REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL APPEAL NO. 65 OF 2018

ESTHER MUTHONI MUNYIRI………..…………...……APPELLANT

VERSUS

AMACO INSURANCE COMPANY LIMITED….……RESPONDENT

(Being an Appeal from the Judgement and Decree of Hon. N. W. Kariuki Senior Resident Magistrate (SRM) delivered on 19th October 2018 in Nyeri CMCC No. 391 of 2017)

JUDGEMENT

Brief Facts

1. The appellant sued the respondent's insured in Nyeri CMCC No. 152 of 2014 in a claim of general damages and special damages a result of a road traffic accident that had occurred on 19/11/2013. She was awarded a sum of Kshs. 124,843/- all inclusive.

2. Following the judgment in the primary suit, the appellant filed a declaratory suit compelling the respondent to satisfy the judgment against its insured.

3. The trial court dismissed the appellant's case on the grounds that she had not proved on a balance of probabilities that the respondent was the insurer of the motor vehicle prompting this appeal.

4. Being aggrieved with the decision of the trial court, the appellant has lodged the instant appeal citing six(6) grounds of appeal which can be summarised as follows: -

a) The learned magistrate erred in law and in fact in finding that the appellant had not proved her case on a balance of probabilities

b) The learned magistrate erred in law in delivering judgment without citing reasons for her decision contrary to Order 21 Rule 4 of the Civil Procedure Rules.

5. By consent, parties agreed to exchange written submissions on the appeal. A summary of their rival submissions is as follows:-

Appellant's Submissions

6. The appellant submits that she proved her case to the required standard of a balance of probabilities. The appellant relies on the case of **Miller vs Minister of Pensions (1947) 2 ALL ER 372** as quoted in the case of **Juliana Mulikwa Muindi vs Board of Management Yangua Mixed Secondary School & Another [2018] eKLR.** The appellant filed a declaratory suit against the respondent seeking a declaration that the respondent is bound to satisfy the judgment entered against its insured in the primary suit. The respondent had issued a valid policy insurance vide policy no. AMK/08511/002268/2013 covering motor vehicle registration number KBD 139N owned by Mbui Elias & Joseph Gikonyo as at 19th November 2013. The respondent opposed the claim and filed a statement of defence denying the entire claim including the fact that it had effected a policy of insurance covering motor vehicle registration number KBD 139N. The appellant submits that she testified to the effect that the respondent had insured the suit motor vehicle and she produced a police abstract as an exhibit to support her claim. As per the police abstract the respondent had insured motor vehicle registration number KBD 139N vide policy No. AMK/08511/002268/2013 commencing on 3/11/2013 and expiring on 2/12/2013, which period was within the period of the accident. The respondent however did not challenge the production of the said police abstract, nor did it produce any evidence to rebut the appellant's claim.

7. The appellant submits that the police abstract is sufficient evidence to prove that the respondent had insured the suit motor vehicle. She

relied on the case of **Bernard Mutisya Wambua vs Kenya Orient Insurance Company Limited [2020] eKLR** where the court quoted the decision of **APA Insurance Company Limited vs George Masele [2014] eKLR.**

8. The appellant further submits that since the respondent herein being the party with the special knowledge of particulars of insurance of its insured, the burden of proof to prove or disapprove the existence of the pleaded insurance certificate shifted to the respondent. However, at the hearing of the declaratory suit, the respondent did not produce any evidence to prove or disapprove the existence of the pleaded insurance policy. As such, the respondent failed to discharge its burden of proof as required under section 109 and 112 of the Evidence Act.

9. The appellant thus concludes from the reasons given above, that she proved on a balance of probabilities that the respondent had insured motor vehicle registration number KBD 139N. In that regard the trial magistrate misdirected herself as follows:-

a) By requiring a higher standard of proof than is required in civil cases;

b) By finding that the police abstract produced by the appellant amounted to third party information on the existence of a valid insurance cover despite the fact that its production was not challenged; and

c) By not appreciating that upon production of the police abstract by the appellant, the burden of proof shifted to the respondent to prove that it had not insured the motor vehicle registration no. KBD 139D.

10. The appellant submits that the respondent is statutorily bound to satisfy the judgment entered against its insured in the primary suit. The respondent was duly served with the statutory notice as required under Section 10(2) of the Insurance (Motor Vehicles Third Party Risks) Act, which the appellant produced as an exhibit to corroborate her claim. The duly stamped copy of the statutory notice by the respondent was not contested by the respondent during the hearing nor did the respondent produce any evidence to rebut the appellant's claim.

11. The appellant further submits that the respondent ought to have filed a declaratory suit under **Section 10(4) of the insurance (Motor Vehicles Third Party Risks)Act** in the event the respondent wanted to avoid liability which it did not do. As such, on this contention the appellant submits that the appeal ought to succeed.

12. The appellant submits that the judgment falls short of the requirements set out under Order 21 Rule 4 of the Civil Procedure Rules. The trial magistrate did not give any reasons for her decision and neither did she specifically consider the position advanced by the respondent in its submissions.

13. For the above reasons submitted above, the appellant prays that the appeal be allowed.

The Respondent's Submissions

14. It is the respondent's submission that it had not insured motor vehicle registration number KBD 139N at the time of the accident or at any other time. It was thus imperative for the appellant to adduce substantial evidence to back up such claim. The trial court applied the facts, law and proper reasoning to arrive at the conclusion that the appellant failed to adduce evidence on a balance of probabilities. The respondent contends that the appellant did not discharge her burden of proof contrary to section 107 and 109 of the Evidence Act. As such, the respondent submits that the appellant is erroneously seeking to shift the burden of proof she bore on the respondent through her appeal when the respondent unequivocally refuted the substance of the appellant's allegations. To buttress its position, the respondent relies on the case of **Alfred Kioko Muteti vs Timothy Miheso & Another [2015] eKLR.**

15. The respondent submits that insurance of a motor vehicle is confirmed by either a policy of insurance or certificate of insurance. The respondent admits that a policy of insurance is challenging for a claimant to obtain. Although, a party seeking to prove insurance details of a motor vehicle after an accident needs to request for a copy of the same from the police who make a copy of the same after an accident and retain the said copy in the investigation file. Such certificate of insurance is required by law to be affixed on the front of the windshield of every motor vehicle. As such, the respondent contends that the appellant did not make any effort to obtain a certificate of insurance of the said motor vehicle to verify who its insured was. Instead, the appellant chose the indolent approach to rely on a police abstract without bringing the investigating officer to claim that the respondent had insured the motor vehicle.

16. The respondent contends that a copy of the police abstract is not sufficient evidence to be relied upon especially since the respondent profusely refuted having insured the said motor vehicle. The police abstract did not emanate from the respondent and neither did the respondent participate in recording it. As such, it would be a mockery of justice and evidentiary process if the said police abstract was to be used to aid the appellant who has failed to prove his case. In saying so, the respondent relies on the cases of **Richard Makau Ngumbi & Another vs Cannon Assurance Company Limited [2016] eKLR** and **Kenya Orient Insurance Co. Ltd vs Farida Hemed [2015] eKLR** to support its contention that a police abstract is not to be taken as evidence of existence of policy of insurance over a motor vehicle in circumstances where the respondent has denied the allegations and challenged the police abstract.

17. The respondent contends that the appellant did not even bother to call the police to testify where they obtained the details alleging that motor vehicle registration number KBD 139N was insured by the respondent. She never asked the police officers to confirm to her where they obtained they obtained the alleged details of the insurance policy o even see any copy of the alleged certificate of insurance. Further, she did not explain at the declaratory suit hearing any enquiries she fielded to the police officers with a view to getting a copy of the certificate of insurance that is retained after an accident. Besides reading the contents of the police abstract, the appellant did not make any attempts to find out who had insured the said motor vehicle. Neither the appellant nor her advocates contacted the defendant(s) in Nyeri CMCC No. 152 of 2014 to get information on which insurance company had insured the said motor vehicle at the stated time of the accident. As such, the appellant failed to do due diligence to confirm who had insured the said motor vehicle as of what was expected of her and required pursuant to **section 12(1) of the Insurance (Motor Vehicles Third Party Risks) Act.** Therefore, based on the foregoing reasons, the appellant failed to prove her case on a balance of probabilities.

18. The respondent submits that pursuant to Section 10(1) of the Insurance (Motor Vehicles Third Party Risks) Act the starting point in maintaining an action against an insurer is that judgment has to be entered against the insurer's insured. The appellant testified on cross examination that she had no knowledge on whether the judgment in Nyeri CMCC No. 152 of 2014 was entered against an insured of the respondent. She further did not know whether motor vehicle registration number KBD 139N was driven by an insured of the respondent or an agent of the respondent's insured. The respondent thus submits that the appellant by her own testimony admitted that her claim against the respondent was riding on mere assumptions that have no place in evidence. As such, the respondent submits that the appellant failed to prove her case against the respondent in the declaratory suit.

Issues for determination

19. On perusal of the Record of Appeal, the Memorandum of Appeal and the submissions, there are two issues for determination as follows:-

a) Whether the appellant proved her case on a balance of probabilities.

b) Whether the judgment meets the requirements of Order 21 Rule 4 of the Civil Procedure Rules.

The Law

20. Being a first Appeal, the court relies on a number of principles as set out in **Selle and Another vs Associated Motor Boat Company Ltd & Others [1968] 1EA 123:**

> **"…..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 allowance in this respect. In particular,, this 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 into account of particular circumstances or probabilities materially to estimate the evidence."**

21. It was also held in **Mwangi vs Wambugu [1984] KLR 453** that an appellate court will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence; or where the court has clearly failed on some material point to take into account of particular circumstances or probabilities material to an estimate of the evidence.

22. Dealing with the same point, the Court of Appeal in **Kiruga vs Kiruga & Another [1988] KLR 348,** observed that:-

> **"An appeal court cannot properly substitute its own actual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand."**

23. Therefore this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering and giving allowance for it, that the trial court had the advantage of hearing the parties.

Whether the appellant proved her case on a balance of probabilities

24. This degree of proof in a civil case is well enunciated in the case of **Miller vs Minister of Pensions [1947]** cited with approval in **D.T. Dobie Company (K) Limited vs Wanyonyi Wafula Chabukati [2014] eKLR.** The court stated:-

> **"That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say 'we think it more probable than not', thus proof on a balance or prepondence of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally unconvincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."**

25. Further, under section 107 and 108 of the Evidence Act, he who alleges must prove. The burden of proof in this case is one of on a balance of probability, which means that a party ought to show that one probability is more probable then the other. **Kanyungu Njogu vs Daniel Kimani Maingi [2000] eKLR.**

26. In the instant case, the appellant filed a declaratory suit against the respondent seeking a declaration that the respondent is bound to satisfy the judgment against its insured in the primary suit. The respondent had a valid insurance policy vide policy no. AMK/08511/002268/2013 which covered motor vehicle registration number KBD 139N owned by Mbui Elias and Joseph Gikonyo Kanini as at 19th November 2013. During the hearing, the appellant produced a police abstract to corroborate her claim. The police abstract showed the details of the insurance policy and the duration of the said policy.

27. The respondent on the other hand, opposed the claim and filed a statement of defence denying that it had effected a policy of insurance covering the said motor vehicle. Notably, the respondent did not contest the contents of the police abstract nor did it call any witnesses to support its contention in denying the claim.

28. In that regard, since the appellant produced the abstract to support her claim, it was then upon the respondent to discharge its burden of proof by supporting its contention that it did not hold a valid policy of insurance with the defendant in the primary suit. As was stated in the persuasive authority in **APA Insurance Co. Ltd vs George Masele [2014] eKLR, "the Certificate of Insurance is usually issued to the**

insured and not the road accident victim." This means that the policy document and certificate of Insurance in the custody of the insurer and the insured will not be easily accessible by a plaintiff in a declaratory suit. It is correct to say that In that case, only the respondent herein being privy to the insurance contract between it and the defendant in the primary suit, ought to have produced evidence in court to refute that it did not have a valid insurance policy with the said defendant. The case of **Isaac Katambani Iminya vs Firestone East Africa (1969) Limited [2015] eKLR**, which outlines the effect of failure by the respondent to adduce rebuttal evidence.

29. Mabeya J. stated in APA Insurance Co. Ltd vs George Masele [2014] eKLR held:-

> **"As to the certificate of insurance which Ms. Akonga insists should have been produced, I am of the contrary view. The Certificate of Insurance is usually issued to the insured and not the road accident victim. It is a document in the special knowledge and possession of both the insured and the insurer. The road traffic accident victim cannot access it. The details in the police abstract as to the details of insurance are in the ordinary cause of events obtained by the police from the Certificate of Insurance affixed to the motor vehicle or are supplied by the insured…."**

30. The Court of Appeal in the case of **Joel Muna Opija vs East African Sea Food Ltd [2013] eKLR** held that:-

> **"The best way to prove ownership of a motor vehicle would be to produce a document from the registrar of motor vehicles showing the registered owner. However, if a police abstract is produced in court without any objection, its contents cannot be denied."**

31. This Court of Appeal decision is binding on this court and presents very sound reasoning on proof ownership of a vehicle which is akin to the issue herein that save for the general denial that it had not insured the vehicle, the respondent did not deny the contents of the police abstract. As such, it is a general practice that the police abstract ordinarily captures the details of the insurance policy from the Certificate of Insurance affixed to the motor vehicle. In case, the contents of the abstract have not been contested by the respondent through evidence. As such, I hold the view that the police abstract was sufficient proof of evidence that the respondent was the insurer of the vehicle registration number KBD 139N at the time of the accident.

32. . The plaintiff obtained judgement and a decree was issued by a court of competent jurisdiction in CMCC No. 152 of 2014. The respondent has certain statutory defences under the Act but opted not to rely on any of them. The plaintiff satisfied the court that the statutory notice was duly served on the respondent and stamped using the respondent's official stamp.

33. The law provides in *Section 10(2) of the Act 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 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."***

34. Further, **Section 10(4) of the Insurance (Motor Vehicles Third Party Risks) Act** 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 judgment was given, he has obtained a declaration that, apart from any provision 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 subsection as respects any judgment obtained in proceedings commenced before the commencement of that action he has given notice thereof to the person who is the plaintiff in the said proceedings specifying 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.

35. ***The Court of Appeal was clear on what circumstances an insurer can avoid liability. In*** ***BlueShield Insurance Co. Ltd v Raymond Buuri M'rimberia (supra),*** ***the Court 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 triable 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.***
>
> ***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 ever been 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."***

36. Judgement in the primary suit was obtained by consent of the parties on 24/05/2015 and the declaratory suit filed on 22/11/2017after duly giving notice of the judgement to the respondent as required by law. The respondent having been served with the statutory notice failed to move the court to obtain a declaration to avoid liability despite being aware of its rights under Section 10(2) and (4) of the Act.

37. On perusal of the respondent's defence it did not plead any of the defences as outlined in Section 10(2) and (4) of the Act. The respondent did not state that it had avoided the policy, rather it argued that it was not the insurer of the motor vehicle. The burden of proof having shifted to the respondent, it was the duty as the person making such a claim to adduce evidence and show that indeed it was not the insurer. However, the respondent failed to do so making his assertion in the defence a mere denial.

38. Bearing in mind that the burden of proof in this case is on the balance of probability, I am of the considered view that the appellant had proved its case to the standards required by the law leading this court to the conclusion that the magistrate erred in finding that the case had not been proved.

b) Whether the judgment meets the requirements of Order 21 Rule 4 of the Civil Procedure Rules.

39. **Order 21 Rule 4 of the Civil Procedure Rules** provides:-

40. **Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon and the reasons thereof.**

41. The duty to give reasons is a function enshrined under **Article 10 of the Constitution on National Values and Principles of Governance.** Reasons for Judgments/Rulings both manifest transparency and accountability. The rationale for the duty to give reasons by judges as a custom has been recognised by the courts and that position is well documented in the precedent case of **Soulmezes vs Dudley Holdings [1987] 10 NSWLR 247** it was stated:-

> **"The giving of reasons for a judicial decision serves at least three purposes. First, it enables the parties to see the extent to which their arguments have been understood and accepted as well as the basis of the Judge's decision. As Lord Macmillan has pointed out, the main object of a reasoned judgment "is not only to do but to seem to do justice."**

42. In "The Writings of Judgements [1948] 26 Canadian Bar Review at 491" it is stated thus, **the articulation of reason provides the foundation for acceptability of the decision by the parties and the public. Secondly, the giving of reasons furthers Judicial accountability.** As Professor Shapiro recently stated (In Defence of Judicial Candour [1989] 100 Harvard Law Review 731 at 737 thus:-

> **"…A requirement that judges give reasons or their decision, grounds of the decision that can be debated, attacked and defended serves 9 vital functions in constraining the Judiciary's exercise of power."**

43. The other basis essentials for the duty to give reasons by Judges and Magistrates is to be found in the case of **Grollo vs Palmer [1995] 184 CLR 348 while Gummow J** said:-

> **"An essential attribute of the judicial power of the Commonwealth is the resolution of such controversies…so as to provide final results which are delivered in public after a public hearing, and where a judge is the tribunal of fact as well as law, are preceded by grounds for decision which are animated by reasoning, an objective of the exercise of the judicial power in each particular case is the satisfaction of the parties to the dispute and the general public that, by these procedures, justice has both been done and seen to be done."**

44. I have carefully perused the judgement of the Learned Magistrate and observed that she gave a summary statement of the case, identified the issues for determination and clearly stated it before analysing the evidence. The court then analysed the evidence adduced by the parties, set out the reasons for her decision in a clear and concise manner. The decision of the court was also clearly stated. Contrary to the submissions of the respondent, the judgement was in total compliance of Order 21 Rule 4 in my considered view.

45. It is my finding that this appeal has merit and is hereby allowed in the following terms:-

a) The Judgement of the Learned magistrate in the declaratory suit is set aside accordingly.

b) Judgement is hereby entered in favour of the appellant against the defendant for Kshs.124,843/= together with interests from the date of judgement in CMCC No. 152 of 2014 being 24th May 2015.

c) Costs of this appeal and of the court below to be met by the respondent.

46. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 17TH DAY OF JUNE, 2021.

F. MUCHEMI

JUDGE

Judgement delivered through video link this 17th day of June 2021.