REPUBLIC OF KENYA

HIGH COURT AT KISUMU

Civil Appeal 242 of 2002

KENINDIA ASSURANCE CO. LTD……...…APPELLANT

=VERSUS=

PASCAL JUMA OJIAMBO…….RESPONDENT

JUDGMENT

This is an appeal from a ruling and decree of the Senior Principal Magistrate's Court Kisumu SRMCC no. 676 of 2002 delivered on 11th December, 2002.

On 12th December, 1998, Pascal Juma Ojiambo, the respondent, in this appeal sustained some injuries as a result of a road accident along Busia - Kisumu road at Otonglo involving Motor Vehicle reg. no. KAH 939 P. Thereafter he brought an action in Kisumu Chief Magistrate's Court registered as SPMCC no. 148 of 2001 against Joseph Ochieng Osewe and Yakub Osman Abba who were the driver and the owner respectively of the said vehicle.The case was eventually tried and at the end it was found that the driver's negligence caused the said accident. He was therefore found liable and the owner of the vehicle was held to be vicariously liable to the respondent, who was awarded general damages assessed at Ksh 120,000/= and the costs were agreed at Ksh 24,560/=. The resultant decree in that case does not appear to have been satisfied by the defendants and that that forced the respondent to once again file another suit registered as Kisumu CMCC no. 676 of 2002 against M/s Kenindia Assurance Co. Ltd, the appellant, herein which was the insurer of Yakub Osman Abba the owner of motor vehicle registration no. KAH 939 H involved in the said accident seeking a declaration that the appellant was under an obligation to satisfy the decree in Kisumu CMCC no. 148 of 2001. The appellant filed a defence denying that it was bound to satisfy the said decree as claimed by the respondent. Thereafter the respondent applied for an order to strike out the appellant's defence on the ground that it was sham and did not raise triable issues. That application was duly heard by Senior Principal Magistrate and by a ruling of 11th December 2002, the said defence was struck off and judgment was entered for the respondent against the appellant as prayed in the plaint. That prompted the appellant to lodge this appeal. In its memorandum of appeal the first 3 grounds were as follows:-

1. "That the Learned Senior Principal Magistrate erred in law and in fact in ruling that the appellant had covered one Yakub Osman Abba for the accident for which the later had been found liable in Kisumu CMCC no. 148 OF 2001;

2. The Learned Senior Principal Magistrate erred in law and in fact in ruling that the question whether the plaintiff in Kisumu no. 148 of 2001, belonged to a class of persons the liability to whom the appellant had covered one Yakub Osman Abba;

3. The Learned Senior Principal Magistrate erred in law and fact in assigning liability for the decree in Kisumu CMCC no. 148 of 2001 to the appellant when no facts existed to support such a finding."

In his submission, Mr Kopot for the appellant contended that the Learned Magistrate made errors of fact and law and wrongfully exercised her discretion under Order VI rule 13 (1) by striking out the appellant's defence. He further contended that for a liability to arise under Section 10 of Cap 405, the Court must first find as a preliminary issue that the defendant had in fact covered the person for whom liability is found in the parent suit as laid down under Section 5 (b) of Cap 405 and that the Court must refer to the policy document before making the decision. According to Mr Kopot, the policy which existed at the time of the said accident between the appellant and Yakub Osman Abba the defendant in Kisumu CMCC no. 148 of

2001 which is the parent suit stipulated that it did not cover the use of the vehicle for "hire, racing, and pacemaking". It was Mr Kopot's further submission that the vehicle was used for hire at the time of accident and hence Yakub Osman Abba could not be called as a person specified in the policy as having been insured in terms of Section 5 (b) of the said Act for the reason that the use was excepted. The Court according to Mr Kopot, ignored that fact even when the defence had raised it and proceeded to claim that the appellant had not repudiated its liability. He asserted that assignment of liability cannot be based on repudiation or non repudiation of liability as the defendant in the parent suit was not a person who was insured and hence there was no contract. Mr Kopot submitted that in the Civil Appeal no. 107 of 1997 - Blue shield Insurance Co. Ltd -vs- Raymond Buuri M' Rimberia the Court of Appeal had stated that the Court could proceed in the way it did if it was satisfied that there was liability covered by the terms of policy under Section 5 (b) of the Act. He claimed that in the M'Rimberia case there was no denial of liability while the appellant in this case had denied it.

Anne Omollo (Ms) for the respondent opposed the appeal contending that the Learned Magistrate was correct in her ruling by striking out the appellant's defence and entering judgment against the appellant and that the appellant was therefore bound to satisfy the decree in Kisumu CMCC no. 148 of 2001. She contended that the facts of the Blue Shield Insurance case were very similar to the facts in the present case. She added that in M'Rimberia case liability had also denied by the Blue Shield Insurance but the Court rejected it and that in this case the appellant cannot rely on Section 5 (b) of the Act if it had not complied with Section 10 (4) of it. According to Anne Omollo (Ms) the Learned Magistrate correctly held that the dispute between the Insurance Company and the insured could not affect the injured party. She also contended that the Magistrate correctly held that there was no triable issue in this case.

As stated above, the appellant's gravemen in this appeal is that it was held liable to satisfy a judgment against the insured when his vehicle was used at the time the accident for duties not covered by the policy in force and as such it was not bound to satisfy the judgment against the insured in the parent suit. In paragraph 7 of its defence in Kisumu CMCC no. 676 of 2002 which defence was struck out on 11th December, 2002 the appellant had pleaded that the policy no.

113/080/11/01303/19997/12 in which it had insured Yakub Osman Abba the owner of the motor vehicle registration no. KAH 939 P between 2nd January, 1998 and 31st December, 1998 had specially excluded liability for injuries caused to the third parties as a result of the vehicle being used for hire and reward. It was further pleaded therein that the appellant had sustained injuries on 12th December, 1998 when he boarded the said vehicle at the time it had been hired out for transportation of fish which did not belong to the insured contrary to the provisions of the policy. It was urged that at the time of the accident the insured was not a person specified in the cover as having been insured in terms of Section 5 (b) of Cap 405. The Senior Principal Magistrate in her ruling of 11th December, 2002 was not convinced with that claim and accordingly she held that there were no triable issues raised by the defence. In striking out the appellant's defence the Learned Magistrate relied in the decision of the Court of Appeal in the Civil Appeal no. 107 of 1997 between Blue Shield Insurance Co, Ltd and Raymond B. M'Rimberia. In that case the appellant Insurance Company had issued a policy cover for a motor vehicle for commercial activities which expressly excluded liability to passengers. However, during the period the policy was in existence the respondent's wife travelled as a passenger in the said motor vehicle when it was used as a matatu but unfortunately the vehicle got involved in the accident as a result, she sustained fatal injuries. Thereafter the respondent on his own behalf and of their children sued the insured for damages under the Law Reform Act and the Fatal Accident Act. The appellant was duly served with a statutory notice of bringing of proceedings to Court under Section 10 (2) (a) of Cap 405. However, the appellant also sued the insured seeking declaration that it was entitled to avoid the said policy for non-disclosure of material facts and that it was not liable to satisfy any claims by third parties in respect of the said policy. Though the insured filed a defence the case was not set down for hearing and no declaration in terms of the prayers of that suit were obtained but the respondent prosecuted his suit against the insured and obtained judgment. Thereafter the respondent sued the appellant in another case seeking a declaration that it was bound to satisfy the said judgment against the insured. The appellant filed a defence to it but the respondent brought on application under Order VI rule 13 (1) (b) (c) and (d) of Civil Procedure Rules seeking an order to strike out the said defence as being frivolous, vexatious and an abuse of the process of the court and that judgment be entered as prayed. The trial Judge found that there were no triable issues

which could entitle the case to go to trial. He ordered that the said defence be struck out and he entered judgment as prayed. The appellant lodged an appeal against the striking out of its defence but the Court of Appeal dismissed it.

Having carefully examined the facts of the M'Rimberia's case and those of this case, I find that they are on all fours. As the decision in that case was made by the Court of Appeal this Court is bound by it. I also find that the contention of Mr Kopot that the court is bound to carefully look at the policy and find as a preliminary issue that the defendant is in fact a person for whom liability is found in the parent suit cannot be correct. It appears to me that the spirit of Cap 405 is that all third parties have to be covered by the insurance policies before the vehicles, can venture into the road. Where an accident occurs involving the vehicle of the insured person and a third party is injured, the onus is upon the insurance company to obtain a declaration of it in Court of avoidance of liability where the insured was not covered. In the present case the denial of liability in the defence was not sufficient; the appellant ought to have obtained a declaration in terms of Section 10 (4) of the said Act. In the result, I dismiss the appeal with costs.

Dated 9th December 2003 and delivered this 10th December 2003

In the presence of Mr. Wanga for Mr. Kopot for appellant and Anne Omollo (Ms) for the respondent.

B. K. TANUI

JUDGE