



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT BUSIA

Criminal Application 10A of 2006

GENERAL ACCIDENT INSURANCE CO. LTD.....APPELLANT

VERSUS

FRANCIS MUCHOI NG'ANG'A.....RESPONDENT

(From the judgement and Order of J.R. Ndururi, in Busia Civil Suit No. 345 of 2005)

JUDGEMENT

The facts from which this appeal arises are as follows , as far as this courts understands them;-

The responded filed a suit against the appellant seeking a declaratory judgement and order directing the Appellant to pay the Respondent asum of kshs 194,762/= in satisfaction of Busia Senior Resident Magistrate's Court Civil case NO. 42 of 2002 together with interest thereof since 12.7.05. The Defendants in the above cited suit were, first, Charles Oluoch and second, Equator Bottlers Ltd. The said Charles Oluoch had failed to enter appearance and defence in the case of judgment in default which was eventually assessed at Ksh s 194,792/= as general damages, was entered for the plaintiff/ Respondent herein. The claim against the Defendant, Equator bottlers Ltd., was dismissed on the basis that the Plaintiff / Respondent, had failed to prove that the motor vehicle Reg. No. KZS 683, Isuzu Lorry, at the material time being driven by the said Charles Oluoch, belonged to the said Equator Bottlers Ltd.

It later transpired however, that in correspondence between the Plaintiff / Respondent and Appellant herein , Appellant had in response to a demand notice under the Act ,admitted that it had insured the said motor vehicle at the request of the said Equator Bottlers Ltd . Who was their insured. The letter from the Operations Manager, Mrs Hellen Omiti Machora, to F.O. Wanga & Company Advocates dated 12.2.02 had stated inter-alia.

“Kindly note that our insured’s vehicle was a commercial vehicle with no passenger liability cover and therefore your client was traveling in the said vehicle illegally , and at his own risk and on frolic of his own. We would like to inform you that liability is denied ad any legal action taken against our insured will rigorously defended”

The letter in its topic heading had clearly stated thus-

“ involving vehicle registration No. KZS 683 INSURED: Equator Bottlers LimitedCLAIMANT:Francis Muchoi Nganga” For some reason, the Respondent/Plaintiff had not used the above information or documents of correspondence in trying to prove ownership of the said motor vehicle against the said Equator Bottlers Ltd. in the Civil case No. 42 of 2002. However, the said Equator Bottlers Ltd., neither advised its driver to enter appearance or defense in the case. As stated earlier, a judgment of Kshs. 154,000 plus costs and interest which inflated the

final figure to Kshs. 194,762 was entered against the driver.

In Busia, PMCC No. 345 of 2005 from which this appeal arises, the Respondent however, produced the demand letter from the Respondent's advocates as well as the Appellants reply already quoted hereinabove to prove that the Appellant had insured the motor vehicle above mentioned and that it had so admitted and should not be heard to deny it. The Respondent accordingly filed an application seeking to strike out the defense filed by the Appellant based on denial of existence of such insurance cover and non-ownership of the motor vehicle. It further tried to argue that the contents of the quoted letter had been written on a "without-prejudice-basis" and that the trial court should not rely on it.

However, on a very well reasoned ruling, the trial court first struck out a replying affidavit filed by the Appellant for good reasons therein given which this court approves and upholds. That striking out of the replying affidavit, in this court's view, left the application seeking striking out of defense, uncontrolled. But the trial magistrate nevertheless went ahead to support the course of his action by other additional grounds. He found as a fact that the correspondence earlier cited had actually been exchanged. He concluded that a Notice under Section 10 (2) (b) of Cap 405 had been properly served, and acknowledged by the Appellant. He found also that the receipt of such notice cannot be on a without-prejudice basis. Once received, it is received. The trial court further accepted that the Appellant sufficiently admitted that there was an insurance cover over the operation of the relevant motor vehicle at the time of the accident. The court also lastly observed that while no judgment stood against the Appellant out of Civil case No. 42v of 2002, nevertheless one stood against the driver of the motor vehicle Reg. No. KZS 683. He quoted S. 10 (1) of Cap 405, which states:-

"if, after a policy oof insurance has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of section 5 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or any have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereuder..."

The trial Magistrate found that whether or not the motor vehicle may have been sold to the judgment debtor, it was as a matter of fact at the material time insured by the Appellant who accordingly must have had insurable interest in the vehicle. He concluded that a judgment against the judgment debtor who drove the vehicle insured by the Appellant, transferred liability under Section 10 (1) above cited, to the insurer, first and foremost.

I have carefully considered each ground of appeal herein. I am satisfied that the Lower court properly approached the application before it. He made findings of fact that the court did not misdirect itself. It was indeed in a better position to judge those facts as the facts were argued before it and the court was placed in a more advantaged position to judge them. In ant case, this court most likely would have come to the same conclusions. In addition, as earlier stated, the struck out replying affidavit left the application before court uncontroverted which then entitled the court to come to the decision it did on that ground alone it also relied on the facts before it.

Upon the above grounds, this court finds no merit in this appeal. The appeal is dismissed with costs.

DATED and DELIVERED at Busia this 4TH day of October 2010

D .A ONYANCHA

JUDGE

