REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO.763 OF 2001

UNITED INSURANCE CO. LTD:::::::::::::::::::::::::::::::::::: APPELLANT

VERSUS

LAWRENCE RUTHI MWANGI :::::::::::::::::::::::::::::::::::: RESPONDENT

JUDGMENT

The Respondent filed a claim in the lower Court against the Appellant seeking Judgment as follows:

> **"(a) A declaration that the defendant is liable to satisfy the decree agains t its insured Boniface Mbugua Nuthu.**
>
> **(b) A judgment be entered against the defendant for the said decretal sum of Ksh l82,586.00 together with costs and interest from June 22, 2000 until payment in full."**

In his statement of claim, the Respondent averred that the Appellant was the insurer of motor vehicle registration number KAB 895 Q owned by one Boniface Mbugua Nuthu. I shall hereinafter refer to that motor vehicle as "the offending motor vehicle." According to the Plaint, the offending motor vehicle caused a collision with another in the course of which the Respondent was injured. The Respondent sued Mr. Nuthu in SPMCC No.6281 of l997 and obtained Judgment for Kshs 151,166.00. He sought to have that Judgment and other costs and interest satisfied by the Appellant under Section 10(2) of the Insurance (Motor Vehicles Third Party Risks) Act (Cap 405) (hereinafter referred to as "the Act").

The Appellant filed defence to the action in the lower Court in which it denied the Respondent's claim.

The Respondent did not think that the Defence was worthy and applied to have it struck out and at the same time sought Judgment to be entered for him as prayed in the Plaint. From the record of the lower Court that application was filed on July 27, 2001 and was served upon the Appellant's Advocates on July 30, 2001. It was slated for hearing on September 27, 2001. Again the record of the lower Court shows that at the hearing of the application on September 27, 2001 the Respondent's Counsel prosecuted his application and took objection to the Appellant's Replying Affidavit which was served on him the same day. Indeed it was filed on that same day before the hearing. It is only then that Mr. Wamalwa applied for leave to be allowed to file the affidavit out of time. That application was refused by the Court. There is no appeal against that refusal. That being so that the Respondent's application proceeded without any affidavit from the Appellant challenging the Respondent's case.

After considering the application before her, the supporting affidavit and the rival submissions of the Advocates for the contending parties, the Learned Magistrate of the Court below allowed the Respondent's application and in the process delivered herself thus:

"I have considered both submissions defence and no doubt defendant in RMCC was represented by a Counsel appointed by his insurer who is the current defendant….. issues being raised in the defence and Replying Affidavit ought to have been raised and canvasse d in RMCC 6281/97. Having been represented by a firm of Advocates of their choice, instructed by them, Defendant/Respondent herein cannot be heard to turn round and make denials now….."

The Appellant was aggrieved by that decision and appealed to this Court. The appeal was premised on six grounds set out in the Memorandum of Appeal as follows:

"1. The Learned Magistrate misdirected herself on the evidence and the applicable law.

2. The Learned Magistrate considered and decided the case against the Appel lant by reference to matters which were neither proved in evidence nor manifests from the evidence on record

. 3. That the Learned Magistrate failed to weigh matters adduced in evidence and made findings therein not supported by the weight of evidence adduc ed or by any evidence.

4. That the Learned Magistrate failed to find and should on the material on record have found that there was no conclusion of evidence of a policy of Insurance by the Defendant.

5. That the Learned Magistrate misdirected herself on the evidence the applicable law and arrived at erroneous conclusions.

6. That the Learned Magistrate misapprehended misconstrued and misapplied the applicable law ."

The Appellant, therefore, sought the following orders from this court:

"**(a) That the whole o f the Judgment and order of Mrs Ngare Resident Magistrate dated 11 th October, 2001 be set aside.**

(b) The Respondent's application dated 3 rd August 3001 be dismissed.

(c) That the Respondent be condemned to pay costs of and incidental to this app eal and the application dated 3 rdAugust 2001".

At the hearing of the Appeal, Mr. Oonge for the Respondent sought to have the appeal rejected on the ground that the Judgment sought to be set aside did not exist. Indeed it is correct that there was no Judgment or Order made on October 11, 2001. In the face of this objection, Mr. Wamalwa for the Appellant chose not to say anything. That was unfortunate as he offered no guidance to the Court on that issue. I am, however, reluctant to decide the appeal on this narrow and technical point. It is obvious from the record that there is only one decision of the lower Court which was being appealed from. The error in the date it was made is a minor one. The Respondent was not misled about the decision which was the subject of this appeal. The conduct of the appeal by his Counsel is testimony to this.There is no possible prejudice which will be occasioned to him if the default is ignored and the Court proceeded to consider the appeal on merit. In any event Order XLI Rule 27 of the Civil Procedure Rules empowers this Court to make such order as the circumstances of the Court may require. Employing that power and the inherent jurisdiction of the Court and in an effort to meet the ends of justice, I Order that the appeal shall proceed on the basis that the decision appealed against is the one dated October 2, 2001 and hereby direct that the Memorandum of Appeal be and is hereby amended appropriately to show as much.

I now proceed to consider the appeal on its merits. As was seen earlier, the Respondent's application for striking out of the Appellant's defence was not controverted by any affidavit evidence from the Appellant. The Appellant's Replying Affidavit was rejected for having been filed out of time and this

appeal does not refer to that refusal.

In his affidavit in support of his application, the Respondent said that before filing the primary suit against Mr. Nuthu, his Advocates gave the Appellant a Statutory Notice of Intention to institute action against Mr. Nuthu. When the suit was finally filed, the Appellant instructed a firm of Advocates to act for the said Mr. Nuthu which was done. He also annexed to his affidavit a police abstract showing that the Appellants were the insurers of the offending motor vehicle. That being the case I do not think that Mr. Wamalwa's criticism of the Magistrate of the lower Court is fair. Mr. Wamalwa attempted to split hairs by arguing that the notice referred to a different date from the date given in the Plaint. This is a very minor issue. The notice referred to an accident having occurred on December 12, l996 while Plaint in the primary suit and the suit against the Appellant referred to an accident on December l3, l996. Either way, the Appellant has not shown that once it received that notice it either commenced before or within three months of the primary suit an action for a declaration that it was entitled to avoid the policy on grounds of non-disclosure of material facts or false representations and that it had given the Respondent notice of its intention so to do according to Section l0(4) of the Act; or that it sought clarification as to the proper date of the accident. In my view, once Judgment was entered in the primary suit –which was defended on the instructions of the Appellant, the Magistrate of the lower Court was entitled to hold as she did that the Appellant could not seek to present a different version of things only because it was then faced with a risk of being called upon to satisfy the Judgment obtained in the primary suit against its insured.The Appellant by its conduct was estopped from denying the existence of insurance of the offending motor vehicle. What more proof was required when that had been shown by the police abstract and affirmed by the Appellant's own conduct?

Mr. Wamalwa also argued that once the defence was struck out, the Court ought not to have entered Judgment but set the case down for formal proof since this was a declaratory suit. In his words, he said that since "this was a declaratory suit ….(when) the defence is struck out, it is not automatic that "declarations" follow". He referred the Court to the cases of Grant V Knaresborough Urban District Council (l928) 1 Ch.311 an d Wallersteiner V Moi (l974) 3 All ER 217 to augment of his submission that the Court was bound to hear evidence of proof of insurance. I have already said that there was proof of this and there was nothing more left to investigate flowing from the Appellant's defence in the Court below. Those authorities do not, as was properly pointed by Mr. Oonge, support Mr. Wamalwa's case.

In the result, I do not find any sufficient ground to entitle me to interfere with the finding of the lower Court and I hereby dismiss the Appellant's appeal with costs and affirm the decision of the lower Court.

Dated and Delivered at Nairobi this 11th day of February, 2004

ALNASHIR VISRAM

JUDGE