



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

CIVIL APPEAL NO. 17 OF 2020

BETWEEN

MONARCH INSURANCE COMPANY LTD.....APPELLANT

AND

EMILY AKOTH ONGERE & MATHAYO ONDIEK

(Suing as personal representatives of the estate of

SAMSON AGUNGA ONDIEK-DECEASED).....RESPONDENT

(Being an Appeal from the judgment and decree in Mbita Senior Resident Magistrate's

SRMCC No. 12 of 2018 by Hon. J.C. Bii –Senior Resident Magistrate).

JUDGMENT

1. Monarch Insurance Company Ltd, the appellant herein was the defendant in Mbita Senior Resident Magistrate's SRMCC No. 12 of 2018. This was a suit seeking a declaration that the appellant was bound to pay the decretal amount in Mbita RMCC No. 8 of 2017 which was in favour of the respondents. 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 Nishi Pandit & Company Advocates. Nine grounds of appeal were raised as follows:
 - a) The trial magistrate erred in arriving at a finding that the appellant was liable to settle the decretal amount in Mbita RMCC NO. 08 of 2017 in the absence of evidence to support the said finding.
 - b) The trial magistrate erred in ignoring the fatal defects in the documentary evidence relied upon by the respondent in arriving at a finding.
 - c) The trial magistrate erred in not taking into consideration that there was sufficient oral and documentary evidence on record by the appellant to support a finding that the appellant was not liable to settle the decretal amount in Mbita RMCC No.08 of 2017.
 - d) The trial magistrate erred in not weighing the plaintiff's evidence and the defence evidence on a balance of probabilities and thereafter arriving at a finding on the declaration sought by the respondent.
 - e) The trial magistrate erred in not taking into consideration the mandatory provisions of Section 10 of the Insurance (Motor Vehicle Third Party Risks) Act Cap 405 in arriving at a finding on the declarations sought by the respondent.
 - f) The trial magistrate erred in not taking into consideration the submissions by the appellant in respect of the declarations sought by the respondent.
 - g) The trial magistrate erred in not taking into consideration the evidence on record with regard to limits on liability as set out in the exhibit relied upon by the appellant in arriving at a finding on the declaration sought by the respondent.
 - h) There was misdirection on the part of the trial magistrate in awarding damages.

i) The trial magistrate erred in awarding damages that were excessive.

3. The appeal was opposed by the respondent through the Ochoki & Company 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 in respect of motor vehicle KCD 352A. It was contended that the policy in respect of the said motor vehicle had lapsed on 15th June, 2016 and was not renewed. This was insurance policy number KSM/0700/003143/2015. Policy period was 16/6/2015 to 15/06/2016. The insured was Mr. Owino Hezron. The certificate of insurance was No. C12449279.

6. At the time of the hearing in the trial court, the respondent produced a copy of insurance certificate in respect of motor vehicle registration number KCD 352A. This is however not contained in the record of appeal. It is therefore safe to conclude this certificate is the one whose policy number is given in the pleading as KSM/0700/00016/TPO. The copy of police abstract showed the policy number as: KSM/0700/00016/2016/TPO.

7. The appellant denied to have issued the said certificate which the respondent was relying on. The respondent indicated that the assured was Kennedy Adwar Odhiambo. The appellant having denied to have assured the said motor vehicle at the time of the accident, the respondent ought to have produced copies of the policy to prove his assertion. He did not do so and he therefore did not prove that after the expiry of policy number KSM/0700/003143/2015 on 15/06/2016, he renewed it. Owing to the documentary evidence the appellant presented in court, the respondent did not discharge his onus. The learned trial magistrate therefore erred in finding that the motor vehicle KCD 352A was insured by the appellant as at 13th November, 2016 the time of the accident that gave rise to this case.

8. I therefore allow the appeal with costs in this and the lower court.

DELIVERED AND SIGNED AT HOMA BAY THIS 7TH DAY OF DECEMBER, 2021

KIARIE WAWERU KIARIE

JUDGE