



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII**

Civil Appeal 124 of 2003

KENINDIA ASSURANCE COMPANY LIMITED APPELLANT

VERSUS

JACOB ONDARA MOGAKA RESPONDENT

JUDGMENT.

By a plaint filed on 17th January 2003, the respondent stated that sometimes in the year 1999 he entered into an agreement with the appellant who agreed to comprehensively insure the respondent's motor vehicle registration No. KAC 002 B, Isuzu lorry. Pursuant thereto an insurance policy No. 118/080/11/00178/1993/11 was issued by the appellant. On 25th May 1999 the respondent's aforesaid motor vehicle was involved in a road traffic accident along Kisii-Kilgoris road and one Kefa Onywoki was injured. Following the said accident, the injured Kefa Onywoki filed an action for recovery of damages against the respondent, **KISII CMCC NO. 355 OF 2002.**

The respondent alleged that after he was served with summons to enter appearance in the said suit he passed over the same to the appellant who declined to take over the defence case on his behalf. The said suit was heard and determined and judgment was entered for the claimant in the sum of Kshs. 400,000/= as general damages plus costs and interest.

The respondent stated that the appellant refused and/or failed to indemnify him, having satisfied the decretal sum in the aforesaid suit. He sought a declaration that the appellant is obliged to indemnify him under the insurance contract aforesaid.

The appellant filed a statement of defence and denied the respondent's averments. The appellant added that it was not notified by the respondent of the aforesaid suit and therefore the terms of the insurance policy having been breached by the respondent, it was not under any obligation to indemnify him.

During the hearing the respondent admitted that when he was served with summons to enter appearance in CMCC No. 355 of 2002 he did not forward the summons to the appellant. The respondent did not also defend the said suit and he was surprised to see auctioneers attaching his property. He alleged that he paid the entire decretal sum to the said Kefa Onywoki as well as the auctioneer's charges. When he notified the appellant about the incident, the appellant said that it was too late and could do nothing about it.

The appellant did not testify but filed written submissions.

The learned trial magistrate held that the appellant was liable to satisfy the judgment in KISII CMCC NO. 353 of 2002 as well as the auctioneer's charges. He proceeded to enter judgment for the respondent in the sum of Kshs. 460,000/= being the judgment sum together with the costs of Kshs. 114,000/=, all totaling to Kshs. 574,000/=.

The appellant was aggrieved by the said judgment and preferred an appeal to this court. The memorandum of appeal raised nine grounds and I need not set out the same herein.

Mr. Oguttu for the appellant faulted the learned trial magistrate for grossly misdirecting himself in finding that the respondent had proved his case against the appellant. He added that the respondent had not adduced evidence to prove that under the insurance policy aforesaid he was entitled to any indemnity in the circumstances under which the aforesaid case was handled by the respondent. He emphasized that the respondent conceded that he did not forward the summons that were served upon him to the appellant. He was therefore in breach of the terms of the insurance policy.

Mr. Ondieki for the respondent submitted that although the respondent failed to forward the summons in the said case to the insurance company, he nevertheless notified the appellant verbally. Having satisfied the decretal sum in the said case, the appellant was obliged to indemnify him, counsel submitted.

I have considered the brief submissions made by both counsel. It is not in dispute that the respondent's motor vehicle registration number KAC 002 B was comprehensively covered by the appellant. The terms and conditions of the said insurance policy were clearly stipulated in the policy document that was issued to the respondent by the appellant. The said document was not produced by the respondent before the trial court. However, it is common knowledge that all such insurance policies require any insured person to not only notify an insurance company about occurrence of any accident involving the insured motor vehicle but also to forward to the insurance company any court process that is served upon the insured by any third party. This enables the insurer to take steps to safeguard its interests under the terms of the policy. The respondent admitted that he did not forward the summons to the appellant even though he alleged that he had verbally notified the appellant about the accident. The appellant had even compensated him for the damage occasioned to his motor vehicle following the aforesaid accident. The respondent did not state why he did not inform the appellant about the case that was filed against him by Kefa Onywoki. The respondent did not even defend that suit. He only notified the appellant about the suit when auctioneers attached his property.

It was not stated that any notice was given to the appellant before the aforesaid suit was commenced against the respondent. **Section 10 (2) of the Insurance (Motor Vehicle) Third Party Risks (Act) Cap 405** states as follows:

"No sum shall be payable by an insurer under the foregoing provision of this

Section –

(a) in respect of any judgment, unless; before or within fourteen 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 stated in his defence and submissions that it had no notice of the aforesaid proceedings and as such it was under no obligation to satisfy the judgment that was entered against its insured, the respondent.

The appellant, having taken the above legal position, the respondent was duty bound to adduce evidence to show that he had complied with all the terms of the insurance policy and the relevant law. He not only failed to do so but by his own words conceded that he did not forward the summons to the appellant.

In the circumstances, the appellant was under no obligation to indemnify the respondent. The learned

trial magistrate had no basis of reaching the conclusion that the appellant was liable to indemnify the respondent. Consequently, I allow this appeal, set aside the judgment entered by the trial court and substitute therefor an order dismissing the respondent's case before the trial court with costs to the appellant. The respondent will also bear the costs of this appeal.

DATED, SIGNED AND DELIVERED AT KISII THIS 21st DAY OF MAY, 2009.

D. MUSINGA

JUDGE.

21/5/2009

Before D. Musinga, J.

Mobisa – cc

Mr. Oguttu HB for Mr. Otieno for appellant

Mr. Minda HB for Mr. Ondieki for respondent

COURT: Judgment delivered in open court.

D. MUSINGA

JUDGE.