REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU

Civil Appeal 47 of 2006

(Being an appeal from the Ruling/Order of Senior Resident Magistrate, Hon.

M. S. G. Khadambi, in Meru Civil Suit No.494 of 2004 on 30th September, 2004).

BLUE SHIELD INSURANCE CO……..……. APPELLANTS

VERSUS

MERCY KAWIRA (Suing through her mother and

Next friend Jane Mugito M'Njuki) ……....…….. RESPONDENT

(Being an appeal against the Decree in Meru CMCC No.1090 of 1999 dated 24.4.2003 delivered by Honourable Njeru Ithiga, -SPM).

JUDGMENT

This is an appeal from the decree of the court below (Mr. Ithiga,SPM) in which the appellant was found to be bound in law to satisfy a decree issued in CMCC No.59 of 1998.

In the latter suit the plaintiff, a minor, through her mother, obtained judgment in the sum of Kshs.293,460.10 being general and special damages as well as costs and interest following a traffic road accident involving the plaintiff and motor vehicle registration No.KAH 773 H owned by one S.W.Gicheru and insured by the appellant.

Subsequently the plaintiff in the primary suit instituted a declaratory suit in which she sought an order that the appellant was enjoined in law, being the insurer of the motor vehicle in question, to satisfy the decree in Meru CMCC No.59 of 1998.

I have already stated that the court below found that the appellant was bound to satisfy the decree. The appellant was aggrieved by that finding and has preferred this appeal citing four grounds which were argued together. The arguments can be condensed into two grounds, namely that statutory notice under Section 10(2) (a) of the Insurance (Motor Vehicle Third Party Risks Act (the Act) was not issued and secondly that there was no proof that the motor vehicle in question was insured by the appellant.

Section 10(2) (a) of the Act provides that;

"10(2) No sum shall be payable by an insurer under the foregoing provisions 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…"

It was the plaintiff's testimony in the primary suit that the appellant was duly served with the statutory notice. In the declaratory suit it was contended that a letter dated 27th November, 1997 from the firm of Mithega and Arithi Advocates, which was produced as exhibit, notified the appellant of the accident and the intended institution of a suit against their insured and a declaratory suit against it. The plaintiff was categorical in both the primary and declaratory suits that she is not aware how the letter in question was dispatched to the appellant.

There was, however, a mention by DW1-Charles Macharia(Charles), in cross-examination, of a certificate of postage, which bore the address of the appellant. There were, however, no details of this certificate of postage.

Yet this was a critical piece of evidence as the respondent maintained that the appellant was duly served. Service had to be proved on a balance of probabilities.

Section 112 of the Evidence Act places the burden on the party claiming the existence of a fact to prove the same. Charles, although not based in the Nairobi office of the appellant, repeatedly denied service based on the records availed to him by their Nairobi office. Without proof of service under Section 10(2) (a) of the Act the appellant cannot be called upon to satisfy the decree in Meru CMCC No.59/1998(erroneously reflected in that decree as Meru CMCC No.59/1997).

That notice is required to be served before the commencement of litigation or within 14 days after the filing of the suit in which the judgment was given.

On the other hand the appellant would have only proceeded under Section 10(4) of the Act to obtain a declaration to avoid the policy if the existence of the primary suit had been brought to its attention. See Blueshields Insurance Co.Ltd V Raymond Buuri M'Rimberia, Civil Appl.No.107/97.

I turn now to the second ground relating to the proof of the existence of the insurance cover. The only basis of the respondent's assertion that the appellant provided insurance cover to the motor vehicle in question is the certificate of insurance which was allegedly retrieved by one P.C.Ali Godana from the windscreen of the motor vehicle in question.

The same was produced by PW2, Francis Agesa who confirmed that he did not investigate the accident but merely certified the copy of the certificate. He therefore could not state with certainty where the certificate came from.

Although the certificate displayed on the motor vehicle need not disclose the name of the policy holder, the respondent was duty bound to link the certificate produced in the trial with the policy holder, the defendant in the primary suit. The duplicate of the certificate, according to Rule 6 of the Insurance(Motor Vehicles Third Party Risks) (Certificate of Insurance) Rules, 1999, is retained by the Registrar of Motor Vehicles.

This is what the respondent ought to have sought to link the appellant with the certificate instead of the letter to the officer in charge, Isiolo Patrol Base. There was absolutely no mention of the defendant in the primary suit. The truth regarding the certificate lay with him. He is the policy holder and although he did not take part in the primary suit, there was no evidence of any efforts made to get his input in the matter.

PW2 PC Francis Agesa confirmed that he personally certified the copy of the certificate of insurance from the original and that the original was taken back by the owner. He also talked of a police abstract form and the police file from which he learnt that the accident motor vehicle had been insured by the appellant. Both the police file and the abstract were not tendered in evidence.

From all the reasons stated I come to the conclusion that the respondent failed to demonstrate that the statutory notice was served upon the appellant and to establish a nexus between the certificate of insurance in question, the defendant in the primary suit and the appellant. Consequently I find that the learned trial magistrate misdirected himself in these matters and in the result, this appeal is allowed with costs to the appellant.

DATED AND DELIVERED AT MERU THIS 8TH DAY JUNE, 2007

W. OUKO

JUDGE