



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Appeal 462 of 2011

APA INSURANCE LIMITED. APPELLANT

VERSUS

JAPHY ELLIOT OGUNDOH OKUWA. RESPONDENT

***(From the judgment and decree of P. Nditika, Principal Magistrate in Milimani Commercial Court
CMCC No. 5586 of 2010)***

J U D G M E N T

The Respondent herein, by a plaint dated 26th July, 2007, sought a declaration that the Defendant was liable to satisfy a court Judgment decretal sum of Ksh.306,853/-, obtained under Nairobi Milimani Civil Suit No. CMCC 12468 of 2004, under the provisions Section 10 of the Insurance (Motor Vehicles Third Party Risks) Act, Cap 405 of the Laws of Kenya.

The Appellant had entered defence and agitated the same but the trial court had been satisfied that the claim had been proved on the balance of probability, and had entered judgment for the sums stated above. It is then that the Respondent had filed the declaratory claim No. 5586 of 2010 from which this appeal arose.

The Appellant filed a defence in the above stated suit, raising several defences. However the one defence among them that is most relevant to this appeal, is that one contained in paragraph five (5) of the said defence. It asserted that the Respondent/Plaintiff, had not served upon the Defendant/Appellant, a Statutory Notice required to be served upon the Insurance Company under Section 10 of the Chapter 405 of the Laws of Kenya aforesaid. This court understands that to mean that the Notice provided for under Section 10(2)(a) of the above statute had not been served and that, therefore, the insurer was not under legal obligation to satisfy the obtained judgment. The section above 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,”

The Appellant appeal mainly hinges on the above provision. It asserted during the hearing of the lower court declaratory suit, that the Respondent/Plaintiff had not served on it or the Respondent's insurer, the said notice either before the suit was filed or within 14 days of the filing thereof. In the circumstances, the appellant argued, the insured sum is not payable and the declaratory judgment of the insured aforesaid, is an exercise in futility.

The trial court did not deal with this issue of service of the statutory notice in depth. The honourable magistrate simply stated thus on page (2) of its brief judgment: -

“It would therefore mean that the defendants are liable to pay. We have service of statutory notice. The defendants cannot therefore deny service. The record speaks for itself.”

And with the above, the honourable magistrate entered the declaratory judgment now being disputed in this appeal. This court will accordingly have to dig into the evidence on the record of Nairobi CMCC No. 5586 of 2010 in which the trial court found such a convincing evidence as to persuade it to enter the judgment .

The file record shows that the plaint starting the declaratory suit, was filed on 10th September, 2010 and was served on 21st September, 2010. On 9th November, 2006 the Appellant, APA Insurance Ltd was further served with what the process-server termed.

“a demand letter to satisfy the court judgment of 15th September, 2006, within 14 days .”

The letter referred to was probably the office copy the original letter addressed to **APA INSURANCE LTD, P.O. Box 30065 - 00100, NAIROBI**. The contents of the letter were effectively notifying the Appellant herein, that the Respondent who had obtained a judgment Ksh.306,853/- under Civil suit No. 12468 of 2004 against the Appellant’s insured Kenya Bus Services Ltd and Another- intended to file a declaratory suit to recover the said sum unless the appellant paid and settled the sum to the writer’s advocate, within 14 days. The letter with copies of relevant documents, were apparently received by **APA INSURANCE LTD** on 9th November, 2006 at 11.00 a.m. going by the original rubber stamp on the said letter. The process server, one William Owade Omari, swore an affidavit on 28th September, 2010 to the above end and swore that he served the documents at Hughes Building, 6th Floor.

Apart from producing the above mentioned documents which apparently were filed in court in the record of CMCC No. 5586 of 2010, the said William Owade Omari had also sworn another affidavit also sworn on 28th September, 2010 in which he deposed that: -

“On 2nd of August, 2004 at 2.00 p.m. at Hughes Building, 6th Floor, I served Personally APA INSURANCE LTD. with a Statutory Notice and Intention to sue....”

He had annexed to the affidavit, a document headed **“STATUTORY NOTICE”** quoting Policy No. Comp/010/810/1/00004/2001/04. The document was dated 2nd August, 2004 and was signed and drawn by the firm of Owade Omari & Co. Advocates, to be served upon **APA INSURANCE LTD** of 6th Floor Hughes Building. The original rubber stamp of **APA INSURANCE LTD** pressed on it, shows that it was received on 2nd August, 2004 at 14.00. The insured person of the policy number given was shown to be the Respondent herein, **JAPHY ELLIOT ODUNGOH OKUWA**. The statutory Notice was to the effect that the insured who was the owner of motor vehicle registration No. KAP 846N, intended to claim special and General damages arising from injuries sustained when the said motor vehicle was involved in a road accident on 9th February, 2003.

Clearly, it was the above facts and information which were introduced and produced in the trial of CMCC No. 5586 of 2010 which convinced the lower trial court to enter the declaratory judgment. The Appellant, who through its advocate, one Antony Mungai Njogu, testified, in the lower court trial, did not deny the information above. That is to say, Mr. Antony Mungai Njogu, did not deny that a Statutory Notice was served on APA Insurance Ltd before the original suit No. 12468 of 2004 was filed. He did not either deny the fact that the appellant was served with a demand notice before the declaratory suit was filed.

It is noted further, that the advocate who was instructed by the Appellant to defend the original suit No. 12468 of 2004 aforesaid – M/s Mareka & Co. – never raised the issue of service of a statutory notice. That is to say that if the notice had not been served, it could, as in this case now before us, have been made part of the defendant’s defence therein and resolved by that court.

I have, notwithstanding the above observation, considered the issue afresh as I am bound to do as the first appellate court. I notice that the Appellant made the statutory notice an issue in this declaratory case. In response to it the Respondent produced the copy of the original statutory notice dated 2nd August, 2004 which was clearly received by the Appellant on 2nd August, 2004. The Respondent further produced an affidavit of service sworn by an advocate who served it. The advocate also produced another affidavit of service on the Appellant of a demand letter giving notice to the filing of this suit at the lower court. I have not seen responding sworn denials of service of the abovementioned documents by the Appellant. Furthermore, If there were such denials, this court might not believe them since the rubber stamp for service on the copies of the document by the appellant is clear, original, convincing and would make any denial a joke and a lie.

The conclusion I make on the issue above, therefore, is that a statutory notice was properly served by the Respondent upon the Appellant before the original suit was filed in 2004. Furthermore, before the declaratory suit was also filed, a demand notice was issued and served upon the Appellant. In the circumstances, the negative effect of section 10(2) (a) earlier cited does not arise and the Appellant herein is bound to pay and settle the declaratory judgment sum.

In the Memorandum of Appeal filed in this appeal the Appellant, inter alia, raised the issue of the merger between Apollo Insurance Co. Ltd and Pan African Insurance Co. Ltd to form APA Insurance Ltd, the Appellant in this appeal. However the issue was not only clearly abandoned but also compromised by admission. I will say no more about it.

The final result accordingly is that this appeal has no merit and is hereby dismissed with costs. Orders accordingly.

Dated and delivered at Nairobi this 20th day of December, 2012.

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D A ONYANCHA
JUDGE