



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

Civil Case 981 of 2003

LALCHAND SHAH1ST PLAINTIFF

RAMBHA SHAH2ND PLAINTIFF

VERSUS

KENINDIA ASSURANCE COMPANY LTDDEFENDANTS

JUDGMENT

1: PROCEDURE

1. The suit before me is declaratory. The plaintiffs pray that this court declares that:

“The defendant is obliged to satisfy the judgment sum in CMCC no. 8455 of 2002 in the sum of Ksh.1,033,144 inclusive of costs and interest up to 25.7.03.”

2. Lalchand Shah and Rambhah Shah (the two plaintiffs herein) were involved in a self accident whilst travelling in a motor vehicle owned by M/s Kingsway Tyres and Automart Ltd and driven by Agusten Juma Madha. The plaintiffs successfully sued the latter two and obtained judgment in their favour. The insurance company according to law are never enjoined as a party in a tort suit. This is because the cause of action against an insurance company arises after liability and quantum has been determined by a court of law. All the party suing requires to do before trial is to issue a statutory notice to the insurance company to notify them that a suit will be filed against their insured where the tort case is finalized and there are no pending appeals, review application and any issues, the insurance company on behalf of its insured would be obliged to pay. If it fails to do so, the plaintiffs are to file a declaratory suit in the High court seeking for the court to pronounce that they are owed the award.

3. In this case, the two plaintiffs had been given a lift in the motor vehicle Reg. KAE 740P which was insured by the defendants. The journey was from Mombasa to Nairobi when the said vehicle was involved in a self accident (due to a defect to the vehicle). The two plaintiffs originally filed suit in the High Court of Kenya Hccc976/00 when the enhancement of the monetary jurisdiction of the subordinate courts was given from Ksh.500,000/- to Ksh.3 million the plaintiffs transferred the High court suit to the subordinate courts. The case was duly heard and determined.

4. In the said hearing the defendant engaged the services of M/s Riunga Raiji & Company

advocate who participated in the conduct of the trial on behalf of the defendant. This included the examination of the two plaintiffs by their medical doctor although M/s Riunga Raiji & Company may have been instructed by the defendants, they would represent M/s Kingsway Tyres and Automart Ltd and another on behalf of the defendants. I was not given the proceeding of the lower court case but a judgment of the court was supplied. The plaint and defence was on the file. In the said case the defence was maintained at all times that there was “no negligence by their insured.” In the alternative, the accident was “inevitable” that is, an act of god. The trial magistrate held that there was no evidence called to disapprove negligence. Applying the principle of Res Ipsa Loquitur, the trial magistrates found liability against M/s Kingsway Tyres and Automart Ltd.

5. It is an admitted facts that there was a subordinate court case involving the two plaintiffs and defendants insured.

That there (was) no appeal nor setting aside of the decision in CMCC 8455/02.

6. When the plaintiff prayed in their declatory suit to have their judgment satisfied, the defendant entered appearance and filed defence (although this was in issue but the same was settled by Nyamu, J (25.3.04) an attempt to struck out the defence was refused by Kubo J (25.2.05). The position taken by the two judges was correct.)

7. The issues for determination was narrowed down. It was therefore not disputed that the defendant was the insurer of motor vehicle KAE 740P on the 10.6.99. That a judgment was obtained from the subordinate courts in which the defendants herein participated. What was disputed was:-

- “i) Whether the defendant was served with a statutory notice envisaged under Cap.405 Laws of Kenya
- ii) Whether the defendant is obliged to satisfy the decree in RMCC 8455/02 in favour of the plaintiff.
- iii) Whether the plaintiff is entitled to costs.”

8. The statement of defence dated 4.11.03 and filed on the 7.11.03 stated that:-

“I) The defendants avers that it is a stranger to the allegations contained in paragrah 4 and 5 of the plaint and avers further that it was not a party to the alleged civil suit 8455/02 hence the contents of the said paragrah are denied in entirety and the plaintiff is put to strict proof thereof.

ii) Further to the foregoing and without prejudice thereto the defendant avers that if indeed any judgment was entered in Civil Suit 5053 of 95 as alleged or at all which is denied the defendant was never notified of the same and the plaintiff is put to strict proof of allegations to the contrary.

iii) In the alternative and without prejudice to the foregoing the defendant avers that if at all there was hitherto any insurance policy in respect of motor vehicle KAE 740P which is still denied the said policy was no longer binding on the defendant on the material date herein as the defendant had repudiated liability against all claims in respect of the said motor vehicle and had communicated its position above to the said owner of the motor vehicle Registration Number KAE 740P aforesaid and the plaintiff is put in strict proof of allegations to the contrary.

iv) The defendant denied being served with any demand notice and/or notice of intended prosecution and the plaintiff is put to strict proof thereof.”

9. Though the issues have been narrowed down, I wish to just touch on the defence as per the above paragraphs.

From the records of this file and from the judgment of the subordinate courts the defendants had participated in the lower court trial through their advocate M/s Riunga Raiji & Co. Advocates this now is no longer an issue. The next paragraph of the defence deals with Civil suit 5053/95. There is no where in

the plaintiff that mentions this case and none of the parties mentioned this case number within the trial. It may perhaps have been a typographical error. The next paragraph of the defence above deals with repudiating liability by the defendant on the grounds that the policy is no longer binding. This was never a defence in the lower subordinated court case. I am not quite clear why it has been raised at this stage in the defence. The plaintiff's advocate stated that if the insurance company wished to repudiate the liability they only needed to file a declaratory suit stating so but had not done so.

10. From the evidence before the court the advocate for the defendant in cross – examining the plaintiff witness tried to state that the notice insured to the defendants was defective. The policy number was different and the name of the defendant was not Kenindia Insurance Co. Ltd but Kenindia Assurance. It transpired from the documents put in by the witnesses that the M/s Kingsway Tyres and Automart Ltd had changed their policy by having a “policy endorsement advice.” This advice, which was effective from 1.6.99 stated that:-

“The policy [be] extended to cover legal liability to 2 passengers per vehicle sitting in front cabin and the limit of liability is reinstated as under:-

- i) In respect of death or bodily injury to any person . . . 2 m
- ii) In respect to series of claims arising out of the event . . Ksh.6 m
- iii) In respect of any other person unlimited in consequence of the above an extra premium amounting to Ksh.4409/- is hereby charged.

All other terms and conditions remain unaltered.”

Nine days later the plaintiff had the accident. They would of course not have been covered if the above policy changes were not made. They were passengers and not employees presumably of the insured. The issue of repudiation was not taken up during this trial of this present case.

11. The last relevant matter, which is also an issue for determination is the defense denying there was a demand notice and or intended prosecution. The issues was:-

“whether the defendants were served with a statutory notice envisaged under Cap.405, laws of Kenya?

The plaintiff stated that they did issue the notice and produced Ext.P2. This notice was dated the 26.6.00 the same date when the plaintiff was filed.

It most certainly is wanting in form and the typographical error of description of the Kenindia Assurance Co. Ltd being wrong. The defendant's advocate state proof of service most certainly was required. The document notice read as follows:-

Notice under Cap.405

Laws of Kenya

To. Kenindia Insurance Co. Ltd

Kenindia Insurance House

Loita Street

Nairobi – Ref/P/No:0/080/11/0/024/1778

Take notice that the plaintiff herein has instituted this suit against the driver and owner of motor vehicle KAE 740P which was involved in a road accident on 10.6.99 along Nairobi/Mombasa road

causing injuries to the plaintiff. This notice is served upon you as the insurance of the motor vehicle in accordance with the provisions of the law.

Dated at Nairobi this 26th day of June 2000

Signed

Malonza & Co.

Advocates for the plaintiff

12. If indeed the issue is that the defendant were never served with the notice, this should have been taken up as a preliminary objection in the subordinate courts trial. The suit would have been struck out until there was compliance. The evidence from the lower court is that the defendant had sent an advocate to represent their interest. The two plaintiff were examined by the defendants doctors. The defence in that trial was that there was no negligence. The accident was inevitable, an act of God. It may be true that the police numbers differed but this may also have been due to the policy endorsement advice. In either case the effect of participating in the trial is a waiver to the defence that the said statutory notice was never served on them. The defendants action of not raising this point through the 1st trial does not give them a defence in this suit on the grounds of waiver of their rights.

13. I would therefore find that a notice had been issued albeit wanting in form. That the defendants waived their rights when they engaged an advocate who did not take this issue as a preliminary object. The explanation can only be that it was not objected to.

14. I enter a declaratory judgment in favour of the plaintiff against the defendants as per the trial magistrate judgment namely;

That a declaration be and is hereby entered for the plaintiffs against the defendant jointly and severally to satisfy the judgment in CMCC8455/02.

Lalchand Shah plaintiff No.1

Rambhar Shah plaintiff No.2 Versus Kingsway Tyres and Automart Ltd – defendant No.1

Agusten Juma Madha – defendant No.2

I: General Damages: Pain and suffering

Plaintiff No.1 Ksh.120,000/-

Plaintiff No.2 Ksh.200,000/-

II: Special Damages Ksh491,014/-

Total Ksh.811,014/-

The cost of the suit awarded to the plaintiff. Interest on General Damages from the date of judgment. Interest on Special Damages from the date of filing suit.

A 30 days stay had been allowed as from 25..2.03.”

I award the costs of this declaratory suit to the plaintiff.

Dated this 2nd day of June 2005 at Nairobi.

M. A. ANG'AWA

JUDGE

Malonza & Co. Advocates for plaintiff

Okundi & Co. Advocates for the defendant