

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 565 OF 2017

CANNON ASSURANCE CO. LTD.....APPELLANT

VERSUS

JOHN SIMON KARANJA.....RESPONDENT

(Appeal from the Judgment of Hon. G. Mmasi, SPM delivered on the 18.9.2017 in Milimani CMCC No. 1395 of 2015)

JUDGEMENT

This appeal arises from the Judgement of the lower court delivered on 18th September, 2017. The respondent had succeeded in Civil Case No. 129 of 2011 at the Magistrate's court at Kajiado where he had sued a company known as Mandrix Distributors Limited. That company is said to have been the owner of motor vehicle registration No. KAE 065C which collided with another motor vehicle leading to the death of the wife of the respondent.

Judgment was given in favour of the respondent herein but the said company failed to settle the claim. The respondent then filed a declaratory suit against the appellant herein under Section 10 of the Insurance (Motor Vehicle 3rd Party Risks) Act. Cap 405 Laws of Kenya.

The respondent pleaded in that suit that, the appellant being the insurer of the said motor vehicle, was bound and liable to settle the decree issued in the other claim against his insured Mandrix Distributors Limited. The questions that stood out in this case were whether or not the defendant in the lower court and in the other case at Kajiado was insured by the appellant, and whether the respondent herein satisfied all the conditions set out under Section 10 of the Act.

In the Judgment of the lower court leading to this appeal, the court was persuaded that the appellant was the insurer of the owner of motor vehicle registration No. KAE 065 C, Mandrix Distributors Limited. In evidence tendered in the trial court, the appellant called Peter Kamau Njurumba who testified as D.W. 2 that he was the insured of the said motor vehicle and not Mandrix Distributors Limited. The lower court was not persuaded in that regard and gave judgement against the appellant.

As the first appellate court it is my duty to evaluate the evidence adduced before the lower court to arrive at independent conclusions. The evidence adduced by the appellant before the trial court was contrary to the defence filed to the respondent's claim. A party is bound by the pleadings lodged in court.

In the statement of defence dated 7th May, 2015 the appellant denied insuring the said motor vehicle or issuing policy No. 01/08/33775/09. The appellant also denied knowledge of the party known as mandrix Distributors limited and stated that at no time did that party procure insurance cover from the appellant in respect of that motor vehicle. Most importantly however is paragraph 6 of the statement of defence dated and filed on 7th May, 2015 which reads as follows

“The defendant states that at no time did it neither issue a policy of insurance No. 01/08/33775/09 nor accepted any premiums from any person thereon. The plaintiff is enjoined to avail proof in respect of the allegation to the contrary.”

At page 15 of the record of appeal there appears a copy of records issued by the registrar of the motor vehicles dated September, 15, 2010 which shows the motor vehicle registration No. KAE 065C is an Isuzu Lorry registered in the name of Mandrix Distributors.

Page 16 of the record has the police abstract containing the policy number which tallies with the motor vehicle and the pleadings as stated by the respondent, and then at page 17 there is a certificate of insurance issued by the appellant commencing 29/11/2009 and expiring on 28/10/2010 in respect of motor vehicle registration No. KAE 065C.

The appellant on the other hand, produced a proposal form by one Peter Kamau Njaramba, a name that tallies with DW.2 and at page 28 of the record, and a certificate of insurance at page 28 showing the commencement date and expiry date, issued by the appellant in respect of the same motor vehicle in the name of Peter K. Njurumba. It will be noted at that paragraph 6 of the defence cited above, the appellant denied issuance of any policy bearing that number or to any person in that respect. This is in total contradiction with what the evidence showed.

The respondent has correctly observed that the introduction of this document was an afterthought and with respect I agree. I say so because, the appellants list of witnesses dated 7th May, 2015 had only one name, Martha Muntoro. If it is true DW2 was the insured, his name should have been included in the list. The same applies to the list of documents which were filed over one year after the statement of defence. This was a classic example of tailoring of evidence to arrive at a predawn conception which regrettably does not find favour with this court.

The respondent proved its case against the appellant to the required standards. The lower court cannot be faulted and therefore this appeal is

dismissed with costs to the respondent.

Dated and delivered at Nairobi this 15th day of October, 2020.

A.MBOGHOLI MSAGHA

JUDGE