisfied that the defence by the appellants did raise triable issues. The issue as contained in paragraph 4 of the plaint that,

“By a policy of insurance No. AM1/070/1/005975/2006/02 issued by the Defendant as authorized insurer within the meaning of the insurance motor vehicle (Third Party Risks) Act 405 Laws of Kenya, to Dan Gichuki, it agreed to insure him in respect of any liability for the death or bodily injury to any person caused by or arising out of the use on a road accident of their motor vehicle Registration number KAC 585K as required to

be covered by a policy of insurance under the said Act”.

Was specifically denied by the Appellant in paragraph 3 of the Defence.

There were issues on the certificate of insurance itself as it had been alleged that the details of the policy holder were not given but had been fixed by hand.

This was a matter that ought to have been determined through a hearing but not by affidavit evidence.

In addressing the principles to be observed in striking out pleadings the Court of Appeal in the case of **DT DOBIE & CO (K) LTD – Vs- MUCHINA CIVIL APPEAL NO. 37 of 1978 (1982)KLR** had this to say,

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be infected with real life by amendment it ought to be allowed to go forward for a Court of Justice not to act in darkness without full facts off a case before it”.

This case falls on all fours with the above.

The appeal has merit and it is accordingly allowed, the order of striking out the defence is set aside. Mombasa CMCC No. 301 of 2009 is reinstated. Same to proceed to full

trial before a magistrate of Competent Jurisdiction. Costs to the appellant.

Judgment delivered dated and signed this **11th** day of **November, 2013**.

.....

M. MUYA

JUDGE

11TH NOVEMBER, 2013

In the presence of:-

Learned Counsel for the appellant Mr. Ajibo for Appellant

Learned Counsel for the Respondent

Court clerk Mr. Musundi