



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

Coram: D. K. Kemei - J

**CIVIL APPEAL NO. 88 OF 2019**

**UAP INSURANCE CO. LTD..... APPELLANT**

**-VERSUS-**

**PATRICK CHARO CHIRO.....RESPONDENT**

*(Being an appeal from the judgement of the Senior Principal Magistrates Court at Mavoko delivered on 12<sup>th</sup> June, 2019)*

**BETWEEN**

**PATRICK CHARO CHIRO.....PLAINTIFF**

**AND**

**UAP INSURANCE CO LTD.....DEFENDANT**

**JUDGEMENT**

1. The background of this appeal is that the respondent herein, **PATRICK CHARO CHIRO**, had filed a primary suit namely **Mavoko Senior Principal Magistrate's Civil Case No. 372 of 2017** as a result of an accident that occurred on 11.3.2016 involving motor vehicle registration number KCG 094C Faw Lorry belonging to the appellant's insured and which had been insured by the appellant. Judgement was later entered in favour of the respondent against the appellant's insured for the sum of Kshs 5,045,000 with costs of the suit.

2. The respondent later approached the trial court and filed a declaratory suit namely Civil Case No. 284 of 2018 where it was pleaded that the appellant was the insurer of motor vehicle registration number KCG 094C under policy number 496/087/1/004349/2016 that covered third parties in respect of inter alia, injury caused by the suit vehicle. It was pleaded that the mentioned policy was in force on 11<sup>th</sup> March, 2016 when the suit vehicle that was being driven by the insured's driver knocked the respondent and resultantly a suit was filed and judgement was entered against Nicholas Charles Oyaro, the appellant's insured. It was pleaded that the appellant was bound to satisfy the judgement in **Mavoko SPMCC 372 of 2017** of Kshs 5,045,000/- that was entered against its insured by dint of section 10 of the Insurance (Motor Vehicles Third Party Risks) Act as well as under the insurance policy number 496/087/1/004349/2016; the respondent sought a declaration to that effect and stated that demand and notice of intention to sue had been duly served on the appellant who refused to satisfy the judgement in **Mavoko SPMCC 372 of 2017**.

3. In response, counsel for the appellant filed a notice of preliminary objection on the ground that the suit had been filed contra statute because the respondent had not complied with section 10(2) of the Insurance (Motor Vehicle Third Party Risks) Act CAP 405. Counsel also contended that the respondent did not serve the appellant with statutory notice and therefore the suit ought to be dismissed.

4. In its defence dated 27<sup>th</sup> July, 2018 filed on its behalf, the appellant denied receipt of any insurance claim from Nicholas Kerandi Oyaro under the policy number 496/087/1/004349/2016. The appellant denied knowledge of the judgement delivered in **Mavoko SPMCC 372 of 2017** dated 30.1.2018 against Mr Nicholas Oyaro. The appellant denied that it was bound to settle the mentioned judgement because it was not in receipt of the statutory notice prior to filing the primary suit **Mavoko SPMCC 372 of 2017** as provided for under section 10(2) of the Insurance (Motor Vehicle Third Party Risks) Act CAP 405. The appellant also stated that by dint of section 5 (b)(iv) of the Insurance (Motor Vehicle Third Party Risks) Act CAP 405, it was not required under the insurance policy to cover liability in excess of Kshs three million arising out of a claim by one person. The appellant urged the court to dismiss the suit.

5. The preliminary objection was dismissed vide ruling delivered on 15.8.2018 and the court heard the parties on the merits of the case.

6. Vide judgement that was delivered on 12<sup>th</sup> June, 2019, the trial magistrate found that because there was no prescribed form of a notice, the demand letter and the notice dated 3<sup>rd</sup> June, 2014 was proper under section 10(2) of the Insurance (Motor Vehicle Third Party Risks) Act CAP 405. The trial magistrate also found that the appellant was properly served with the notice of the claim and of the filing of the suit and therefore under section 5 (b)(iv) of the Insurance (Motor Vehicle Third Party Risks) Act CAP 405 it is bound to settle the claim to a sum of Kshs three million. The trial magistrate granted a declaration that the appellant as the insurer of Nicholas Charles Oyaro is bound to satisfy the judgement that was entered on 30.1.2018 to the tune of Kshs three million and the balance of the decretal sum was to be paid by the defendants in the primary suit.

7. The appellant was aggrieved by the said decision and filed a memorandum of appeal on 12<sup>th</sup> July, 2019 that raised nine grounds of appeal which are inter alia; that the trial magistrate erred in finding that the appellant had the 14 days' notice of the bringing of the primary suit and that the appellant was served with the pleadings in the primary suit; that the trial magistrate erred in finding that the demand letter was a statutory notice under section 10(2)(a) of the Insurance (Motor Vehicle Third Party Risks) Act CAP 405; that the trial magistrate went into error for relying on what to counsel was an unfiled affidavit of service; that the trial magistrate went into error for ordering the appellant to pay costs of the suit and interest. The appellant prayed that the judgement of the trial court be set aside and that the award of costs be set aside as well.

8. Learned counsel for the appellant vide submissions dated 4<sup>th</sup> November, 2020 framed two issues for determination; Firstly, whether a statutory notice under section 10(2)(a) of the Insurance (Motor Vehicle Third Party Risks) Act CAP 405 was issued upon the appellant and Secondly, who bears the costs of the appeal? In respect of the first issue, it was submitted that the insurer has to have notice of any proceedings vide a statutory notice. While appreciating the case of **Mvuria Magwabi Chadago v Africa Merchant Assurance Company Ltd (2017) eKLR** it was submitted that there was no 14 days' statutory notice of the filing of the primary suit; it was reiterated that the appellant received the demand letter dated 7<sup>th</sup> March, 2017 vide its postal address which demand letter is not a statutory notice. Counsel submitted that the process server's affidavit of service of summons was not filed and in placing reliance on the case of **Philip Kimani Gikonyo v Gateway Insurance Co Ltd (2007) eKLR** it was submitted that a service of the front cover copy of summons was not a statutory notice under section 10(2) of the Insurance (Motor Vehicle Third Party Risks) Act CAP 405. On the issue of costs, it was submitted that the appellant ought to be awarded the costs of the appeal.

9. In response, counsel for the respondent pointed out that the process server testified that he served a notice dated 7<sup>th</sup> March, 2017 and that the letter dated 7<sup>th</sup> March, 2017 was received by Joseph Mwai for the appellant. It was pointed out that there was evidence that the appellant received the summons. To counsel, the letter dated 7<sup>th</sup> March, 2017 was sufficient notice as it contained the policy number, name of insurer, name of the claimant, date of the accident and in citing the case of **Gateway Insurance Co Ltd v Paul Kamau Waitaha (1993) eKLR** the court was urged to find that there was sufficient notice. Counsel submitted that summons was served on the appellant and therefore it was aware of the filing of the **Civil Suit No. 372 of 2017** and which was done within 30 days are required by the law. The court was urged to dismiss the appeal.

10. This being a first appeal, this court's role as the first appellate court is to re-evaluate and re-assess the evidence adduced before the trial court keeping in mind that the trial court saw and heard the parties and giving allowance for that so as to reach an independent conclusion as to whether to uphold the judgment. This was observed in the case of **Selle v Associated Motor Boat Co. [1968] EA 123**.

11. In performing that role, I shall consider the evidence on record in the trial court. Isaac Makau Malonza testified as Pw1 and he told the court that on 22.3.2017 he served a one Sarah Mugo, with summons and pleadings in the case Mavoko Civil Suit No. 372 of 2017. He testified on cross examination that the said lady duly stamped the summons which he tendered in court.

12. **Patrick Charo Chiro (Pw2)** was the respondent who testified that he had secured a judgement in Mavoko Civil Suit No. 372 of 2017 and that he had issued a notice to sue as well as a demand letter. The same was tendered in evidence. The respondent closed his case and the appellant was given an opportunity to present its case.

13. **Dw1** was **Joseph Mwai** who admitted that a one Nicholas had been insured by the appellant but that no claim had been lodged with the appellant. He testified that Sarah Mugo was based at the customer care desk; that the customer care section has no authority to receive documents but they are received by a legal assistant. He admitted receipt of summons in the case namely Civil Suit No. 248 of 2018; he admitted receipt of the demand that was sent through registered post. On cross examination, he confirmed that the demand notice was received before the suit was filed and that summons in the case 372 of 2017 were received by the appellant. He confirmed that the suit vehicle was insured by the appellant.

14. I have considered the memorandum of appeal, the evidence in the trial court, the submissions and the authorities referred thereto. Should the respondents be compelled to pay the decretal amount in Mavoko SPMCC 372 of 2017? Can the respondent's suit be defeated for want of notice of 14 days as provided for under section 10(2)(a) of the Insurance (Motor Vehicle Third Party Risks) Act CAP 405?

15. In addressing the above issues for determination, it is imperative that I first deal with the law on the subject. Section **10** of the **Insurance (Motor Vehicles Third Party Risks) Act**, Chapter 405 of the Laws of Kenya is what the respondent's claim is hinged on and it provides as follows -

**"Duty of insurer to satisfy judgements against persons insured:**

***(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.***

(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 provisions 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 the 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.*

(3) .....

*(4) 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 provisions 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, unless before or within fourteen days after 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.*

16. The import of the above provision of the law is that for liability to accrue under section 10 of the Insurance (Motor Vehicle Third Party Risks) Act CAP 405, there is a 4-fold test to be met. Firstly, that the motor vehicle in question was insured by the appellant; Secondly, that the respondent has a judgement in his favour against the insured; Thirdly, that statutory notice was issued to the insurer either at least 14 days before the filing of the suit wherein judgement has been obtained **or** within 30 days of filing the suit where judgement has been obtained and finally the respondent was a person covered by the insurance policy. See **Roseline Violet Akinyi v Celestine Opiyo Wangwau (2020) eKLR** and **Stephen Kiarie Chege v Insurance Regulatory Authority & Another (2009) eKLR**.

17. The appellant seemed not to have challenged the other 3 requirements but has taken issue with the lack of notice. I have considered the record and noted as follows;

*a) Mavoko Senior Principal Magistrate's Civil Case No. 372 of 2017 (the primary suit) was filed on 21.3. 2017.*

*b) Mavoko Senior Principal Magistrate's Civil Case No. 284 of 2018 (the declaratory suit) was filed on 9.3.2018.*

*c) The letter dated 7.3.2017 was posted via registered post on 8.3.2017 to the claims manager of the appellant and the said letter indicates that the respondent was injured in an accident that involved the suit vehicle that the appellant admitted to have insured.*

*d) The letter dated 12.2.2018 equally was delivered to the appellant and received by Sarah Mugo.*

18. Being guided by the case of **Philip Kimani Gikonyo v Gateway Insurance Co Ltd (2007) eKLR** I am convinced that there was notice to the appellant of the filing of the two suits and that the notice meets the test of a statutory notice. Were the notices within time? The notice in 17(c) above was issued within 14 days to the filing of the primary suit and the notice in 17(d) above was issued within 30 days of the filing of the declaratory suit. I find that the test under section 10(2)(a) of the Insurance (Motor Vehicle Third Party Risks) Act CAP 405 has been met and the respondent's claims is not defeated by want of the statutory notice since the appellant was sufficiently notified of the existence of the two suits. The appellant wants to suggest that the letters sent to it by the respondent do not amount to a statutory notice. Nothing is further from the truth since ordinarily those kind of letters contain the requisite information constituting a statutory notice to an underwriter. By and large, the most important factor is whether an underwriter has been notified pursuant to the provisions of section 10(2)(a) of the Insurance (Motor Vehicle Third Party Risks) Act. The contention by the Appellant's manager that documents ought to be served on some particular department and not at the reception is not convincing since it was the duty of the receptionist to give those directions to a process server but in this case the documents were duly received and stamped by the receptionist and it was then the upon the appellant to address the issues. The process server cannot be faulted in any way. In any event, the appellant's witness admitted that indeed the said letters were duly received. I am satisfied that the Appellant was duly notified and should now settle the sums due to the respondent. In the premises the decision arrived at by the learned trial magistrate cannot be faulted and must be upheld.

19. In the result, it is my finding that the appellant's appeal lacks merit. The same is dismissed with costs.

It is so ordered.

**DATED AND DELIVERED AT MACHAKOS THIS 2ND DAY OF JUNE, 2021.**

**D. K. KEMEI**

**JUDGE**