CIC Insurance Company Limited v Kazungu (Civil Appeal 79 of 2021)
[2023] KEHC 23899 (KLR) (23 October 2023) (Judgment)

Neutral citation: [2023] KEHC 23899 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CIVIL APPEAL 79 OF 2021

SM GITHINJI, J

OCTOBER 23, 2023

BETWEEN

CIC INSURANCE COMPANY LIMITED ..... APPELLANT

AND

JOSEPH MASHA KAZUNGU ..... RESPONDENT

(Being an Appeal from the Ruling of the Hon S.D.Sitati - RM and delivered by Honourable J.Kituku – PM on 12th August, 2021 at Kilifi))

JUDGMENT

1. This is an appeal arising out of the ruling delivered by Hon. J. Kituku on 12th August 2021 in Kilifi SRMCC No. 155 of 2017. The Appellant listed six grounds of appeal as follows:

    1. That the learned Magistrate erred in law and in fact in not properly appreciating the evidence that was before him.

    2. The learned Magistrate erred in law and in fact in finding that one Daniel Katana, the defendant in SRMCC No. 88 of 2015, Joseph Masha Kazungu vs Daniel Katana was insured by the appellant within the meaning of Section 10 of the *Insurance (Motor Vehicles Third Party Risks) Act*, Cap 405.

    3. The Learned Magistrate erred in law and in fact in finding that there existed a policy of insurance between the appellant and one Daniel Katana, the defendant in SRMCC No. 88 of 2015, Joseph Masha Kazungu vs Daniel Katana.

    4. The Learned Magistrate erred in law and in fact in basing his finding of the existence of a policy of insurance on a police abstract.

    5. The Learned Magistrate erred in law and in fact in finding the appellant issued Policy Insurance Number 5C2/0085/1/007761/2013/06 when there was clearly no evidence in this regard.

6. The Learned Magistrate erred in law and in fact in considering irrelevant matters and failing to consider relevant matters in making his award for damages.

2. The Appellant urged that the impugned judgment be set aside and replaced with an order dismissing the said judgment delivered on the 12th day of August, 2021.

3. A brief background of this appeal is that the Respondent filed the primary suit against the Appellant seeking for declaratory orders, which were to the effect that the Appellant had an obligation to settle the decretal sum in Senior Resident Magistrate Case No. 88 of 2016, Joseph Masha Kazungu vs Katana Daniel since it was the insurer of motor vehicle registration No. KAV 868W. The Respondent asserted that the motor vehicle which was held wholly liable was insured by the Appellant and as such it was bound to settle the claim as the insurer.

4. PW1 Joseph Masha Kazungu told the court that by a policy of insurance Number 5C2/085/1/007761/2013/06 issued by the Appellant as an authorized insurer within the meaning of the insurance motor vehicle(Third Party Risk) Act Cap 405 to Katana Daniel to insure him in respect of any liability for the death or bodily injury to any person caused by or arising out of the use on a road accident of his motor vehicle registration number KAV 868W as required to be covered by a policy of insurance under the Act. That on or about the 7th day of October, 2014 during the existence of the said policy of insurance he sustained certain injuries as a result of an accident which took place along Kilifi-Malindi Road involving the aforesaid motor vehicle by the negligent driving of the defendant's said insured's authorized drivers, servants and/or agents.

5. That on 27th March, 2015 he brought an action against the Appellant's insured for recovery of damages in respect of the said accident and that on 10th October, 2016 Judgment was entered in his favour against the defendant's insured for the sum of Kshs. 160,025/- general and special damages plus costs. His testimony was that the appellant failed to remit the decretal amount on the due date which has not been paid even at the time of filing this suit and remains payable plus interest as from the date of judgment.

6. DW1 Joseph Mwenga the Branch Manager at CIC Insurance Co. Ltd informed the court that the policy number does not exist in series of the number they give to their customers. According to him, they became aware of the accident in 2014 when the same was reported by the insured, King Solomon School and after the report was made, they registered the claim in the system.

7. His testimony is that he is not aware what other action was taken after they forwarded the claim to the head office. He confirmed that he had seen the abstract and their name appears as the Insurance Company. He also confirmed that he was aware that their office received the notice of demand and the notice of Judgment on 25.10.16 and in respect to the evidence, no documents were produced in support of their case.

8. Parties agreed to dispose of the appeal by filing written submissions. The Appellant's submissions were filed on 16th March 2023 while the Respondent filed its submissions on 10th July 2023. I have carefully perused the record and considered the submissions and authorities cited to formulate the following issues for determination; -

   i. Whether at the time of the accident the Appellant had issued the subject Motor Vehicle KAV 868W with the policy of Insurance No. 5C2/085/1/007761/2013/06 to commence on 1st September, 2014 and expire on 24th June, 2015.

   ii. Whether the Appellant is statutory bound to satisfy the Judgment in the primary suit.

Analysis and Determination

9. I have carefully considered the appeal herein, it's grounds and the parties' submissions. The court is alive to the fact that it did not hear the witnesses testify; nor did it observe their demeanor and therefore should make due allowance for that. This court is also alive to the fact that an appeal is in a way a retrial and the court must reconsider the evidence, evaluate it and draw its own conclusions. In *Peter M. Kariuki -vs- Attorney General (2014)* eKLR the court held inter alia as follows:

> " We have also, as we are duty bound to do as a first appellate court to reconsider the evidence adduced before trial court and re-evaluate it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence."

10. The Respondent filed a declaratory suit under section 10(1) of the *Insurance (Motor Vehicle Third Party Risks) Act* to enforce the trial court judgment. In essence, the issue before the trial court was not about liability but rather whether the respondent was bound to settle the decree.

Section 10(1) of the *Insurance (Motor Vehicle Third Party Risks) Act* 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."

11. On the other hand, the Act affords an insurer certain statutory defences in section 10(2) of *the Act* which provides:

(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 fourteen days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings;

or

(b) in respect of any judgment, so long as execution thereon is stayed pending an appeal; or

(c) in connexion with any liability if, before the happening of the event which was the cause of the death or bodily injury giving rise to the liability, the policy was cancelled by mutual consent or by virtue of any provision contained therein, and either—

(i) before the happening of the event the certificate was surrendered to the insurer, or the person to whom the certificate was issued made a statutory declaration stating that the certificate had been lost or destroyed; or

(ii) after the happening of the event, but before expiration of a period of fourteen days from the taking effect of the cancellation of the policy, the certificate was surrendered to the insurer, or the person to whom the certificate was issued made such a statutory declaration as aforesaid; or

(iii) either before or after the happening of the event, but within a period of twenty-eight days from the taking effect of the cancellation of the policy, the insurer has notified the Registrar of Motor Vehicles and the Commissioner of Police in writing of the failure to surrender the certificate."

12. I have considered the arguments by the Appellant and in my view, it did not plead any of the defence in section 10, including subsection (4) which in summary states that the insurer may not pay any sum if in an action commenced before, or within three months after, commencement of the proceedings in which the judgment was given, he has obtained a declaration that, he is entitled to avoid the policy 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.

13. In the case of *Blueshield Insurance Co. Ltd v Raymond Buuri M'rimberia (1998)* eKLR, the Court of Appeal dealt with the issue of a declaratory suit under section 10(1) of the Act and stated;

> "Although the appellant did not plead in its defence in the enforcement suit, that it had already sued the insured in H.C.C.C. No.2976 of 1986 for a declaration that it was entitled to avoid the policy and that the said suit was still pending, Mrs. Kiarie did say that in her replying affidavit hereinabove mentioned. Can that allegation in itself be a friable issue? We think not: Under s.10(4) the liability of the insurer to satisfy the judgment under s.10(1) is excluded only if, not only that the insurer had commenced an action within the time scale prescribed thereunder, but also that it has obtained a declaration that it is entitled to avoid its liability under the insurance policy.
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> No declaration has been so far obtained although the declaratory suit was filed some 12 years ago by the appellant. Mrs. Kiarie's vague explanation for this delay "although the suit has been fixed for hearing a few times it has never taken off" smacks of gross lack of diligence on the part of the appellant in prosecuting the declaratory suit. Moreover, there is no evidence that a mandatory notice as envisaged by the proviso to s.10(4) had been ever given. The effect of that omission is that even if the appellant has obtained the said declaration which it has not so far, it may still not be entitled to the benefit of that declaration as against the respondent."

14. The appellant in this case has argued that it was not the insurer of the motor vehicle in question. That reason as has been advanced by the appellant cannot be made in the declaratory suit. Even where it is made, it is the duty of the appellant, as the person making it, to adduce evidence and show that indeed it was not the insurer. The Plaintiff relied on the Police Abstract which captured the details of the Insurer and the Policy Number and I agree with the trial court that the contents of the Abstract are rebuttable presumption of facts and could only be challenged by the appellant at the hearing. Notably, the appellant at the hearing of the declaratory suit did not call evidence to show that it was not the insurer and that the insurance policy of the motor vehicle or the certificate of insurance did not belong to it. In my view, it was not enough to just state that they were not the insurer of the said motor vehicle; they had a duty to show that it did not issue the subject policy to cover the vehicle and that the certificate of insurance on the vehicle was forged and therefore invalid.

15. For the foregoing reasons, I am of the position that the Learned Magistrate was well within the provisions of the law in finding that the Respondent was entitled to the prayers sought in the declaratory suit. In the end, I find the appeal in want of merit and is hereby dismissed with costs to the Respondent.

JUDGMENT READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 23RD DAY OF OCTOBER, 2023.

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S.M.GITHINJI

JUDGE

In the Presence of; -

1. Ms Osino for the Respondent

2. Firm of Okello Kinyanjui is for the Appellant (absent)