



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CIVIL APPEAL NO. 19 OF 2019

BETWEEN

INSURANCE COMPANY OF EAST AFRICA LTD.....APPELLANT

AND

AMOS SHADRACK OBWOGO (suing as

personal representative of Allan Moses Victory).....RESPONDENT

(Being an Appeal from the Judgment and Decree in Busia Principal Magistrate's Court Civil Case No.372 of 2015 by Hon. T. Madowo – Resident Magistrate).

JUDGMENT

1. Insurance Company of East Africa Ltd, the appellant herein, was the defendant in the Busia Principal Magistrate's Court Civil Case Number 372 of 2015. This was suit seeking declaratory orders for the satisfaction of the decree in Busia CMCC NO. 114 of 2009.
2. The learned trial magistrate, in her judgment, made orders in favour of the respondent and ordered the appellant to satisfy the decree in Busia CMCC NO. 114 of 2009.
3. The appellant was aggrieved by the judgment which was delivered on 9th July 2019 and filed this appeal. The appellant was represented by the firm of Kimanga & Company Advocates. She raised three grounds of appeal as follows:
 - a) The learned trial magistrate misapprehended and misdirected herself on the law and facts of the case before her thereby arriving at an erroneous finding.
 - b) The learned trial magistrate erred in law by failing to subject the totality of the evidence adduced to proper scrutiny thereby reaching at an erroneous finding that the respondent herein was entitled to the declaratory orders sought in the claim thereby leading to a miscarriage of justice.
 - c) The learned trial magistrate erred in law in disregarding vital evidence tendered in favour of the appellant herein to the detriment of the appellant's case in the subordinate court.
4. The respondent was represented by the firm of Balongo & Company Advocates. He opposed the appeal on grounds that:
 - a) The appellant is introducing new evidence at the appeal stage without leave of court; and
 - b) The appellant that the issue of unqualified driver could not have been raised at the declaratory stage.
5. 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.
6. The appellant herein is seeking to 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.

7. 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 only 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.

8. In cases where the declaration was obtained before the commencement of the action, the insurer has an obligation either before or within fourteen days after the commencement of the action give notice to the plaintiff in the said proceedings that he would avoid the policy specifying the non-disclosure or false representation on which he proposes to rely.

9. In the supplementary record of appeal, the appellant introduced the proceedings in Busia CMCC. No. 285 of 2013. The parties in the said case were **I.C.E.A. Lion General Insurance CO. Ltd (plaintiff) vs. Ushindi Wycliffe Calab (defendant)**. This case was mentioned in passing and the proceedings were not availed to the learned trial magistrate. This is tantamount to introducing new evidence at the appellate stage. This cannot be allowed. The learned trial magistrate was not given the benefit of the evidence in the decision in Busia CMCC. No. 285 of 2013. Her decision cannot be faulted on the basis of evidence that was not before her.

10. The appellant did not satisfy the learned trial magistrate that she had complied with the conditions to allow her to avoid liability under the provisions of section 10 (4) of the Insurance (Third Party Motor Vehicle Risks) Act CAP. 405. This court, has also not been satisfied that the appeal has merits.

11. The upshot of the foregoing is that the appeal is dismissed with costs.

DELIVERED and SIGNED at BUSIA this 8th day of April, 2020

KIARIE WAWERU KIARIE

JUDGE