No. 2807

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO. 162 OF 2008

PHOENIX OF EAST AFRICA ASSURANCE CO. LTD.....APPELLANT

-VERSUS-

ALFRED ONYANGO OBONDO.....RESPONDENT

JUDGMENT

(Being an appeal from the Judgment and decree of the Resident Magistrate's Court at Migori Hon. Kibet Sambu CMCC No. 53 of 2007, delivered on 3rd September, 2008)

The respondent, **Alfred Onyango Obongo** filed a declaratory suit against the appellant, **Phoenix of East Africa Assurance Company Limited** in the Senior Principal Magistrate's Court at Migori vide a plaint dated 16th April 2007, praying for declaratory orders pursuant to the provisions of section 10 of the **Insurance (Motor vehicle, Third Party Risks) Act**. The suit sprung out of a road traffic accident which occurred on or about 11th June, 2000 along Rongo-Migori road involving the respondent's motor vehicle registration number KAJ 162Q, Nissan Matatu and Motor vehicle registration KAM 032G Scania bus owned by **Mbaruk t/a Takrim Bus Services** but insured by the appellant. The respondent in the suit had prayed for:

"a. A declaration that the defendant is bound to satisfy the judgment in Migori SRMCC No. 564 of 2002 in accordance with section 10 Cap 405 Laws of Kenya.

b. An order directing the defendant to pay to the plaintiff the decretal sum with interest at court rates since the date of judgment in Migori SRMCC No. 564 of 2002.

c. Costs of the suit.

d. Interest on a, b and c above at court rates.

e. Any other relief this honourable court may deem fit to grant in the circumstances…".

The appellant entered appearance and filed a defence which was subsequently amended by the consent of the parties. The appellant generally and categorically denied any liability to the respondent and in the alternative averred that if it had insured any motor vehicles belonging to **Mbaruk t/a Takrim Bus Services**, then the motor vehicles were either registration numbers KAM 032Q or KAM 032L. The same had been insured under policy number 12CV4679 which insurance policy was however cancelled and all requisite steps taken for its cancellation on or about the 5th May, 2000.

During the hearing of the case, the respondent testified that the appellant had insured motor vehicle registration number KAM 032G Scania Bus vide policy No. 12/CV/4679 and that the accident which had occurred on the 11th June 2000 involved his motor vehicle registration number KAJ 162Q Nissan Matatu and the aforesaid motor vehicle. The accident was a liability covered by the said policy within the meaning of section 5 of the **Insurance (motor vehicles third party risks) Act** hereinafter ***"Cap 405"***. Following the accident he had filed a material damage claim in Migori SPMCC No. 564 of 2002 against the appellant's insured **M/s Mbaruk t/a Takrim Bus Services** and its driver one, **Hassim Bakam**. His vehicle as a result of the accident aforesaid was extensively damaged and reduced to a shell, hence the suit filed being Migori SPMCC No. 564 of 2002. He successfully prosecuted the suit and obtained judgment and decree in his favour. From the information he obtained from Rongo Police Station, he became aware that the offending motor vehicle was owned by **M/s Mbaruk t/a Takrim Bus** Service and insured by the appellant vide policy number 12/CV/4679, which policy was valid and in force as at the time of the accident. That the appellant was duly served with the statutory notice as required by Cap 405. In support of his case, the respondent produced a police abstract report obtained from Kamagambo Police Station and a decree obtained in Migori SRMCC No. 564 of 2002.

The respondent on cross examination by the appellant's counsel maintained that the requisite statutory notice in accordance with the provisions of Cap, 405 was duly issued and served on the appellant by his advocates and that his claim was premised on material damage caused to his motor vehicle which was reduced to a shell as a result of the accident and that he had filed the parent suit vide Migori SRMCC No. 564 of 2002 wherein he had obtained a decree against the appellant's insured. Referred to the various correspondences on the purported cancellation of the insurance policy document in respect of the subject motor vehicle by the appellant, to wit, letters dated 30th June, 7th June and 6th May 2002 respectively, he maintained that to the best of his knowledge, the insurance policy issued in respect of the motor vehicle was still valid and in force at the time of the accident and denied the appellant's assertion that, given the said correspondences it had effectively cancelled the insurance cover.

The respondent, on re-examination by his counsel, stated that the appellant's correspondence aforesaid did not show or proof that the same had been served on the insured since the certificates of posting of the said documents were not exhibited, or produced in evidence in proof of service and acknowledgement thereof. He denied any knowledge of any business dealings between the appellant and Finesse Insurance brokers in respect of the insurance policy issued to the motor vehicle.

The respondent in further support of his case called **Gerald Kabutu**, a process server who confirmed that he duly served on the appellant a copy of the statutory notice as required by the provisions of Cap 405. The same was received and acknowledged by the appellant's claims manager.

The appellant's, case through its claims supervisor, **Mr. Ngaira Mbagaya**, was that it had issued an insurance policy cover on the motor vehicle vide policy No. 12 CV4679 which was to cover the period 22nd January to 2nd December, 2000 all days inclusive. However, the same was cancelled midway on the 4th June, 2000 due to unforeseen circumstances and breach of contract by the insured. Prior to that, a 28 days period notice of its intention to terminate the policy cover was duly issued and served on its insured. As at the time of the occurrence of the accident on the 11th June, 2000 therefore, there was no cover and thus it was a stranger to the respondent's case.

The witness, in support of the appellant's case produced in evidence several correspondences on the purported cancellation of the insurance policy issued to its insured and the return or surrender of the PSV Insurance certificate thereto: The correspondence included the appellant's letters dated 30th June, 2000 addressed to the commandant, traffic Department, Nairobi, one dated 7th June, 2000 addressed to the commandant traffic department Nairobi, one dated 16th May, 2000 addressed to Finesse Insurance Brokers – Nairobi, a letter dated 5th May 2000 addressed to **M/s Takrim Bus Service Limited** – Nairobi, a forwarding letter dated 16th October, 2000 and the returned certificate of insurance and finally a credit note advice No. 039828 dated 29th November, 2000 addressed to Finesse Insurance brokers on the returned premiums.

DW1, on cross examination by the respondent's counsel conceded that it had issued an insurance cover to Takrim Bus Service in respect of the subject motor vehicle to run from the 22nd January, 2000 to 2nd December, 2000, which insurance cover would have been valid and in force at the time of the accident on the 11th June, 2000 had it not been cancelled owing to unforeseen circumstances. That no evidence had been adduced in proof of the fact that the letter dated 5th May, 2000 giving the 28 days notice to its insured on its intention to terminate the insurance policy was ever served upon its insured. The same logic applied to the letters issued to the Traffic commandant, Nairobi and copied to the Commissioner of Police respectively. That, no notice was ever issued to the motor vehicle registrar on the non surrender of the certificate of insurance by the insured, that the notices were issued to the Traffic commandant and copied to the commissioner of police instead of the commissioner of police nor the motor vehicle registrar as required by law and that in effect the provisions of section 10 (2) and (3) of Cap 405 thereof were not complied with. As such the termination of the insurance policy had not been completed. That the original and a copy of the certificates of insurance issued were returned to the appellant by Finnese Insurance brokers but not by its insured. That the refund of premiums initially paid by the insured were processed on 29th November, 2000. Prior to that the appellant was still holding on the insurance premiums of its insured and by extension it would be correct to say that as at 11th June, 2000, the insured's motor vehicle had an insurance policy cover with the appellant and finally that there was no evidence linking or connecting M/s Finesse and its insured in the case.

The learned magistrate having carefully considered the pleadings, the evidence, respective written submissions on record and the law came to the inevitable conclusion that, ***"… this being a declaratory suit the issue on whether or not the defendant is liable to satisfy the plaintiff's claim, which is premised on a material damage, in my respectful new is belated as same ought to have been raised in the main suit giving rise to these proceedings or an appeal preferred. In the upshot and given the foregoing evidence and observations do find the plaintiff having proved his case on a balance of probability against defendant accordingly the plaintiff's case hereby succeeds in terms of the prayers sought in the plaint…".***

The appellant was aggrieved by the judgment and decree aforesaid. It therefore lodged this appeal setting out 13 grounds to wit:-

"1. The learned trial magistrate grossly misdirected himself in treating the evidence and submissions on liability before him superficially and consequently coming to a wrong conclusion on the same.

2. The learned trial magistrate erred in not sufficiently taking into account all the evidence presented before him in totality and particular the evidence presented on behalf of the appellants.

3. The learned trial magistrate was biased in his attitude towards the appellant's submissions and dealt with the same with a preconceived mind.

4. The learned trial magistrate proceeded on wrong principles whilst assessing the evidence as well as the submissions of the appellant's counsel and failed to appreciate and apply precedents and tenets of law applicable.

5. The learned trial magistrate wholly erred in law and fact by failing to appreciate that the appellant had sufficiently proved cancellation of the policy.

6. The learned trial magistrate wholly erred in law and in fact by failing to find and appreciate that the insurance broker was the respondent's agent and/or principal.

7. The learned trial magistrate wholly erred in law and fact by failing to find and appreciate that the appellant had taken and met all requisite legal steps in cancellation of the policy.

8. The learned trial magistrate's finding went against the weight of the evidence adduced by the appellant.

9. The learned trial magistrate erred in law when he found that provisions of law had to be pleaded.

10. The learned trial magistrate grossly misdirected himself by failing to take cognizance of established principles and tenets vis-à-vis decisions of superior courts and thereby contravened the time bound principle of stare decision.

11. The learned trial magistrate erred when he failed to find that the respondent had totally failed to discharge the onus of proof which lay on him.

12. The learned trial magistrate decision went totally against the facts and law.

13. The learned trial magistrate erred in law and in fact when he failed to find that there was no insurance cover in force or valid at the date of the accident…".

When the appeal came up for directions, one of the directions sought and granted was that the appeal be canvassed by way of written submissions. Subsequently, however only the respondent filed his submissions which I have carefully read and considered alongside cited authorities. Thus this judgment

has been crafted without the benefit of the appellant's submissions.

The foregoing notwithstanding and before entering into consideration of the grounds of appeal, I think it is necessary to set out what I consider to be the approach, function and duty of this court in connection with this appeal. An appeal from the subordinate court to this court is by way of a retrial. However, this court is not bound necessarily to accept the findings of fact by the subordinate court but this court must re-consider the evidence, re-evaluate it and make its own conclusions, although always bearing in mind that it has not had the advantage of the trial magistrate in seeing and hearing witnesses. See **Selle –vs- Associated Motor Boat Company (1965) E.A 123**.

I shall bear in mind the foregoing as I consider this appeal. In the trial court, the respondent gave detailed evidence supported by various documents in a bid to prove his case against the appellant. There can be no doubt on the evidence on record that the appellant, had an insurance cover over its insured motor vehicle and was valid at the time that the subject motor vehicle was involved in an accident with the respondent's motor vehicle on 11th June, 2000. The cover may have been cancelled by the appellant as claimed. However in doing so the appellant did not strictly comply with the mandatory provision of section 10(2) and (3) thereof of Cap 405. That being the case the alleged cancellation if at all was of no consequence in law. It was in view of this finding that the learned magistrate entered judgment in favour of the respondent. I have carefully considered the evidence of the respondent and that of the appellant and it is my view that the learned magistrate was entitled to find that the appellant was liable. The learned magistrate properly and carefully weighed the evidence of both parties and came to the right conclusion. He considered all the documents produced in evidence as exhibits and weighed them against the rival submissions and the relevant law and found for the respondent. Indeed he also considered the documents tendered in evidence by the appellant and found them wanting particularly on the aspect of service or lack of it as required in law. The learned magistrates found as a fact that there was no evidence that the letters of cancellation of the policy were served as required on the insured, traffic commandant, Nairobi and a copy thereof to the police commissioner.

The appellant was required by section 10 (2) (iii) to notify the registrar of motor vehicles and commissioner of police that it had cancelled the policy and that the insured had refused to surrender the policy in writing. The requirement is mandatory. The appellant's sole witness conceded that no such notification was issued and or served on the two offices.

The learned magistrate was also alive to the fact that the insurance cover was not availed to court so that the court could peruse it and satisfy itself whether it had terms which allowed the appellant to cancel it in the manner it allegedly did. In the absence of such evidence as correctly submitted by counsel for the respondent, the trial court could not have been satisfied that the appellant had acted procedurally and or contractually. Again and flowing from the foregoing, the learned magistrate was right when he held that the policy issued was still valid as at the date of the accident. In any event, it is apparent that the alleged surrender of the certificate of insurance was on 16th October, 2000. This was long after the accident occurred. Further there is uncontroverted evidence that the premiums if at all paid by the insured, were only refunded on 29th November, 2000, yet the appellant purported that it had cancelled the policy in May, 2000. Something just does not seem to add up here. Even the alleged refunds were not made to the insured but to a 3rd party. One is left wondering whether the documents tendered in evidence by the appellant were genuine. Is it possible that they were merely generated for purpose of this case, hence the discrepancies and contradictions therein. In this era and with the advanced technology available, that possibility cannot wholly be ruled out.

The appellant's complaint that its submissions and authorities were not considered by the trial court cannot possibly be correct. In my view and having carefully read and considered the judgment, I have no doubt at all in my mind that the learned magistrate carefully analyzed the entire evidence on record very keenly, the filed submissions by both parties and the relevant law in order to come to the conclusions he

came to. He says so in the judgment. He even picked on extraneous issues raised by the appellant in the written submissions but which had not formed part of its pleadings in the parent suit. This cannot be an act of a judicial officer who did not consider all the issues laid before him.

The appellant may perhaps be right in saying that a claim anchored on material damage to a motor vehicle may perhaps not have been one of the risks contemplated by Cap 405. However this issue was never raised in the pleadings of the appellant in the parent suit nor the instant suit. It was only raised in its written submissions. Written submissions are no replacement for evidence. Indeed in so saying in its written submissions, the appellant was introducing evidence from the bar which is not permissible. Besides, the cover itself was not tendered in evidence so that the court could appreciate its tenor and meaning. It may well be that it had a clause extending to material damage claims.

This appeal lacks merit. Accordingly, it is dismissed with costs to the respondent.

Judgment dated, signed and **delivered** at Kisii this 30th day of May, 2011.

ASIKE-MAKHANDIA

JUDGE