



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 136 OF 2016

STEPHEN MWANGI MUTUKU..... APPELLANT

VERSUS

INVESCO ASSURANCE CO. LTD..... RESPONDENT

JUDGMENT

1. This is an appeal from the judgment and decree of the Chief Magistrate (as she then was) Honourable Teresia Matheka delivered on the 28th September, 2016 in Mombasa SRMCC NO. 1685 of 2008 whereby the Respondent was awarded Kshs.145,840.00 as general damages for pain and suffering plus costs and interest.

2. Being aggrieved, the Appellant preferred this appeal against the said judgment for the following grounds;

(a) That the trial magistrate erred in both law and in fact by holding that the plaintiff did not issue a statutory notice prior to the filing of the suit despite the fact that the plaintiff had no obligation in law to issue such a notice.

(b) That the trial magistrate erred in both law and in fact by finding tht the Defendant could exonerate itself from the obligation to the plaintiff/applicant third party satisfying a decree against its insured.

(c) That the trial magistrate erred in fact and in law by failing to allow the plaintiff/applicant's suit considering the circumstances of the suit.

(d) That the trial court wrongly misinterpreted the law as regards issuance of Notice under the law and whether it is an obligation of the Third party or the insured.

3. The appellant sought for the court to set aside the judgment and decree of the trial court and the costs of the appeal to be borne by the respondent. On 16th October, 2018, the matter came up for directions on the hearing of the appeal and parties agreed to dispose of the appeal via written submissions.

4. In reliance to Section 4(1) and 5(b) of the Insurance (Motor vehicle Third Party Risks) Act, the appellant that submitted that Section 10(2) of the said Act is the one to fulfill the requirements of serving a statutory notice to the insurer and it should be the insured's duty to serve the notice to its insurance and not a mere third party.

5. The appellant also submitted that the insurance is only excluded from liability when the insurer has commenced an action within the time frame prescribed there under or it has obtained a declaration that it entered to avoid its liability under the Insurance policy.

6. The Respondent's counsel on the other hand submitted and opposed the appeal in its entirety and relying on the judgment of the trial court and their written submissions. The Respondent submitted that since the appellant had conceded to not serving the statutory notice upon the Respondent then the trial court was justified in finding that such failure was fatal to the suit. He submitted that the court finds that the Respondent is absolved from liability since the mandatory notice was not served as required by the law.

7. As this is a first appeal, it is the duty of this court to assess and re-evaluate the evidence before the lower court, bearing in mind that this court has neither seen or heard the witnesses and should, therefore, make allowance for the same. I must be sure that the findings of facts made by the learned magistrate are based properly on the evidence before him/her and that he/she has acted on wrong principles in reaching his conclusion. Having warned myself of that, I will examine the relevant evidence that was adduced before the trial court. The Respondent's side had two witnesses while the Appellants called no witness.

8. In his evidence before the court, the Respondent testified that he was cross the Mombasa- Nairobi at Changamwe road with his three children when the Motor Vehicle Chasis No. AE 104-3008478, Toyota Station Wagon owned by SUNIL KUMAR KHERA and was insured by Invesco Company (The Appellant) herein, knocked him down. That he filed the matter being Mombasa. SMRCC No. 1685 of 2008 against the Appellant's insured and judgment was entered in his favour. However, the Appellant's insurance failed to pay him the decretal amount. This is what he prayed that the Appellant be compelled to pay him the decretal sum in SRMCC NO. 1685 OF 2008.

9. PW2, BERNARD ONDUSO, an Executive Officer at Mombasa law Courts gave evidence that he was the custodian of files and also deals with Administrative issues. He confirmed the existence of CMCC NO. 1685 OF 2008, **Stephen Mwangi –Versus- Sunil Kumar Khera** and that it had been finalized. He proceeded to produce the said file as Exhibit P1. The Appellant did not call any witness in evidence.

10. In considering the appeal with regard to the grounds raised by the appellant, I find that the same is mainly premised on the issue of the statutory notice, hence the five(5) grounds of appeal are hereby coalesced under one ground being:-

Whether the appellant's failure to serve the statutory notice was fatal to its case.

11. To determine this, I have examined and evaluated the evidence that was adduced before the trial court, considered the judgment of the trial court, written submissions by both parties, the law and cited authorities. Section 10(2) of the Insurance (Motor Vehicle Third Party Risks) Act which the trial court made specific reference to in arriving at its finding, states as follows;

“... 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 14 days after commencement of the proceedings in which the judgment was given, the insurer had notice of bringing of the proceedings.....”

12. The purpose of a statutory notice was considered in the case of **Philip Kimani Gikonyo –versus- Gateway Insurance Co. Ltd (2007) eKLR** where the court stated that its purpose is to alert the insurer of the potential claim and liability.

13. The fatality of a suit on account of non-issuance of the requisite notice has been reiterated by courts from time to time. In the case of **Directline Assurance Company Limited –versus- Wilkinsun Mwenda Erastus & 7 others (2016) eKLR**, Mabeja J. observed :

“Whilst it may look as being a mere technical objection curable under Article 159 of the Constitution as the trial court found out, it is not. It makes the whole difference. It goes to the very heart of the entire case of the Respondent, as to whether notice was served in terms of Section 10(1) of the Insurance (Motor Vehicle Third Party Risks) Act, and therefore substantive justice.”

And in **Mvuria Magwabi Chandago –versus- African Merchant Assurance Company Ltd (2017) eKLR**, Justice P.J Otieno held;

“To this court, the provisions of Section 10(2) (c) are substantive legal provisions and not procedural requirements. I regard the provisions to stand at a pedestal above the rules of procedure as the same to this court vast upon the insurer a complete defence and the right to decline to meet a decree given prior in a suit in which notice given before or within 14 days after the commencement of a suit later sought to be enforced by a subsequent declaratory suit. That provision of Section 10(2) Cap 405 is clear, simple and unambiguous. It's true and only meaning is that a victim of a road traffic accident who wishes to enforce a resultant decree against the insurer must serve on such insurer a notice of the primary suit not later than 14 days after the suit is filed. Where the notice is not served, the insurer is by statute absolved from any liability. It matters out tht the insurer came to learn about the suit on its own, the law mandates that it shall be served with a notice.....”

14. The conclusion that flows from the foregoing is that the trial court correctly interpreted the provisions of **Section 10(2) (c) of the Insurance (Motor Vehicle Third Party Risks) Act, Cap 405** that the Respondent is absolved from liability since the mandatory notice was not served as required by law. The said decision is therefore upheld and the appeal dismissed. The Appellant to pay to the Respondent the costs of the appeal.

DELIVERED, DATED and SIGNED this 3rd day of April, 2019.

D. CHEPKWONY.

JUDGE.