REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HIGH COURT CIVIL APPEAL NO. 3 OF 2019

DAVID WAMBUA KISAU.....APPELLANT

-VERSUS-

INVESCO ASSURANCE CO. LTD.....RESPONDENT

(Being an Appeal from the Ruling of Hon. Otieno. J (RM) in the Senior Principal Magistrate's Court at Makueni Civil Case No.116 of 2018, delivered on 20th December 2018)

JUDGMENT

1. The Appellant filed Makueni SPM's Civil Case No. 122 of 2017*(the primary suit)* against Ismail Matata Kasomi *(judgment debtor)* seeking compensation for personal injuries. He avered that the defendant was the registered owner of motor vehicle registration No. KCE 351N in which he was travelling when it got involved in an accident on 08/06/2016.

2. An interlocutory judgment was entered for failing to enter appearance or file defence within the prescribed period. The learned trial magistrate proceeded to assess damages and gave an award of kshs 2,009,835/=.

3. The Appellant then filed the suit Civil Case No. 116 of 2018 seeking a declaration that the Respondent was liable to satisfy the judgment and decree in the primary suit for being the insurer of the defendant's motor vehicle.

4. The Respondent duly entered appearance and filed a statement of defence. It is that defence which triggered the filing of the application dated 05/10/2018 by the Appellant seeking to have the defence struck out. According to the Appellant, the defence was frivolous and it would be an abuse of the court process to allow the case to proceed to full trial.

5. In her ruling delivered on 20/12/2018, the learned trial magistrate declined to strike out the defence.

6. Aggrieved by the ruling, the Appellant filed this appeal and raised 4 grounds stating that the learned trial magistrate erred in law and fact by;

a) ***Not striking out the Respondent's defence.***

b) ***Not holding that the Respondent was under a statutory duty to satisfy the judgment in the primary suit.***

c) Not holding that the Respondent was the insurer* of *motor vehicle registration No. KCE 351N against overwhelming evidence to the contrary.

d) Dismissing the application.

7. Directions were given that the appeal be canvassed by way of written submissions. At the time of writing this judgment, only the Appellant's submissions were on record.

8. The Appellant submits that the trial court made errors of fact by holding that the Respondents were not Insurers and that the Appellant did not provide a certificate of insurance. He referred this court to exhibit *'DW2a'* which shows the name of the insurer being the Respondent, policy number and registration number of the motor vehicle concerned.

9. He also submits that there is case law to the effect that plaintiffs are not required to produce a certificate of insurance as the same is not issued to them. He relies on **Martin Onyango –vs- Invesco Assurance Co. Ltd (2015) eKLR D.S. Majanja J.** held thus

"The second issue is whether the judgment debtor was insured by the Respondent. The insurance company was not party to the primary suit and thus the only evidence pointing to the Respondent as the insurer was the statutory notice bearing the insured's policy number. In the court below the Respondent insisted that the certificate ought to have been produced. A similar issue arose in ***APA Insurance Company Limited v George Masele NRB HCCA No. 170 of 2012 [2014] eKLR*** *where Mabeya J., stated as follows;*

[20] As to the Certificate of Insurance which Ms Akonga insists should have been produced, I am of the contrary view. The Certificate of Insurance is usually issued to the insured and not the road accident victim. It is a document in the special knowledge and possession of both the insured and the insurer. The road traffic accident victim cannot access it. The details in the Police Abstract as to the details of insurance are in the ordinary cause of events obtained by the police from the Certificate of Insurance affixed to the motor vehicle or are supplied by the insured. In this regard, I am unable to agree with Ms. Akonga that the Respondent should have produced the Certificate of Insurance ……. in order to prove who the insurer was.

I agree with the holding of Mabeya J., and I hold that the Appellant need not have produced the certificate of insurance. But was the statutory notice sufficient proof in the circumstances of this case that the judgment debtor was insured? In his evidence, the Appellant did not state how he obtained the insurance policy number nor did he produce the police abstract. The Appellant therefore failed to prove that on the balance of probabilities the Respondent was the insurer of the judgment debtor. The learned magistrate was therefore correct in finding that the nexus between the judgment debtor and the insurer had not been proved in order to found liability as against the insurer."

10. Referring to the letter from the Respondent *(DW2c)*, he submits that the Respondent would not have requested for his medical re-examination if it was not the Insurer and contends that the letter was not denied or challenged in any other way by the Respondent

11. He further submits that the Respondent was served with all the requisite notices before the primary suit was filed and relies on **Philip Kimani Gikonyo –vs- Gateway Insurance Co. Ltd (2007) eKLR** where it was stated;

"So, what form should a notice take? *It simply does not matter. A notice is a notice. The main purpose of a notice is to alert the insurer of a potential claim, a potential liability, so that the insurer can take steps to protect its interest by defending the action, investigating the same, attempting to settle the same and doing anything it wants to in order to protect its rights and interests. The notice need not be in any particular format, and with due respect to the Lower Court, there is nothing like an* ***"actual"*** *notice, or a "not-so-actual" notice. Any notice, howsoever given, as long as it sufficiently outlines the happening of an event giving rise to a claim under the insurance policy, is good notice under the Act. So, here in this case,* ***was such a notice given? In my view, most definitely it was.*** *It is not in dispute that the insurer was served with a copy of the demand letter dated 25th March, 1985..."*

12. It is his submission that there is neither a stay of execution nor pending appeal with regard to the judgment in the primary suit. Further, that the Respondent did not file a declaratory suit in order to avoid the policy as per the provisions of section 10(4) of the Insurance (Motor Vehicle Third Party Risks) Act-Cap 405.

13. This being a first appeal, I have a duty to re-evaluate the record and arrive my own conclusion. **See Selle & Anor –vs- Associated Motor Boat Co. Ltd & Others (1968) E.A 123.**

14. Having considered the grounds of appeal, the entire record and the Appellant's submissions, I find the only issue for determination to be whether the trial magistrate erred by dismissing the application dated 05/10/2018.

15. In the defence to the declaratory suit, the Respondent denied being the Insurer of the judgment debtor and this denial coupled with the fact that a certificate of insurance was not produced informed the learned trial magistrate's opinion that the defence raised triable issues.

16. As for the nexus between the Respondent and judgment debtor, it is important to first determine whether the Respondent was aware of the primary suit. From the record, there is a notice to sue dated 24/12/2016 *(anneture DW1)* addressed to the judgment debtor by the Appellant's Counsel and copied to the Respondent. The primary suit was filed on 06/09/2017.

17. There is another letter dated 06/04/2018 *(anneture Dw2c)* and received on 10/04/2018 informing the Respondent that the judgment debtor was served with the suit documents in person. There is yet another one dated 31/05/2018 and received on 21/06/2018 *(anneture Dw2b)* informing the Respondent that judgment in the primary suit had been delivered in favour of the Appellant.

18. On record is also another letter dated 15/01/2018 from the Respondent to the Appellant's Counsel inviting the Appellant for a medical re-examination *(Dw2e)*. The authenticity of this letter was not challenged at all and even if it were, the court was not appraised of any action that was taken. There was a response from the Appellant's Counsel *via* the letter dated 06/04/2018 confirming that the Appellant was re-examined on 14/02/2018.

19. Had the Respondent not been aware of the Appellant's intention to sue the judgment debtor, it would not have so readily invited the Appellant for a medical re-examination. I find this to be the clearest indictor that the notice to sue the judgment debtor was brought to the Respondent's attention and that it was all along aware of the primary suit. Having opined that the Respondent was informed of the intended suit and the eventual filing of the suit, there is no evidence that it ever obtained judgment entitling it to avoid the policy as per the provisions of **section 10(4)** of cap 405 which provides that;

"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."

20. At the time the Respondent wrote the letter inviting the Appellant for medical re-examination, it was approximately 4 months since the filing of the suit. The record shows that on the same day *(15/01/2018)* the Respondent received another letter from the Appellant's Counsel which was essentially an opinion of how much compensation the Appellant was entitled to in the primary suit. If at all the Respondent was learning about the suit for the first time on that day, it would have at least made effort to file the declaratory suit out of time. Instead of doing that, it wrote a letter requesting for medical re-examination and in my view, that conduct is inconsistent with a party who is trying to avoid the policy at this juncture.

21. There was also a police abstract annexed to the application and marked *DW2a*. It shows the Respondent as the insurer of motor vehicle registration No. KCE 351N between 09/05/2016 and 08/06/2016. The date of accident was therefore within the period covered. The policy no. was indicated as 021/0804/1/024684/2016/09 but there was a slight variation in the one indicated in Dw2e i.e. 021/0804/1/024684/2015/01. My view however is that this was nothing more than a typographical error, which did not change the position.

22. From the totality of the correspondences highlighted herein and the police abstract, my considered view is that there was sufficient material before the trial court to show that indeed the Respondent had insured the judgment debtor's motor vehicle. I agree with the persuasive authorities cited above that indeed a certificate of insurance is a document within the special knowledge and possession of the insured and insurer. One cannot expect an accident victim or a third party for that matter to have it.

23. This appeal and record of appeal were served on the Respondent's counsel. A hearing notice with directions were also served on the counsel who failed to file submissions and/or appear before this court.

24. I find that the Respondent is bent on buying time by having the declaratory suit in the Magistrate's court proceed to full trial. This amounts to an abuse of the court process which should not be countenanced.

25. The upshot is that the appeal has merit and I allow it with costs and issue the following orders: -

i. The ruling and order of the R.M Makueni delivered on 20/12/2018 is set aside and judgment entered in favour of the Appellant in civil case No. 116 of 2018.

ii. A declaration is made to the effect that the Respondent is liable to satisfy the judgment in said suit being Kshs.2,009,835/= plus costs and interest.

Orders accordingly.

DELIVERED, SIGNED AND DATED THIS 1st DAY OF OCTOBER, 2019 IN OPEN COURT AT MAKUENI.

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H. I ONG'UDI

JUDGE