Real Insurance Co. Ltd & another v Mokaya (Civil Appeal 40 of 2020) [2023] KEHC 1672 (KLR) (15 February 2023) (Judgment)

Neutral citation: [2023] KEHC 1672 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CIVIL APPEAL 40 OF 2020

TA ODERA, J

FEBRUARY 15, 2023

BETWEEN

REAL INSURANCE CO. LTD .... 1ST APPELLANT

BRITAM GENERAL INSURANCE CO. LTD .... 2ND APPELLANT

AND

RODAH NSOTO MOKAYA .... RESPONDENT

(An appeal from the judgement and decree of Hon M.M Wachira S.R.M in Migori CMCC No. 957 of 2018 delivered on 2/3/2020)

JUDGMENT

1. By an amended plaint dated 12th April, 2019, the respondent sued the appellants over a fatal accident which claimed the life of her husband. Subsequently, she filed suit in Migori CMCC No. 245 of 2014 (primary suit) which was determined in her favour. Since the entry of judgement, the appellants were yet to satisfy the decretal sum thus the declaratory suit which sought the compulsion of the appellants to pay up the amount.

2. The 1st defendant denied having insured the motor vehicle and or the insureds in the parent suit as there was no contract of insurance between it and them. The issue of service of the statutory notice is also contested. It also averred that the insurance cover was issued to Godfrey Allan Tollo and not Luba Nache.

3. The 2nd appellant on its part averred that it had never issued an insurance policy in favour of Luba Nache.

4. In the ensuing trial, the respondent testified as PW-1 stating that despite judgement having been passed, the respondents were yet to settle the decretal sum.

5. Edina Masanya, the 2nd appellant's legal officer testified as DW-1 and stated that the firm had insured one Godfrey Allan Tolo and not Luba Nache and his driver Amos Githinji.

6. The court after scrutinizing the evidence found in favour of the respondent thus the instant appeal which is premised on the following grounds;

   i. The learned magistrate erred in law when he failed to hold that judgement in the parent suit which gave rise to the declaratory suit was obtained against people who were not insured by the appellants.

   ii. The decision is against the weight of evidence.

   iii. The appellants have already paid Kshs 3,000,000/- to the respondent which constitutes the maximum limit for which the vehicle was insured.

   iv. The learned trial court failed to appreciate that no statutory body was served upon the appellants pursuant to section 10(2) of *cap 405*.

7. The appeal proceeded by way of written submissions. Only the appellants complied by filing theirs dated 14th October, 2022.

8. It is submitted that there was indeed a cover but to an individual other than those sued in the subordinate court. That the trial court's finding was based on the fact that the appellant's tendered no evidence hence liable to settle the claim. That therefore, the trial court's finding was erroneous based on the decision in *Nancy Wambui Gatheru v Peter Wanjere Ngugi* HCCC 36 of 1993-Nairobi.

9. That under Section 10 of *Cap 405*, the respondent did not comply with the conditions therein and the trial court's finding on the issue was contradictory failed to follow the law.

Analysis and determination.

10. The guiding principles in a first appeal were stated in *Gitobu Imanyara & 2 others v Attorney General* (2016) eKLR, where it was stated;

    > " ... Briefly put, they are that this 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 allowances in this respect"

11. The suit before the trial court was declaratory one based on the provisions of Section 10(2) which places a duty upon an insurer to satisfy claims made against the insured and provides instances where an insurer is entitled to avoid the policy. In this case, the appellant's case was that it had not issued a policy in favour of the defendant in the primary suit. It argued that the policy issued was in favour of one Godfrey Allan Tollo who was not a party to the suit.

12. The notice issued under Section 10 of *Cap 405* in Civil Suit No. 245 of 2014 shows that the defendants therein were Luba Nache, Amos Githinji and CFC Stanbic Bank Ltd. The present appellants were not parties to it. In that suit, the defendants were ordered to pay the respondent sums of money running to Kshs.4,510, 000/-. When the respondent was not paid, she filed a declaratory suit to compel the appellants to pay the sum on the basis that the 2nd appellant had taken over the business of the 1st appellant.

13. Nonetheless, the 2nd appellant filed its statement of defence in suit number 957 of 2018 annexing therein a policy issued to Godfrey Allan Tollo over motor vehicle registration number KAX 647L.

According to the respondent, this vehicle belonged to Godfrey and insured by the appellants. According to the abstract filed in the primary suit, the same is jointly owned by Luba Nache and Stanbic Bank and driven by Amos Githinji at the time of accident.

14. In finding the appellants liable, the trial magistrate held that the appellants had tendered no evidence from the policy holder disputing the fact that he had authorized the driver. In my view, this issue was irrelevant to the proceedings before the learned trial magistrate. The issue of who was driving the motor vehicle was not in dispute.

15. In my analysis of the matter, on whether the statutory notice was issued to appellants, they argued that no such notice was issued as required under section 10 of *CAP 405*. I have seen the notice dated 17.7.14 produced in the primary suit served upon real insurance company and received by them on 21.7.2014 as per their stamp on it. It is argued that the 2nd Appellant took over Obligations of the 1st appellant and hence the 2nd appellant ought to have been served with the notice of intention to sue but this was not done. The 2nd appellant having taken up the obligations of 1st appellant which accrued before the taking over is deemed to have had notice of the intention to sue since the 1st appellant was served. On the nexus between the policy holder and the motor vehicle that caused the accident. The policy produced commenced on 15/1/2014 and expired on 14/1/2015 while the accident occurred on 4/4/2014 during the subsistence of the policy. The policy was produced without any objection from the respondent by the 2nd respondent's legal officer. The policy indicates that Godfrey Allan Tollo was the policy holder at the material time not Luba Nache.

16. The duty of the Insurance Company to satisfy or settle decrees against their insured is statutory which stems from Sections 10(1) and (2) of the *Insurance Act Cap 405* Laws of Kenya which provides:

> " 10(1)(f) after a police of insurance has been effected, judgement 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 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 provision of this section, pay to the person 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 some payable in respect of interest on that sum by virtue of any enactment relating to interest on judgment."

17. It is not in doubt that the accident motor vehicle in both instances is the same. The registration number is similar though the insured in the appellants' view is different and the insurer was entitled to avoid the policy. There is no evidence that the appellant took any step to repudiate the policy. This brings into play the provisions of Section 10(4) of *Cap 405* which provides;

> " No sum shall be payable by an insurer under the foregoing, provisions of this Section if in an action commenced before, or within three months after the commencement of the proceedings in which the judgement was given he has obtained a declaration that apart from any provisions contained in the policy he is entitled to avoid it on the ground that it was obtained by the non-disclosure of a material fact, or by a representation of fact which was false in some material particular, or if he has avoided the policy on that ground, that he was entitled so to do apart from any provision contained in it;
>
> Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not thereby become entitled to the benefit of this sub-section as respects any judgement

obtained in proceedings commenced before the commencement of that Section, unless before or within fourteen (14) days after the commencement of that action he has given notice thereof to the person who is the Plaintiff in the said proceedings specifying that the non-disclosure or false representation on which he proposes to rely, and any person to whom notice of such action is so given shall be entitled, if he thinks fit, to be made a party thereto."

18. These provisions were interpreted in *Cannon Assurance Company Limited v Peter Mulei Sammy* (2020) eKLR where it was held;

> "Being guided by the above provisions and noting the fact that the Appellant has never exercised its right by filing the requisite declaration to avoid the policy on any ground in the policy in the primary suit, I find that the time to do so in the proceedings before the trial court the subject of this appeal is not available at that stage. The Appellant did not provide any evidence to the effect that it had sought to set aside the proceedings in the primary suit or that an appeal had been lodged. The trial court was thus left with no option but to find for the Respondent herein. The finding by the learned trial magistrate was therefore not in error as suggested by the Appellant."

19. Further sentiments were expressed by Kasango J in *African Merchant Assurance Co. Limited v Jane Atieno* [2014] eKLR when she held as follows:

> "The preamble of the Act shows that the objective of the Act is to make provisions against third party risks out of the use of motor vehicles. That preamble as read together with Section 4(1) of the Act indicates that the overriding objective of the Act is to protect third parties against the risks that may arise as a result of the use of a motor vehicle. The emphasis therefore, as the name of the Act suggests, is a protection of third parties who may suffer risks as a result of the use of a motor vehicle on the road ...... In my view it would defeat the aforesaid purpose and objective of the *Insurance (Motor Vehicle Third Party Risks) Act* if the Appellant were allowed to escape liability simply on the basis that the person sued was not the policy holder. The insurance policy was issued to cover risks caused by the vehicle and the Respondent did not suffer such risk. She is therefore entitled to compensation by the Appellant....... The insurance policy is not repudiated just because the registered owner is different from the person who took up the policy."

20. I am persuaded by the reasoning in the above authorities, I am inclined to find that the appellants having failed to move as required by the law by filing the declaration to avoid the policy within the time provided by the law, this window is not open to them at this stage and time.

21. On whether the appellants have already satisfied the decree, they submitted that they have already paid the statutory Kshs. 3,000,000/=. The appellant submitted that section 5 (b) of the *Insurance (Motor Vehicle Third Party Risk) Act* provides that;

> "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 reasons 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 onto or alighting from the vehicle at the time of the occurrence of the event out of which the claim 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"

22. The 2nd appellant argued that it was liable to pay upto Ksh.3,000,000/= only as per section 5(b) of the *Insurance (Motor Vehicle Third Party Risk) Act*. The said section is clear that the liability of an insurer is capped at Kshs 3,000,0000/=. The trial magistrate thus erred in finding that the appellants were liable to pay a sum of Kshs 5,562,333/= as per the decree in the primary file.

23. I proceed to declare under section 10 (1) of the *Insurance (Motor Vehicle Third Party Risk) Act* that the 2nd appellant is liable to the respondent in the sum of Kshs 3,000,000/= with costs and interest from the date of filing of the appeal till payment in full in satisfaction of the decree issued in CMCC 245 of 2014 Migori.

24. On whether the Kshs. 3,000,000/= has been settled by the insurer, this was listed as a ground in the Memorandum of Appeal I have seen copies of cheques amounting to Kshs 3,000,0000/= in the name of Ms Kerairo Marwa & Company advocates for the respondent on record. However, the respondent neither filed submissions nor attended court to confirm the same when the appeal came up for submissions. Since this was not controverted I will take it that the amount of Kshs 3000,000/= was settled as stated .

25. In the upshot, the appeal partially succeeds. Costs to the appellant.

T.A ODERA - JUDGE

15. 2.2023

DELIVERED IN VIRTUALLY VIA TEAMS PLATFORM IN THE PRESENCE OF;

No appearance of the appellants.

Achola holding breif for Kerario Marwa for Respondent.

Court Assistant; Nyaoke

T.A ODERA – JUDGE

15. 2.2023