



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL 331 OF 1997

BLUE SHIELD INSURANCE COMPANY LTD.APPLICANT

VERSUS

ABRAHAM K. NDEGWARESPONDENT

JUDGMENT

This appeal arises from a summary judgment entered for the plaintiff-respondent, against the defendant-appellant on 14th November 1997.

According to scanty information on this record regarding Senior Resident Magistrate's Civil Case Number 6318 of 1996, the plaintiff-respondent was on 18th May 1996 traveling in motor vehicle registration number KMS 783 owned and driven by one George

Ngotho Mbugua when it was involved in an accident in which the respondent was injured.

He filed civil suit indicated above against and the court found the driver and owner of the motor vehicle negligent and awarded the respondent damages. Some correspondence was exchanged between the owner of the motor vehicle and the respondent over the payment of the decretal sum but when this was not forthcoming the respondent filed a declaratory suit against the appellant and it is the result of this case which is the subject of this appeal.

What happened in that case was that though the appellant filed a defence denying liability this defence was struck out on 14.11.97 when the respondent through counsel, filed an application to this effect on 13th October 1997. Thereafter summary judgment was entered for the respondent against the appellant, hence this appeal. The main ground of defence which was struck out and on which this appeal hinges is whether the respondent was a fare paying

passenger, hence covered by Chapter 405 of the Laws of Kenya – See grounds 3,4 and 5 of the Memorandum of Appeal. This is what counsel for the appellant stressed when he argued the appeal on 5th June 2002.

Counsel recited the statement of the defendant in the primary suit and likened and respondent in this appeal to a private passenger who was not using the motor vehicle for hire having hiked a lift from the owner of the motor vehicle to be taken to his place of work. That he had no right of action against the insurance company for lack of privity of contract between the two. Counsel referred the case of *Kayaija V*

New India Assurance Company Ltd. [1968] EA 295 and the proviso (ii) to Section 5 of Chapter 405 Laws of Kenya. He repeated that a passenger being carried in a private vehicle cannot directly sue the insurance company even if negligence is shown to exist.

Counsel for the respondent opposed this appeal and said his client was a fare paying passenger hence entitled to bring the suit subject to the appeal.

According to him, the appellant had defended HCCC No. 6318 of 1996 where the defence was struck out and judgment entered in favour of the respondent.

That the court had found that the appellant had been served with a statutory notice and acknowledge but took no steps to make an application to be exempted from liability; hence was not estopped from raising the issue on appeal. That though the appellant had denied insuring the motor vehicle involved in the accident, the court found it hard and the defence found to be full of untruths. That infact after the primary suit was concluded the appellant agreed to satisfy the full amount and never disputed it and the court in the declaratory suit took notice of all these admissions and this is why the defence was struck out.

Counsel stated that the respondent had a statutory right to bring the suit subject to this appeal and prayed for this appeal to be dismissed with costs. When counsel were submitting on this appeal it came out that infact the decretal sum had already been paid and that the appellant did not need its refund even if the appeal succeeded but was only

concerned with whether the respondent was the correct party to sue it in the declaratory suit, in which case if the appeal succeeded the appellant needed refund of costs paid in relation to the declaratory suit.

From the letters from the appellants counsel in the primary suit dated 18th August 1997, 26th August 1997 and 5th September, 1997 to counsel for the plaintiff and which gave rise to the striking of the defence and entry of judgment in the declaratory suit, all indications are that the appellant took part in the primary suit and acknowledged that the respondent was properly in court as a paying passenger – entitled to the payment of the decretal sum awarded in that suit. If then, as he did, the respondent filed the declaratory suit simply to enforce what the appellant had already agreed to pay, he cannot now be accused of being in court improperly. The learned magistrate entered judgment in the primary suit on the basis that the respondent was a paying passenger because, according to the letter by counsel for the appellant dated 18th August, 1997, liability had not been denied.

In that event, a defence filed to the declaratory suit to allege that the respondent was not a paying passenger in the accident

motor vehicle was an afterthought and cannot be proper subject of this appeal.

If counsel for the appellant would wish to have court interpret the proviso to Section 5 of Chapter 405 Laws of Kenya then the best way out is to use the provision of Section 60 of the Civil Procedure Act.

Otherwise I find this appeal unmerited and dismiss it with costs.

Delivered this 18th day of June 2002.

D.K.S. AGANYANYA

JUDGE