Ambasa v CIC Insurance Co Limited (Civil Appeal 68 of 2019)
[2024] KEHC 8527 (KLR) (Civ) (8 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8527 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 68 OF 2019

DKN MAGARE, J

JULY 8, 2024

BETWEEN

TIMOTHY AMBASA ..... APPELLANT

AND

CIC INSURANCE CO LIMITED ..... RESPONDENT

([Being an appeal from the Judgment of Hon. M.W. Murage (RM) in Nairobi CMCC No. 2377 of 2017, delivered on 16th January, 2019)

JUDGMENT

1. This appeal arises from the Judgment and decree of M.W. Murage, Resident Magistrate delivered on 17/1/2023 in Milimani CMCC No. 2377 of 2017.

2. The Appellant was the Plaintiff. He lodged the Memorandum of Appeal dated 12/2/2019 on the following grounds:

    a. The leaned magistrate erred in holding that the Defendant was not liable and dismissing the Plaintiff's suit yet the matter was a declaratory suit and the Respondent insured the accident motor vehicle.

    b. The learned magistrate erred in disregarding the evidence of the Appellant.

    c. The learned magistrate erred in failing to consider the submissions of the Appellant.

Pleadings

3. In the Claim dated 10/2/2017, the Plaintiff sought a declaration that the Appellant is bound to indemnify the Respondent in the sum of Kshs. 4,215,223 or up to the amount provided by law with costs and interest.

4. The suit arose from judgement in the primary suit which was stated to have arisen from a road accident that occurred on 29/11/2006 when Respondent's insured motor vehicle registration number KAC 703B was so negligently driven that it knocked down the Appellant.

5. The Appellant consequently filed the primary suit in Milimani CMCC No. 2015 of 2007 in which Judgement was entered for the Plaintiff as against the insured defendant, one Vincent Kamau Njuguna at Kshs. 3,907,200/- plus costs and interest totaling Kshs. 4,215,223/-.

6. The Respondent filed a defence to the suit on 9/6/2017 denying the averments in the plaint. The Respondent was categorical in its defence that it was not issued with a statutory notice and that the defendant in the primary suit, one Vincent Kamau Njuguna did not have a valid insurance cover.

Evidence

7. The Appellant testified as the Plaintiff, PW1. He relied on his witness statement and bundle of documents dated 10/2/2017 which he produced in evidence. It was his stated case on cross examination that the statutory notice had no stamp of the Respondent. That the police abstract showed that Vincent Kamau Njuguna was the insured and as such he sued him. Further, that he had never heard of Teresia Njeri Nuguna.

8. On the part of the Respondent, they called DW1 one Lydia Wairimu Mwangi, the Claims Manager in charge of legal. She relied on her witness statement dated 30/8/2017.

9. It was her testimony that the policy holder was Teresia Njeri Njuguna. That they had never received a statutory notice and were not aware of the accident herein. On cross examination, it was her case that the accident motor vehicle was insured by the Respondent.

Submissions

10. The Appellant filed submissions dated 29/9/2023.

11. It was the submission of the Appellant that the Appellant served the Respondent with a statutory notice and the learned magistrate erred in her finding that the statutory notice was not served as required under Section 10 (1) of the Insurance (Motor vehicle Third Party Risks) Act.

12. Reliance was placed on the cases of Jason Ngumba Kagu v & 2 Others v Intra Africa Assurance Co Ltd (2014) eKLR and Ngiri v Africa Merchant Assurance Co. Ltd (2022) eKLR to canvass the argument that there was a valid insurance cover as corroborated by the Police Abstract.

13. On the part of the Respondent, they filed submissions dated 25/1/2024. It was submitted that the learned magistrate correctly interpreted the law. They submitted that there was no valid policy at the time of the accident and statutory notice was not issued. That the person who was insured under the policy was one Teresa Njeri Nuguna and not Vincent Kamau Njuguna. They relied on Section 10 (2) of Cap 405 as follows:

> " 10(2). No sum shall be payable by an insurer under the foregoing provisions of the section.

(a) in respect of any judgment, unless before or within 14 days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings....."

14. Reliance was also placed on Kenindia Insurance Co Ltd v James Otiende (1989)2 KAR 162 to canvass the submission that there was no valid policy and Section 10 of Cap 405 could not be imposed on the Respondent.

Analysis

15. This court has considered the pleadings, evidence, submissions and authorities relied on by the parties in support and opposition to the appeal.

16. The issue that fall for this court's determination is therefore whether the learned magistrate erred in dismissing the Appellant's suit.

17. This being a first appeal, the court should with judicious alertness re-evaluate the evidence, and consider arguments by parties and apply the law thereto, and, make its own determination of the issues in controversy. Except however, that it should give allowance to the fact that it neither saw nor heard the witnesses' testimonies.

18. In the case of Selle & Another vs. Associated Motor Board Company Ltd. [1968] EA 123, the Court stated as follows:

> " The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal form a trial by the High Court is by way of a retrial and the principles upon the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect, in particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

19. The Appellant's case is that the lower court erred in dismissing his suit on account of failure of service of statutory notice and existence of an insurance cover in respect of the defendant in the primary suit. On the other hand, the Respondent contends that indeed statutory notice was not served as required under the law and the policy holder was one Teresia Njeri Njuguna and not the defendant in the primary suit.

20. The requirements for an insurance policy are set under the law. I will reproduce in extenso the entire provisions of section 5 of the Insurance (Motor Vehicle Third Party Risks) Act CAP 405 which stipulates as follows: -

> 5. Requirements in respect of insurance policies
>
> In order to comply with the requirements of Section 4, the policy of insurance must be a policy which –
>
> (a) Is issued by a company which is required under the *Insurance Act*, 1984 (Cap 487) to carry on motor vehicle insurance business; and
>
> (b) Insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in

respect of the death of, or bodily injury to, any person caused by or arising out of the use of the vehicle on a road:

Provided that a policy in terms of this section shall not be required to cover –

i) Liability in respect of the death arising out of and in the course of his employment of a person in the employment of a person insured by the policy or of bodily injury sustained by such a person arising out of and in the course of his employment; or

ii) Except in the case of a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, liability in respect of the death of or bodily injury to persons being carried in or upon or entering or getting on to or alighting from the vehicle at the time of the occurrence of the event out of which the claims arose; or

iii) Any contractual liability.

iv) Liability of any sum in excess of three million shillings, arising out of a claim by one person

21. On the other hand turning to the provisions of Section 10(1) of the Insurance (Motor Third Party Risks) Act, Cap 405, on the statutory notice, the same provides as follows: -

> If, after a policy of insurance has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of section 5 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.

22. Section 10(2) of the Insurance (Motor Third Party Risks) Act, Cap 405 provides:

> " 10(2). No sum shall be payable by an insurer under the foregoing provisions of the section.
>
> (a) in respect of any judgment, unless before or within 14 days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings....."

23. I understand the import of the above provision of the law to be that for liability to accrue under Section 10 of the Insurance (Motor Vehicle Third Party Risks) Act Cap 405, there is a 4-fold test to be met. Firstly, that the motor vehicle in question was insured by the Appellant; Secondly, that the Respondent has a judgement in his favour against the insured; Thirdly, that statutory notice was issued to the insurer within 30 days of filing the suit where judgement has been obtained and finally, the Respondent was a person covered by the insurance policy.

24. In my view, the purpose of the above provisions and the Insurance (Motor Vehicle Third Party Risks) Act CAP 405 was to ensure that a third party who suffered injury or loss due to acts or omission on the part of an insured motor vehicle would be assured of compensation for their injury, loss or inconvenience in circumstances where the owner or driver of the insured motor vehicle has no means

to settle the claim. This view is supported by Sir Clement De Lestang, J.A. in New Great Insurance Co. of India Ltd – Vs - Lilian Everlyne Cross & Another (1966) EA, 90 at page 104 as doth:

> "Generally speaking the Act seeks to achieve that object (of making provision against third party risks arising out of the use of motor vehicle on the roads) not by placing the whole burden of compensating third parties injured in accidents on the insurers but by combination of two means namely:
>
> 1. by making it obligatory, on pain of punishment, for any person who uses or causes or permits any other person to use a motor vehicle on the road, to have in relation to the user of the vehicle a policy of insurance which satisfies the requirements of the Act, and
> 2. restricting the right of insurers to avoid liability to third parties."

25. Similarly, Lord Denning in Escoigne Properties Ltd – Vs - I.R. Commissioners (15) [1958] A.C at 565 stated that,

> "A statute is not named in a vacuum, but in a framework of circumstances, so as to give a remedy for a known state of affairs. To arrive at its true meaning, you should know the circumstances with reference to which the words were used, and what was the object, appearing from those circumstances, which parliament had in view."

26. It is not in dispute that the policy was a third party insurance cover. The learned magistrate dismissed the declaratory suit on the basis that no statutory notice was served and the policy holder was not the defendant in the primary suit. On my reevaluation, I note from the Record of Appeal filed in court that the copy of the statutory notice dated 26/2/2006 was not one of the documents listed in the Appellant's bundle of documents dated 10/2/2017 in support of the declaratory suit. However, during his testimony, the Appellant referred to the said copy of the statutory notice and conceded that it did not bear the rubber stamp of the Respondent.

27. I have perused the policy document whose validity was noted to be from 22/12/2005 to 21/12/2006. The insured thereon is stated to be one Ms. Teresa Njeri Njuguna and not Vincent Kamau Njuguna. The defendant in the primary suit was Vincent Kamau Njuguna denoted as owner of the insured motor vehicle registration number KAC 703B.

28. Consequently, I do not agree with Appellant that the trial court failed to take into consideration the evidence adduced by the Appellant. It was clear that the statutory notice was not stamped as evidence that it was served upon the Respondent and the insured person was not the person sued as defendant or a party in the primary suit.

29. The Appellant had the duty to show by way of evidence that the statutory notice was duly served as required under Section 10(2) of the Insurance (Motor Vehicle Third Party Risks) Act Cap 405, and the defendant in the primary suit was the policy holder and insured. This is because the Policy as produced supported the Respondent's case. On the proof of the allegations of breach of contract in Raghbir Singh Chatte v National Bank of Kenya Limited [1996] eKLR the Court of Appeal stated thus:

> "When a party in any pleading denied an allegation of fact in the previous pleading of the opposite party, he must not do so evasively, but answer the point of substance. Thus, if it be alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum, or any part thereof, or else set out how much he received. And so, when a matter of fact is alleged with

> divers circumstances, it shall not be sufficient to deny it as alleged along those circumstances, but fair and substantial answer must be given."...
>
> ...First of all a mere denial is not a sufficient defence in this type of case there must be some reason why the defendant does not owe the money. Either there was no contract or it was not carried out and failed. It could also be that payment had been made and could be proved. It is not sufficient therefore simply to deny liability without some reason given."

30. Based on the foregoing, I find no reason to interfere with the finding of the lower court.

Determination

31. In the circumstances, I make the following Orders.

    i. The Appellants Appeal is dismissed.

    ii. The Respondent shall have the costs assessed at Ksh. 85,000/-.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 8TH DAY OF JULY, 2024.

Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of:-

No appearance for the Appellant

Kiplagat for the Respondent

Court Assistant – Jedidah