



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL APPEAL NO. 34 “A” OF 2019

ELIZABETH WAITHERA NGIGE.....APPELLANT

VS.

AFRICA MERCHANT ASSURANCE COMPANY LTD.....RESPONDENT

(Appeal from the Ruling of the Resident Magistrate at Kiambu, R. Orora, RM, dated 21st February, 2019 CMCC No. 468 of 2018)

JUDGMENT

1. This is an appeal against the Ruling of the Resident Magistrate R. Orora of 21st February, 2019. The appeal is filed by **ELIZABETH WAITHERA NGIGE** (hereinafter **Elizabeth**).

BACKGROUND

2. Elizabeth filed a suit before the Kiambu Chief Magistrate’s Court being Civil Case No. 119 of 2011, (which shall be referred to as the primary suit). In that primary suit, **Elizabeth** sought damages for injuries she suffered following a road traffic accident while she was a fare paying passenger in vehicle registration No. KAK 395W. The accident was between car registration No. KAK 395W and vehicle registration No. KAT 342V. Elizabeth obtained judgment for decretal sum of Kshs.716,058.00 in the primary suit.

3. On obtaining that judgment **Elizabeth** filed before the Chief Magistrate Court a suit, being Civil Case No. 469 of 2018 which I shall refer to as secondary suit. In this secondary suit, Elizabeth sought the judgment obtained in the primary suit be entered against **AFRICA MERCHANT ASSURANCE COMPANY LIMITED (AMACO)** as the insurer of both the vehicles that were involved in the accident which led to the injuries suffered by Elizabeth. Elizabeth in the secondary suit sought judgment against the AMACO for kshs.878,433 plus interest and costs.

4. AMACO filed a defence in the secondary suit. In that defence AMACO denied being served by Elizabeth with Statutory Notice and denied being the insurer of the subject vehicles which caused injuries in Elizabeth.

5. Elizabeth filed before Kiambu Chief Magistrate’s Court a Notice of Motion application dated 13th November, 2018 seeking for the striking out of AMACO’s statement of defence, in the secondary suit. The striking out was on the ground that the defence was scandalous, frivolous, vexatious and an abuse of the process of the court.

6. The trial court on receiving submissions of the parties for and in opposition to that application dismissed that application. It is that dismissal that Elizabeth has appealed against.

THE APPEAL

7. Elizabeth has raised three grounds of appeal as follows:-

1. THAT the learned trial magistrate erred in law and in fact in failing to appreciate the provisions of the law under the Insurance (Motor Vehicle) Third Party Risks Act (Cap. 405) Laws of Kenya.

2. THAT the learned trial magistrate erred in law by failing to determine whether the respondent had complied with the law by availing itself to the Provisions of **Section 10(2) and (4)** of the Insurance (Motor Vehicle Third Party Risks Act (Cap. 405) Laws of Kenya.

3. THAT the learned trial magistrate erred in law in failing to appreciate and/or correctly interpret the judicial authorities referred to by the appellant in his submissions.

8. In submissions in support of the above grounds, Elizabeth reiterated that both the motor vehicles involved in the accident, which led to her injuries and also led to the filing of the primary suit were insured by AMACO. To support this contention Elizabeth relied on the police abstract issued by the police, after the accident and which is dated 9th May, 2011. Elizabeth relied on various authorities namely, **BLUESHIELD INSURANCE COMPANY LIMITED VS. RAYMOND RIMBERIA (1998) eKLR**, **High Court Civil Case No. 132 of 2003**, **EDWIN OGADA ODONGO VS. PHOENIX OF EAST AFRICA ASSURANCE COMPANY LIMITED** (unreported), and **High Court Kiambu Civil Case No. 84 of 2016 JOHN KARANJA NJUENGA VS. INVESCO ASSURANCE CO. LTD** (unreported), amongst others. Elizabeth sought this Court to find that there was no defence to the secondary suit against her claim and judgment be entered as prayed in that suit.

9. In response, AMACO argued that Elizabeth had failed to discharge the burden of proof to demonstrate AMACO had insured the motor vehicles. AMACO cited the case of **KENYA ORIENT INSURANCE CO. LTD VS. PAUL MATHENGE GICHUKI & ANOTHER (2017) eKLR** which supports its argument that the courts should be slow at striking out pleadings. AMACO further submitted that its defence raised numerous triable issues that should be considered at a trial.

ANALYSIS

10. The only issue for consideration is whether Elizabeth's application to strike out AMACO's defence and to enter judgment for her was merited.

11. AMACO raised defence to the effect that it was not served with statutory notice within the meaning of Insurance (Motor Vehicle Third Party Risks) Act Cap 495 and also denied having insured the subject motor vehicle.

12. The application to strike out AMACO's defence and to enter judgment for Elizabeth was premised on provisions of **Section 10(1) of Cap 405** which provides:-

“10 (1) 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.”

13. Although Elizabeth attached a copy of Statutory demand written to the owner of the subject motor vehicles and copied to AMACO, receipt of the same having been denied by AMACO I make a finding that receipt can only be provided after trial where viva voce evidence will be adduced. Similarly, the allegation that AMACO is the insurer for the subject vehicles, since that is denied by AMACO it can only be proved by evidence. In this regard I get support by the decision of Justice R.E. Aburirili in the case **TRANSCEND MEDIA GORUP LIMITED VS. INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION (IEBC) (2015) eKLR** where the learned judge stated thus:-

“Having found that the statement of defense as filed in this case raises some triable issues, I also find that judgment or summary judgment for that matter should not be entered in this case. I do not find the averments in the defence to be in any way mere denials. In my view, making a summary determination at this juncture would not only be pre-empting the parties' respective cases but the court would also be analyzing affidavit evidence when it was quite clear to the court that there are weighty and triable issues that would require to be ventilated in a full trial.

Therefore, given the circumstances of this case, there is merit to allow the defendant an opportunity to confront the plaintiff's claim....”

14. The striking out of defence and the entry of summary judgment has serious and far reaching consequences. Such prayer can therefore only be granted in the clearest cases. This case is not such a clear case. This is so because AMACO has denied it insured the subject vehicle. A case in point is **KENYA ORIENT INSURANCE CO. LTD. VS. FARIDA HEMED [2015] eKLR** thus:-

“Appellant in its defence pleaded that it did not issue a Policy No. 201040142 and therefore denied liability. I am well guided by the authority of Appellant KASEREKA -Vs- GATEWAY INSURANCE CO. LTD [2003]2EA which held that the matters recorded in a Police Abstract is rebuttal evidence of the matter. It is however to note that even in that case the Court decided that the matter of whether there is a policy of Insurance had to be determined after oral evidence was adduced. The Court in that case stated-

“It follows that for the purpose of this application, on a balance of probability, the Court finds that the Gateway Insurance Company Limited appears to be the insurer of motor vehicle registration number KAB 405K. I say “appears” because the contents of a police abstract is rebuttable and is not conclusive. I refer to the reverse of this document. However, it suffices to say that having been unchallenged by the defendant, the balance tilts in favour of the plaintiff. This means the denial by the defendant that there was a contract of insurance between itself. Page 505 of [2003]2EA 502 (CCK) AND HOE ENGINEERING

WORKS LIMITED is strictly a triable issue. It is true that the policy document was not produce by the defendant, but this can be dealt with at the stage of discovery and inspection during preparation for the trial. The question of privity of contract is similarly disposed of. This can only be determined once the policy document is availed to the Court and the issue heard on merit at the trial.” (emphasis mine)”

15. This appeal is without merit and it is therefore dismissed with costs and the trial court’s ruling of 21st February, 2019 is upheld.

RULING DATED AND DELIVERED AT KIAMBU THIS 6TH DAY OF MAY, 2021.

MARY KASANGO

JUDGE

Coram:

C/A:

Appellant: Ndege

Respondent: Ms. Mwema H/B for Mr. Mwangi

COURT

RULING delivered virtually.

MARY KASANGO

JUDGE