



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

CIVIL APPEAL NO. 8 OF 2020

BETWEEN

MONARCH INSURANCE COMPANY LTD.....APPELLANT

AND

1. GABRIEL ODODA OGULA OMANGO

2. MILKA ODODA (Suing as personal representatives of the estate

of CASTRO ODODA-DECEASED).....RESPONDENTS

(Being an Appeal from the judgment and decree in Oyugis Principal Magistrate's PMCC No. 156 of 2018 by Hon. J.P Nandi –Principal Magistrate).

JUDGMENT

1. Monarch Insurance Company Ltd, the appellant herein was the defendant in Oyugis Chief Magistrate's PMCC No. 156 of 2018. This was a suit seeking a declaration that the appellant was bound to pay the decretal amount in Oyugis CMCC No. 84 of 2016 which was in favour of the respondent. The judgment was in favour of the respondents.

2. The appellant was aggrieved by the said judgment and filed this appeal through the firm of Kibichiy & Company Advocates. Four grounds of appeal were raised as follows:

- a. That the learned trial magistrate erred in law and fact by arriving at a finding on liability that was not supported by evidence.
- b. That the learned trial magistrate erred in law and fact in basing finding on irrelevant matters.
- c. That the learned trial magistrate erred in law and fact in failing to properly apply and/or failed in completely ignoring the provisions of section 10 of the Insurance (Motor Vehicle Third Party Risks) Act in particular with respect to involvement of policy holder in the judgment that was subject to enforcement.
- d. That the learned trial magistrate erred in all points of law and fact as far as the award is concerned.

3. The appeal was opposed by the respondent through the Khan & Associates Advocates on the ground that it lacks merit.

4. This Court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of **Selle vs. Associated Motor Boat Co. Ltd. [1965] E.A. 123**, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.

5. The defendant in their pleading denied that there was a valid policy with Erick Otieno Obudho, in respect of motor vehicle KBM 186M. They however closed their case without calling any evidence. The learned trial magistrate made a finding that at the time of the accident there was a valid insurance policy in respect of motor vehicle registration number KBM 186M.

6. The respondent, during the hearing in the trial court, produced a copy of insurance certificate in respect of motor vehicle registration number KBM 186M. The respondent also produced a copy of judgment in Kisumu High Court civil case number 2 of 2016 The Monarch

Insurance Company Limited vs. Obudho Erick Otieno. The appellant was ordered to indemnify the respondent against any claim of death or bodily injuries to any persons arising of an accident involving motor vehicle registration number KBM 186M on 7th July 2015. The learned trial magistrate was therefore justified to find the appellant liable.

7. After considering the grounds of appeal and the reasons for the opposition and the submissions by both parties it emerges that there is only one issue in contest; whether the appellant can avoid liability under the provisions of section 10 (4) of the Insurance (Third Party Motor Vehicle Risks) Act CAP. 405. Section 10 (4) of the Act provides as follows:

(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 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, 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.

8. Section 10 of the Insurance (Third Party Motor Vehicle Risks) Act elaborates the duty of the insurer to satisfy judgments against persons insured. This obligation can be avoided as provided for under section 10 (4) of the Act. This is where the insurer has obtained a declaration that he is entitled to avoid the policy before the commencement of an action in which a judgment has been obtained or within three months of commencement of such proceedings. There is a proviso however which the insurer must satisfy in order to benefit from the declaration. The appellant herein had not obtained such a declaration and cannot therefore be heard to say that she cannot be liable to satisfy the decretal amount in in Oyugis CMCC No. 84 of 2016.

9. I accordingly dismiss the appeal with costs.

DELIVERED AND SIGNED AT HOMA BAY THIS 21ST DAY OF JULY, 2021

KIARIE WAWERU KIARIE

JUDGE