REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL APPEAL NO. 204 OF 2009

DANIEL OPAR OUYA.....APPELLANT

VERSUS

FIRST ASSURANCE COMPANY LIMITED.....RESPONDENT

J U D G M E N T

Outline of facts of the case

1. In this appeal, the appellant challenges the decision of the trial court, **Hon. Mutende, PM**, dated the 13/5/2009. In that decision the trial court dismissed the appellant's suit for failure to prove his case on a balance of probabilities. The court said in that judgment:-

> ***"The plaintiff had a duty of proving on a balance of probabilities the relationship between the 2nd defendant and the insured. In his submissions counsel for the plaintiff argued that the company did not exist. He stated that the 2nd defendant in HCC 62/200 Willy Kripping had recorded a statement with the police stating that he was a director with Be Good Co. Ltd which was currently out of operation. It was not established who indeed recorded the statement. The plaintiff was required to adduce evidence establishing the relationship between Willy whose name appeared on the police abstract and "BE GOOD CO. LTD" which was not done. There was also no evidence that BE GOOD CO. LTD was indeed not an existing company. The evidence adduced by the defense therefore establishes the fact that indeed the insurer of motor vehicle registration number KAK 827R at the time of the accident was BE GOOD CO. LTD. Be Good Co. Ltd being a legal person is different from Willy Krippng. The plaintiff herein therefore did not obtain a judgment against the insured of the defendant hereby "BE GOOD COMPANY LTD". This court therefore restrain itself from granting the order sought. The case against the defendant fails. The same is dismissed but each party shall bear its costs"***. (emphasis provided)

2. That judgment has aggrieved the Appellant who has set out some 6 grounds of appeal in the Memorandum of appeal dated 2/11/2009 and filed in court on the 3/11/2018. The summary of the six grounds are that the trial court erred in failing to find and appreciate that the appellant had complied with provisions of Cap 405 and in particular section 10 thereof; that there was an error in failing to find that the onus to prove ownership of the offensive motor vehicle rested with the respondent; failing to adequately consider the entire evidence led; failing to appreciate that negligence rested with the respondent or its insured and lastly that there was an error in failing to find that the respondent had failed to enter appearance in HCCC No. 62 of 2000 necessitating a default judgment.

3. The suit giving rise to the appeal herein was initiated by the plaint dated 27/7/2004 was evidently a declaratory suit. In it, the plaintiff pleaded that the Respondent did issue a policy of insurance no. 98/10/803253 TPO. No. A0195864 to one Willy Kripping over a motor vehicle no. KAK 827R and issued a certificate to the said insured pursuant to Section 7 of the Act. It was equally pleaded that on the 20/4/2000 while the policy was in force, the plaintiff was travelling in the subject motor when it was negligently controlled as a consequence of which the plaintiff suffered bodily injuries loss and damage for which loss the plaintiff filed Mombasa HCC No. 62 of 2000 against the said insured and obtained a judgment in the sum of Kshs.709,885 which together with costs and interests stood at Kshs.1,024,502.00.

4. It was further pleaded that a notice was duly served pursuant to the provisions of the Act hence under Section 10 of the Act the respondent as the insurer became liable to meet that decree.

5. When served with the pleadings the Respondent filed a defense dated 15/2/2005. In that defense, the defendant denied ever issuing the policy a pleaded to the named Willy Krippling over the pleaded motor vehicle and asserted that it was a total stranger to the said Willy Kripping and have no privity of contract with him.

6. It was equally denied that any certificate of insurance was issued by the Respondent with a further denial of the occurrence of my accident as pleaded. It was then asserted that even if the accident occurred as pleaded the Respondent was under no obligation to be liable for the payment of any resultant decree as no notice was ever issued and served in compliance with Section 10 of the Act. In answer to paragraph 8

& 9 of the plaint, the defendant denied any knowledge of the primary suit and that the parties against whose judgment was obtained in the primary suit were strangers to it because there was no contract of insurance between it and the pleaded Willy Kripping.

7. Pursuant to the then Order VI Rule 18, Civil Procedure Act, the defendant did serve request for particulars in almost all pertinent facts pleaded in the plaint and the plaintiff did provide answers to the request for particulars by the answer dated 16/2/2005.

8. It would appear that the plaintiff did not file any Reply to the statement of defense because no record or copy of such is on the record. There is also no evidence that the parties agreed on any issues before the trial court hence it was left to the court to settle and isolate the issues for determination.

Evidence offered

9. At trial the appellants side called two witness, the appellant himself and an officer from Diani Police Station whose propose was to produce the accident file and the document therein contained.

10. In his evidence, the appellant marked for identification the certificate of insurance issued by the Respondent on 31/3/2000 to last till 28/10/2000 for motor vehicle KAK 827R. He equally produced a police abstract from Ukunda Police Station as an exhibit. P1 Notice and Certificate of posting were produced as exhibits P2a & b while the judgment in the primary suit was produced as ExP4 with a letter before action being produced as exhibit P3.There was also produced a response to the demand letter in which it was contended that the respondents were strangers to Mr. Opar.

11. On cross examination, the witness said that the certificate of insurance did not reveal the insured and that he did not conduct a search to reveal who the owner of the motor vehicle was. He however conceded that the certificate of insurance produced showed the insured/policy holder to have been BE GOOD CO. LTD who he did not sue.

12. On the letter before action he conceded that the reference to 20/4/2004 as the date of accident was incorrect as his accident was in the year 2000. In re-examination, the appellant reiterated that the accident was in the year 2000 and not 2004 and that the certificate of insurance named the Respondent as the insured with further assertion that he knew both Willy Kripping and Fred Ouma Onono as the owner and driver of the offending motor vehicle respectively.

13. PW 2, No. 4/259 P.C. FREDRICK WANJAU produced the file and certificate of insurance no. A0195864 for policy no. 98/10/80352 issued on 31/3/2000 to expire on 28/10/2000. He said the sticker was obtained from the suit motor vehicle and several people recorded statement including one Willy Kripping who stated was a director of BE GOOD CO. LTD. He produced the entire police file as exhibit P8.

14. In cross examination, the witness confirmed that in the certificates of insurance produced, the policy holder was BE GOOD CO. LTD and that the name WILLY KRIPPING did not appear on the certificate of insurance.

15. For the Respondent one Edward Maganga Mghanga, an employee of the Respondent in the capacity of an Assistant Manager, gave evidence on behalf of the Respondent. He said that policy no. 98/10/803253 was issued to BE GOOD CO. LTD in respect of three motor vehicles KAK 252 Z, KAK 297A, and KAK 827R from the period 21/10/1999 to 28/10/2000. The certificate of insurance issued were issued in favour of the insured and not Willy Krippling and therefore no suit was ever filed against their insured hence no judgment had been obtained against such insured. He denied any knowledge of the primary suit or any knowledge of any notice issued respecting same and denied that the Respondent was responsible to meet the decree as no judgment had been obtained against its insured.

16. On cross examination, he admitted that the letter and notices were sent to their postal address. He however maintained that there was never a judgment against an insured of the Respondent. That was all the evidence the court was to consider and shown to have been considered in coming up with the judgment now appealed against.

Issues for determination

17. From the record of the trial court comprising the pleadings, proceedings, exhibits and judgment when looked at against the submissions offered by both sides, the following issues do isolate themselves for determination by the court.

- Did the appellant obtained judgment against an insured of the Respondent to entitle it to a judgment in the declaratory suit?
- Did the appellant discharge his onus of proof before the trial court?
- Did the trial court err in coming to the decision it reached?
- What orders should be made as to costs?

Analysis and determination

18. There were two grounds of appeal listed as number 5 & 6 in the memorandum of appeal which need not engage this court much. Those grounds suggest that there was need to consider whether or not the respondent or its insured were negligent and further that failure to enter appearance in the primary suit had some significance in the declaratory suit. To this court those grounds are wholly irrelevant in this appeal in that the declaratory suit demanded no proof of negligence on the defendant. If grounded on section 10 of the Act, it is a statutory remedy that only demand that the matter listed as prerequisites be proved and no more. Negligence is not one of such matters. Equally how the primary suit was determined is not a consideration. The only requirement is that there be a judgment against the policy holder. It matters not that the judgment was by default, consent or a long drawn trial.

19. For a litigant to succeed in a declaratory suit pursuant to Section 10, Cap 405, he ought to prove the following:-

i.A policy issued pursuant to Section 5 of the Act was in force.

ii.A judgment has been obtained against the policy hold.

iii.Prior to filing suit in which judgment was obtained or within 30 days after filing, there was to serve a notice upon the insurer.

20. In this matter there was never evidence that there had been filed a suit or any judgment obtained against BE GOOD COMPANY LTD, who was the conceded to be policy holder. It matters not that there could have been a relationship between that company and an individual called Willy Kripping (Knipping). That relationship even if it be that of a company and its director did not make the individual the policy holder. The two are separate and distinct from each other.

21. In ***Kenindra Assurance Co. Ltd vs James Otiende [1989] 2KLR 162***, the Court of Appeal when faced with an appeal on when an insurer could be declared bound to settle a decree said:-

"Accordingly, on the plain wording of the sub-section, an essential pre-condition of liability did not exist…"

22. Here as in Kenindia's case there was no judgment against the insured and therefore there was never a statutory exception to the general rule that a non-party to a contract cannot sue or be sued on it, for the appellant to have found a cause of action against the Respondent.

23. That there had not been a suit against the Respondents policy holder deprived the applicant of any right to seek to enforce any other judgment against the Respondent. Without a judgment and the basis of cause of action pursuant to section 10 of the Act, there was no suit capable of being meaningfully adjudged. Accordingly whateveramount evidence the Appellant would have led would have amounted to nothing.

24. The trial court was therefore perfectly right to find and hold as it did when the court said:-

"The evidence adduced by the defendant therefore establishes that indeed the insurer (sic) of motor vehicle Registration No. KAK 827R at the time of the accident was 'BE GOOD COMPANY LTD'. Be Bood Co. Ltd being a legal person is different from Willy Kripping the Defendant herein therefore did not obtain a judgment against the insured of the defendant hereby BE GOOD COMPANY LTD".

25. The upshot is that the appeal lacks merit and is hereby dismissed with costs.

Dated and delivered at Mombasa this 16th day of October 2018.

P.J.O. OTIENO

JUDGE