REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU
CIVIL APPEAL NO. 75 OF 2001

UNITED INSURANCE COMPANY LIMITED …...……..…..APPELLANT

VERSUS

MUCHERU KARANJA (suing as the legal

Representative of JOHN NDINGURI MUCHERU…...…….RESPONDENT

RULING

This appeal raises one issue only namely, the liability of an insurer under the Insurance (Motor Vehicles Third Party Risks) Act (Cap. 405) to settle decrees passed against its insured. Before considering that issue, it is necessary to set out the matters leading to the appeal.

The Respondent filed suit in the Lower Court against the Appellant seeking a declaration that the Appellant was liable to pay Kshs. 163,910/= to the Respondent. The Appellant is an insurer. It was alleged in the Plaint that the Appellant had insured motor vehicle registration number KAG 251C which was involved in an accident and caused fatal injuries to John Ndinguri Mucheru (Deceased).

The Respondent brought an action in the lower Court being NAKURU CMCC NO. 2280 of 1997 (hereinafter referred to as "the primary proceedings") against the Appellant's insured. It was further alleged that upon commencing the said proceedings, the Respondent issued or caused to be issued a notice pursuant to Section 10 (2) of Cap. 405 to the Appellant. Although the issuance of a notice was denied, the Appellant admitted in its Defence to the claim in the lower Court that it defended the primary proceedings. What appears to have been the main dispute was whether the risk leading to the claim in the primary proceedings was *"a risk insured (by the Appellant … under Cap. 405."* The Appellant further averred in its Defence that "*the Deceased was a tout in the insured motor vehicle, a class of person that is expressly excluded from the realm of cover under the policy."* At some point, the Respondent filed an application under Order XXXV Rule 1(1) (a) and 2 of the Civil Procedure Rules seeking Summary Judgment for the sum claimed in the Plaint. The application for Summary Judgment was supported by the affidavit of Robert Mungai Mbugua Advocate sworn on September 29, 1999 in which he said that Judgment on liability in the primary proceedings was entered by consent. The application for Summary Judgment was countered by the Replying Affidavit of Isaac Wamaasa Advocate sworn on November 10, 1999 in which he said that there was evidence in the lower suit which showed that the Deceased was in the course of his duties as a conductor when the accident occurred. He went on to say that he had been informed by a Mr. Mburu of the Appellant company that the Insurance Policy did not cover the insured's employees. This allegation was answered by the Replying Affidavit of the Plaintiff sworn on February 1, 2000 in which he denied that the Deceased "*was a tout at the time of the accident"*. When the application came up for hearing, the learned Magistrate said as follows in favour of the Respondent:

> *"I believe the defendant (sic) does not raise any new matter but is meant to delay justice. I strike it out with coss (sic) and declare that the respondent herein pay the amount awarded for Plaintiff in former suit at Kshs. 163,910 plus costs of this application and interest."*

It would appear that at the hearing of the application, argument was led on the competency of the defence – that it had been signed by a legal person who cannot sign defences. This was not a ground upon which the application was based and I do not understand why it was raised and considered by the learned Magistrate. In any event, it was agreed that a legal person cannot sign defences. It is not possible that the

Appellant can sign defences. The only consistent thing in the circumstances is that the Appellant's defence was signed by its agent. In any event, this is a minor issue which the learned Magistrate appears to have treated as much.

Now going to the real issue, I will say as follows: The Appellant disputes having been issued with the relevant statutory notice but does not explain how it comes that it took it upon itself to defend the primary proceedings in which liability was settled by compromise. I also do not think that it lies in the Appellant's mouth to say that the liability in the primary proceedings was not one covered by the terms of the policy. If that were so, the Appellant would not have defended them. When they chose to defend that action, they, by that conduct, represented to the Respondent that that liability was one which was covered under the policy and they are estopped from stating otherwise. In fairness to Counsel and for conclusiveness of record, I would like to state that I have looked at the two cases of Blueshield Insurance Co. Ltd. v. Raymond Buuri M'Rimberia Civil Appeal No. 107 of 1997 and Industrial and Commercial Development Corporation v. Daber Enterprises Ltd. Civil Appeal No. 41 of 2000 cited before me but I do not think that they affect differently the decision I have come to.

Although the learned Magistrate did not consider every detail of the arguments placed before her, I have reviewed the case and I am satisfied that she nevertheless came to a correct decision and nothing useful will be achieved by disturbing it.

I, therefore, dismiss this appeal with costs.

Dated and Delivered at Nakuru this 30th day of July, 2003.

ALNASHIR VISRAM

JUDGE