REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Appeal 746 of 2002

PHILIP KIMANI GIKONYO ……..……..…… APPELLATE

VERSUS

GATEWAY INSURANCE COMPANY LIMITED ….. RESPONDENT

(An appeal from the Judgment, decree and order of the Hon. Ms Maina, Senior Resident

Magistrate issued on the 6th of November 2002 in Milimani CMCC 9153 of 2001)

JUDGMENT

The material facts in this Appeal are not in dispute.

On 21st December, 1984 the Appellant, while walking lawfully along the Nairobi-Thika Road, was hit and injured by a motor vehicle registration number KTZ 301 owned and insured by Glass Fibre Reinforced Plastics Limited, and driven by its director and authorized driver, Jeremiah Gathirimu Gikonyo. He filed a suit in the Lower Court, and obtained Judgment, against the said Jeremiah Gathirimu Gikonyo in the amount of Shs.300,500/=. Being unable to recover the Judgment sum from Jeremiah Gathirimu Gikonyo, he filed a declaratory suit against the insurer of the motor vehicle, Gateway Insurance Company Limited, the Respondent herein. The Lower Court dismissed that suit holding that because the Judgment was against the insured's driver, and not the **insured** itself, the same could not be enforced against the insurer. Secondly, the Lower Court held that, the insurer had not been served the statutory notice required under Section 10(2) of the Insurance (Motor Vehicle Third Partys Risks) Act, Cap 405 (hereinafter "the Act").

According to the Lower Court, the "demand letter" sent to the insurer did not constitute "notice" under the Act, and that "the actual" notice was served long after the 14 day period stipulated in the Act.

Aggrieved by that decision, the Appellant has appealed to this Court, citing the following five grounds:

1. The learned trial Magistrate erred in Law and fact in holding that the judgment obtained against a director of the insured being an authorized driver could not be enforced against the Insurer of the subject motor vehicle.

2. The Learned trial Magistrate erred in Law and fact in holding that Jeremeiah Gathirimu Gikonyo as the authorized driver was not insured by the defendant.

3. The Learned trial Magistrate erred in Law and fact in holding that it mattered not for Insurance purposes that Jeremiah Gathirimu Gikonyo was driving the subject motor vehicle with the consent of

the Insured/owner.

4. The Learned trial Magistrate erred in Law and fact by failing to read the subject Motor vehicles Insurance Policy and contract as written thereby importing therein her own terms and conditions which guided her judgment in error.

5. The Learned trial Magistrate erred in law and fact in holding that a demand notice /letter or notification of accident are not statutory notices under the Provisions of Section 10 of the Insurance (Motor Vehicle Third Party Risks) Act, Cap 405 Laws of Kenya

re are essentially two main issues in this appeal:

(i) was the statutory notice required under the Act given within the time prescribed by the Act, and (ii) is the Judgment against the insured's authorized driver enforceable against the insurer?

With regard to the first issue involving the statutory notice, both Counsels agree that Section 10(2) (a) of the Act simply requires that "notice" be given to the insurer "of the bringing of the proceedings", but the Act does not stipulate the format of the notice. Here is what Section 10(2) (a) states:

"***10(2) (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 proceeding"***

So, what form should a notice take? It simply does not matter. A notice is a notice. The main purpose of a notice is to alert the insurer of a potential claim, a potential liability, so that the insurer can take steps to protect its interest by defending the action, investigating the same, attempting to settle the same and doing anything it wants to in order to protect its rights and interests. The notice need not be in any particular format, and with due respect to the Lower Court, there is nothing like an "**actual"** notice, or a "not-so-actual" notice. Any notice, howsoever given, as long as it sufficiently outlines the happening of an event giving rise to a claim under the insurance policy, is good notice under the Act. So, here in this case, **was such a notice given? In my view, most definitely it was.** It is not in dispute that the insurer was served with a copy of the demand letter dated 25th March, 1985 from the Appellant's advocates addressed to the insured Fibre Reinforced Plastics Limited. The insurer's witness, Mr. Washington Makau Kaveke, acknowledged this notice in his testimony before the Lower Court (see page 15 of the Record). However, the Lower Court rejected this as not being "**actual notice".** It was clearly wrong in doing so.

Secondly, and more importantly, is the Judgment against the insured's driver enforceable against the insurer?

Mr. Chege, Counsel for the Respondent, argued strongly that for an insurer to be liable there must be a Judgment against its insured. Here, the Judgment is against the insured's **driver**, but not the insured. He relied on Section 10(i) of the Act, and on the cases of ***Kenindia Assurance Company Limited v. James Otiende*** (1989) 2 KAR 162 and ***Kasereka v. Gateway Insurance Company Limited*** (2003) 2 EA 502.

Here is what the Court of Appeal said in the **Kenindia** case:

"***We have listened to both advocates and the authorities produced. The main body of s10(1) of the Insurance (Motor Vehicle Third Party Risks) Act Cap 405 is in our opinion clear. It says:***

'***If, after a policy of 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 may 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 thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.'

<u>It is common ground, and is indeed apparent from this record, that no judgment against the insured, that is to say Titus Otiende Midrah who is, or rather was, the second defendant in HCCC 4362 of 1988, has ever been obtained.</u>"(underlining provided).

Now, it is important to note that in the Kenindia case the claimant was an **employee** of the insured, not a third party, and therefore was an exception to the categories of the people required to be covered under Section 5 of the Act. The issue before that Court was one of "jurisdiction", that is, whether the High Court in the first place had jurisdiction to entertain a claim by an "employee" against the insurance company. And, of course, applying Section 5(b) (i), the Court held that there was indeed no Judgment against the insured capable of enforcement. That, indeed, is a very different situation from the facts in the case before this Court.

Here, the Appellant (Plaintiff in the Lower Court) was a third party in respect of whom it was mandatory to take out third party insurance covering the risk of death or bodily injury.

Section 5(b) of the Act states as follows:

"***5. In order to comply with the requirements of section 4, the policy of insurance must be a policy which -***

(b) insure such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of, or bodily injury to, any person caused by or arising out of the use of the vehicle on a road".

Clearly, Section 5(b) makes it mandatory for motor vehicle owners and/or operators to obtain third party cover for death or bodily injury to all persons, except for those categories of people specifically excluded such as employees or passengers. Therefore, the Appellant before this Court was one such person. Now, the next issue is whether there had to be Judgment **against the insured** in addition to a Judgment against his authorized driver. Let us go back to Section 10(1) of the Act. The critical words of that Section are

"***If…… judgment is obtained against any person insured by the policy ….the insurer shall ….. pay to the persons entitled to the benefit of the judgment ……..."***

So, then, who is a person "**insured by the policy"?** The answer to that question is found in the insurance policy itself.

Section 2 of the Respondent's insurance policy (page 30 of the Record) stipulates as follows:

"***In terms of and subject to the limitations of and for the purposes of this Section the Company will indemnify any Authorised Driver who is driving the Motor Vehicle provided that such Authorised Driver***

(i) shall as though he were the Insured observe fulfill and be subject to the Terms of this Policy insofar as they can apply

(ii) is not entitled to indemnity under any other policy"

The person "**insured by the policy" is any authorized driver** provided he shall **as though he were the insured** observe the terms of the policy.

It is not in dispute that the driver in this case was indeed the authorized driver. In fact, he was the director of the insured company, and if the insured's corporate veil was lifted, he would emerge as the insured.

So, if he is deemed to be the "insured" in accordance with the terms of the Policy, and the injured third party here, the Appellant, is a person "**entitled to the benefit of the Judgment"**, the inevitable conclusion is that the Appellant's Judgment against the insured's driver is **enforceable** against the insurer, the Respondent.

This conclusion is fortified by the learned authors of Halsbury's Laws of England, Third Edition, Volume 22 on page 360 (paragraph 740) as follows:

"***740. Rights under the policy of the permitted driver. A permitted driver is not directly a party to the original contract of insurance and, on ordinary common law principles of contract law, he cannot therefore have any right of action against the insurers on the policy, unless it is possible to show that the assured, when making the contract, intended to act as agent or trustee of the permitted driver. Frequently this is not possible, because the particular permitted driver was not, at that time, in contemplation at all. It is, however, now laid down by statute that insurers, if they issue a motor policy covering compulsorily insurable risks, are liable to indemnify any persons or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of those persons or classes of persons. <u>The permitted driver accordingly has a direct right of action within the ambit of this provision against the insurers</u>. He becomes, in effect, a party to the contract of insurance, but he must take the contract as he finds it; he cannot excuse a breach of a condition by pleading that he was quite unaware of its terms of existence". (underlining provided).***

I therefore find that the required notice was properly served upon the Respondent, within the time stipulated in the Act, and that the Lower Court Judgment is enforceable against the Respondent.

Accordingly, and for all the reasons outlined, I allow this Appeal, with costs to the Appellant, and set aside the Lower Court Judgment, and enter Judgment for the Appellant as prayed for in the Plaint dated 12th October, 2001. The Appellant shall also have the costs in the Lower Court.

Dated and delivered at Nairobi this 21st day of November, 2007.

ALNASHIR VISRAM

<u>JUDGE</u>