



REPUBLIC OF KENYA



KENYA LAW

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**Abwao & 2 others v Saham Assurance Limited (Civil Suit 213 of 2017)
[2023] KEHC 3851 (KLR) (Civ) (3 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 3851 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL SUIT 213 OF 2017

JN MULWA, J

MAY 3, 2023

BETWEEN

GODFREY NYANDERA ABWAO 1ST PLAINTIFF

MARTHA ADHIAMBO NYANDERA 2ND PLAINTIFF

LABAN OKOTH OMINDE 3RD PLAINTIFF

AND

SAHAM ASSURANCE LIMITED DEFENDANT

JUDGMENT

1. By a Plaint dated October 5, 2017, the Plaintiffs instituted a declaratory suit against the Defendant arising from the Decree in a primary suit Nairobi HCCC No 2182 of 2001 that was filed against the Defendant's Insured, Mothers Favourite Limited. The Plaintiffs now seek judgment against the Defendant for:
 - i. A declaration that the defendant is liable to the plaintiffs to the tune of Kshs 2,602,978/- together with interest at court's rates from October 16, 2012 until payment in full;
 - ii. Costs of the suit;
 - iii. Any other or further relief as the court may deem just and fit to grant.
2. In the primary suit, the plaintiffs sought general and special damages arising from a road traffic accident caused by the defendant's Insured on January 3, 1999 along Outer Ring Road Nairobi, involving the Plaintiffs motor vehicle registration number xxxx Toyota, and motor vehicle registration number xxxx Mitsubishi pick up, property of the Insured, being driven at the time by it's authorized employee,



servant or agent, Ndiason Kamau. It is alleged that the Defendant had insured the latter motor vehicle vide a Policy of Insurance Number MGL/xxxx which was in force at the time of the accident. The Plaintiffs obtained judgment in their favour against the Insured in the primary suit as follows:

- a. 1st plaintiff Kshs 60,000/- general damages, Kshs 6,900/- special damages and interest at courts rates.
 - b. 2nd plaintiff Kshs 2,000,000/- as general damages plus Kshs 360, 278/- special damages plus interest and costs.
 - c. 3rd plaintiff Kshs 80,000/- as general damages plus Kshs 96,080.70 as special damages plus interest and costs.
3. The Plaintiffs aver that they notified the Defendant herein of the aforesaid judgment vide a letter dated April 20, 2016, but they failed to settle the claims.
 4. The Defendant denied the claim vide a Further Further Amended Statement of Defence dated January 15, 2021. It averred that it is not liable to settle the judgment in the primary suit raising reasons that it was never served with the Statutory Notice prior to the filing of the case, Nairobi HCCC No 2182 of 2001, or having been issued with notice of entry of judgment in the said suit. Further, the Defendant avers that the primary suit was filed against the Insured without prior leave of Court yet the Insured was under Receivership hence judgment was obtained irregularly.
 5. The Plaintiffs responded through a Reply to Further Further Amended Statement of Defence dated September 20, 2021, reiterating their averments and claim in the plaint.
 6. PW1, Godfrey Nyandera Abwao adopted his witness statement dated October 5, 2017 as his evidence in chief and adduced the Plaintiffs Bundle of Documents dated October 5, 2017 in support of the Plaintiffs case. His testimony was that on the material day of the accident, the Plaintiffs were lawfully travelling in their Toyota motor vehicle registration number xxxx when Ndiason Kamau, an employee, servant, or agent of the Insured so negligently drove, controlled and/ or managed motor vehicle registration number xxxx causing it to lose control and violently collide with the Plaintiffs' motor vehicle whereby they sustained severe injuries as a consequence.
 7. The plaintiffs claim that on the On July 7, 2000, their advocates served the Defendant with the requisite statutory notice under section 10 of the Insurance (Motor Vehicle Third Party Risks) Act, cap 405, and successfully instituted legal proceedings through HCCC No 2182 of 2001 and judgment duly entered in their favour against the insured. As such, the Plaintiffs plead that the Defendant has an obligation to make good and settle the judgment sums determined by the trial court.
 8. In cross-examination, PW1 stated that the Defendant in the primary suit was Mothers Favourite which was in receivership; and that he was not aware whether or not leave of court was obtained to institute the said primary suit, nor that the statutory Notice dated May 18, 2000 was served upon the Defendant's predecessor, Mercantile Insurance Company.
 9. DW1, Sarah Weru was a Deputy Legal Manager at MUA Insurance Company formerly trading as Saham Assurance Company Limited and Mercantile Insurance Company, the Defendant herein. She adopted her Witness Statement dated September 16, 2021 and Further Witness Statement dated June 21, 2022 as her evidence. She produced the Defendant's bundle of documents dated June 21, 2021 in support of their defence. She testified that they learnt through their advocates that the primary suit was filed on December 8, 2001 and that Service of Summons to Enter Appearance and Plaint was done through Substituted Service vide Advertisement; that Judgement was delivered on October 16, 2012, and further that they did not receive any notification of the accident or a Statutory Notice of filing of



the primary suit until the time they were served with the Summons and Plaint in the instant matter. It was her further testimony that as the Statutory Notice dated May 18, 2000 did not bear their stamp, then it was not received. However, she confirmed that Notice of Entry of judgment in the primary suit was received on April 20, 2016.

10. Further, it was her testimony that the Defendant's insured was Mothers Favourite Limited but the judgment was entered against a different entity known as Mothers Favourite Bakeries Company Limited (In receivership). She stated that they conducted a search in the Companies Registry which revealed that there are no records of Mothers Favourite Bakeries Limited. It was also her testimony that in any event, the Plaintiffs and/or their advocates on record ought to have first sought leave of the Court to sue the Company Mothers Favourite Bakeries Company Limited as it was placed under receivership on November 15, 2009. In her view therefore, the instant suit cannot be sustained as it is premised on an incompetent primary suit.
11. In cross-examination, DW1 stated that the Plaintiff is claiming under a Policy issued by Merchantile Life and General Insurance Limited which commenced on February 2, 1998 to February 1, 1999; that the Defendant was not aggrieved by the judgment because their insured/client was not a party to the case, and as a result they did not appeal against the judgment nor sought to set it aside. The witness further stated that they became aware of the plaintiff's primary suit after it had been concluded.

Analysis and Determination

12. The court has considered the pleadings, the evidence adduced and the parties submissions from where the issues for determination have been identified thus:
 - i. Whether motor vehicle registration xxxx Mitsubishi pick up was insured by the Defendant at the time of the accident; and if so,
 - ii. Whether the Defendant should satisfy the decretal sum in the primary suit.
13. On the first issue, it is well settled that an Insurance policy document or certificate of insurance issued by a licenced insurance company is prima facie evidence that a motor vehicle is duly insured for the period stated therein. The Defendant did not dispute that it had insured motor vehicle registration number xxxx at the time of the accident subject of the primary suit. Indeed, DW1 produced a Policy Schedule Number MGL/xxxx which contains a list of vehicles belonging to a company known as Mothers Favourite Limited and which was insured by the Defendant's predecessor. Motor vehicle registration number xxxx appears on the said schedule and the policy covered the period February 2, 1998 to February 1, 1999. The answer to the first issue is therefore in the affirmative.
14. As regards the second issue, the court notes that the duty of an Insurer to satisfy or settle decrees against its Insured is a statutory mandate and it stems from Section 10 of the *Insurance (Motor Vehicles Third Party Risks) Act*. Section 10(1) states:
 - ' 10. Duty of insurer to satisfy judgments against persons insured 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

Provided that the sum payable under a judgment for a liability pursuant to this section shall not exceed the maximum percentage of the sum specified in section 5(b) prescribed in respect thereof in the Schedule.'

15. The said provision goes ahead to list the conditions necessary for liability to accrue against an Insurer. Of importance in the circumstances of this case is Section 10(2) (a) of the Act which stipulates that:

' (2) No sum shall be payable by an insurer under the foregoing provisions of this section—

(a) In respect of any judgment, unless before or within thirty days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings;'

16. The Plaintiffs averred that they served the Defendant's predecessor, Merchantile Insurance Company, with a Statutory Notice dated May 18, 2000 but the Defendant refuted this claim. The court has looked at the purported Statutory Notice which appears at page 1 of the Plaintiffs Bundle of Documents. Indeed and as stated by DW1, there is nothing on the face of the said Notice or at all to prove that it was served upon the Defendant and actually received by the addressee who is the Defendant's predecessor Merchantile Insurance company Limited. It does not bear any receipt, stamp or signature of a person who received it in the Defendant's office if at all and neither have the Plaintiffs advocates tendered any certificate of postage.

17. It is trite law that he who alleges must prove. This principle is buttressed by Section 107 of the Evidence Act Cap 81 Laws of Kenya which provides: -

' (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.'

18. Section 109 of the same Act provides: -

' 109 Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.'

19. The Plaintiffs having failed to prove that the Insurer was issued with a statutory notice either before the filing of the primary suit or within 30 days of filing the primary suit where judgement was obtained, it follows that liability cannot accrue against the Defendant under Section 10 of the Insurance (Motor Vehicle Third Party Risks) Act. Since this finding essentially settles the suit, the court will not delve into the other issues raised by the parties herein concerning the competency of the primary suit and the judgment therein. Further, the plaintiffs having admitted that the Defendants insured was at the material time of the accident under Receivership, a fact agreed to by the Defendant itself, and that they



failed to prove that leave of Court was obtained to file the suit, the court cannot be called upon to sanitize an illegality. It therefore follows that the primary suit was irregularly and incompetently filed and any judgment obtained therefrom cannot be enforced. This court is by no way attempting to sit on a non-existing appeal on the latter pronouncement, but again the court will not fail to point to any illegalities committed by any party at any stage of court proceedings.

20. Consequently, the court finds that the Plaintiffs have not proved their case to the required standard which is on a balance of probabilities. In the premises, this suit is dismissed with costs to the Defendant.

21 Orders accordingly.

DATED, DELIVERED AND SIGNED IN NAIROBI THIS 3RD DAY OF MAY 2023.

JANET MULWA

JUDGE

