



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 860 of 2004

BLUESHIELD INSURANCE CO. LTD.....APPELLANT

VERSUS

SAMUEL NYAGA NGURUKIRI.....RESPONDENT

J U D G M E N T

1. This appeal arises from a suit which was filed by the respondent Samuel Nyaga Ngurukiri against the appellant Blueshield Insurance Company Ltd. The suit was initially filed in the High Court but was subsequently transferred to the Chief Magistrate's Court at Nairobi. In the suit the respondent sought a declaration that the appellant is bound to honour and satisfy the judgment in HCCC No.5808 of 1993 under Section 10(1) of Cap 405 in the sum of Kshs.302,739/=.

2. The appellant filed a defence denying having insured motor vehicle KVE 424, (hereinafter referred to as the subject vehicle), at the material time but contending without prejudice, that if there was an insurance cover then the same was a commercial cover which did not extend to passengers. The appellant therefore maintained that the respondent was not entitled to any indemnity under the alleged policy against the alleged judgment in HCCC No.5808 of 1993. The appellant further contended that the respondent's suit was bad in law and did not disclose a reasonable cause of action.

3. During the hearing before the trial magistrate the respondent testified that he was injured whilst traveling in the subject vehicle, pursuant to which he filed Civil Suit No.5808 of 1993 and obtained judgment in his favour for the sum of Kshs.302,739/=. The respondent produced a certified copy of the judgment. The decretal sum was not paid to him and therefore he filed the declaratory suit. The respondent also produced a certified copy of the decree and a certificate of costs. Under cross-examination, the respondent explained that the accident involved the subject vehicle and another, but he sued in respect of the subject vehicle as it was the one in which he was traveling. The respondent conceded that he was not aware of Section 10 of Cap 405 and was not aware that he was required to serve a notice on the appellant 14 days before or after filing HCCC No.5808 of 1993. He maintained that the police abstract showed that the subject vehicle was insured by the appellant.

4. The appellant testified through its claim's Assistant Julius Maina, who stated that the subject vehicle was insured by the appellant from 19th November, 1990 to 18th November, 1991, through a motor commercial policy covering 3rd party risks but excluding passengers. The policy was renewed from 19th November, 1991 to 18th November 1992 under the same terms. He testified that the insured who was one John Muyoki Muchemi did not report the accident subject of the suit to the appellant or lodge any claim. When the appellant learnt about the accident it instructed Panther Investigators to investigate the accident. They also obtained a police abstract report which showed that the subject vehicle had two policies one by the appellant and another by Pioneer Assurance Company Ltd which was for passengers. A certificate for temporary cover for passengers from 25th April, 1992 to 8th May, 1992 by Pioneer Assurance Ltd was produced in evidence. The witness maintained that the appellant had not received any claim from passengers injured in the accident and that it was not liable to satisfy any such claim.

5. In her judgment, the trial magistrate found that the respondent was injured in an accident involving the subject vehicle and that the respondent was a person covered by the policy issued by the appellant which covered 3rd party risks. she found that the policy issued by the appellant was not limited but was for all 3rd party risks. The trial magistrate further found that the appellant did not obtain any declaration absolving it from liability under Section 10(4) of Cap 405. She therefore found the appellant liable to satisfy the respondent's claim and gave judgment in favour of the respondent.

6. Being dissatisfied with the judgment, the appellant brought this appeal raising 8 grounds as follows: -

(i) That the learned magistrate erred in law and in fact in entering judgment against the appellant.

(ii) That the learned magistrate erred in law and in fact in finding that the appellant was obligated under Section 10 of the Insurance (Motor Vehicles Third party Risks) Act Chapter 405 Laws of Kenya to satisfy the respondent's claim.

(iii) That the learned magistrate erred in law and in fact in failing to appreciate the evidence that the policy of insurance issued was for commercial purposes only and did not extend to cover passengers.

(iv) That the learned magistrate erred in law and in fact in interpreting Section 5 of Chapter 405 Laws of Kenya as to find the respondent a person covered by the policy of insurance issued by the appellant.

(v) That the learned magistrate erred in law and in fact in failing to apply abiding decision of the court of appeal and purporting to distinguish it while it was not distinguishable.

(vi) That the learned magistrate erred in law and in fact in finding that the receipt by the appellant of the statutory notice and failure by the appellant to obtain a declaration of repudiation of liability under Section 10(4) Chapter 405 Laws of Kenya as satisfactory to bind the appellant, to satisfy the respondent's claim.

(vii) That the learned magistrate erred in law and in fact in failing to appreciate and consider the evidence that the accident motor vehicle had concurrently been insured by another insurance company which policy covered passengers including the respondent.

(viii) That the learned magistrate erred in law and in fact in finding that the respondent had proved his case on a balance of probabilities.

7. Counsel for the appellant submitted that although the respondent pleaded in paragraph 7 of the plaint that the accident was a liability covered by the terms of the policy issued by the appellant, the respondent was not able to supply any particulars relating to the policy. The respondent's reply to the appellant's request for particulars was that he did not know the terms of the policy as he did not have the policy documents. Counsel noted that the respondent did not adduce any evidence relating to the policy. Counsel maintained that the appellant called evidence to confirm its position that the policy did not cover passengers.

8. Counsel for the appellant further submitted that there was evidence that the subject vehicle was concurrently insured with two companies. The respondent should therefore have enjoined the 2nd insurance company and should also have issued a statutory notice to each of the insurance company. Counsel maintained that failure by the respondent to enjoin Pioneer Assurance was therefore fatal to the respondent's claim. Further, relying on *Civil Appeal No.12 of 1998, Corporate Insurance Company Ltd vs Elias Okinyi Ofire*, counsel for the appellant maintained that the respondent was not covered by the policy issued by the appellant by virtue of the compulsory insurance under Section 5 of Cap 405 as the policy was limited to the subject vehicle as a commercial vehicle, and did not include passengers.

9. In a rejoinder to the submissions made by the appellant's counsel, the respondent's counsel maintained that the appellant having failed to file any avoidance suit even after the declaratory suit was filed, the correct position is that the appellant was bound to satisfy that judgment. Counsel for the respondent urged the court to adopt the legal position as stated in *Civil Appeal No.107 of 1997 Blueshield Insurance Company Ltd vs Raymond Bauri M'Rimberia*.

10. I have carefully reconsidered and evaluated the evidence which was adduced before the trial magistrate. The evidence was clear that the respondent was injured in an accident whilst traveling in the subject vehicle. It was also established that the respondent obtained judgment for Kshs.302,739/= in his favour against the insured of the subject vehicle. It is further clear that the subject vehicle was insured by the appellant for 3rd party risks. The bone of contention is whether that cover by the appellant was a policy under Section 4(1) of the Insurance (Motor Vehicle 3rd Party Risks) Act Cap 405 extending to fare paying passengers such as the respondent and whether the appellant is liable to satisfy the judgment in Civil suit HCCC No.5808 of 1993 under Section 10(1) of the Insurance (Motor Vehicles 3rd Party Risks) Cap 405.

11. In its amended plaint as read together with the reply to particulars dated 20th May, supplied by the respondent it was contended that the appellant issued an insurance policy No.BS 3/080/113463 which was for 3rd party risk under Section 4(1) of Cap 405. The appellant's witness maintained that the policy provided by it in respect of the subject vehicle was a motor commercial policy for 3rd party risks only excluding passengers. However, none of the exhibits produced by the appellant which were debit note No.1863, debit note No.7586 and a certificate of insurance No.201024, confirmed the witnesses allegation that the insurance policy excluded passengers. The only document which mentioned any limitation was debit note No.1863 which indicated:

“limitation as to use”: cv1 Clause: Jurisdiction 3rd party only new and young drivers Kshs.3,000/= excess on all claims Kshs.5,000/=.”

There is nothing on the face of that document to show that the limitation related to exclusion of passengers. Nor did the appellant adduce any evidence as to what “cv1” referred to. These were matters which were within the special knowledge of the appellant and formed the defence put forward by the appellant. In accordance with Section 112 of the Evidence Act, the burden was upon the appellant to establish the alleged limitation of the policy. The appellant failed in discharging this burden. The evidence before the trial magistrate was clear that the insurance policy issued by the appellant was for 3rd party risks, and that there was no condition that the insured was only to use the subject vehicle for his own business or that he was not to use the subject vehicle for hire or reward including carrying passengers.

12. Thus there was no evidence that the third party Risks covered by the policy issued by the appellant was limited. This case is therefore in that regard distinguishable from *Corporate Insurance Co. Ltd vs Elias Okinyi Ofire Civil Appeal No.12 of 1998* where it was evident that there was a limitation that the insured was to use the vehicle for his own business and that the insured was not to use the vehicle for hire or reward.

13. I find that the Insurance cover issued by the appellant was a third party cover under Section 4(1) of the Insurance (Motor Vehicles

Third Party Risks) Act and the respondent was a person within the class of persons insured under Section 5(b) of the Insurance (Motor Vehicles Third Party Risks) Act. the appellant produced a certificate of Insurance showing that the subject vehicle had another temporary insurance cover for passengers from Pioneer Assurance Company. However, that policy even assuming that it existed, did not in any way limit the liability of the appellant.

14. In its defence, the appellant denied having received any statutory notice from the respondent before the accident suit was filed. Nevertheless an appropriate statutory notice was produced by the respondent in evidence.

15. Under Section 10(4) of the Insurance (Motor Vehicle 3rd Party Risks) Cap 405 the appellant was entitled to avoid liability by obtaining a declaratory judgment that he was entitled to avoid liability under the policy on the ground that there was non disclosure or misrepresentation of a material fact. No such suit was however filed by the appellant nor has the appellant ever served any mandatory notice of any intention to file such suit. Thus the appellant cannot seek solace under Section 10(4) of Cap 405.

16. For the above reasons, I come to the conclusion that the appellant is liable to satisfy the judgment issued in favour of the respondent in HCCC No.5808 of 1993. I find that the appeal before me has no merit. It is accordingly dismissed with costs.

Those shall be the orders of this court.

Dated and delivered this 29th day of December, 2008

H. M. OKWENGU

JUDGE

In the presence of: -

E.M. Njiru for the appellant

Mrs. Njiru for the respondent