REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 110 OF 2013

CORPORATE INSURANCE CO. LTD.....APPLICANT

VERSUS

MAKAU KAITHU MUSOMBA.....1ST RESPONDENT

ZIPPORAH KOKI MUIVA (Both suing as

next of kin to and on behalf of the estate

of JOSEPH GAITHO MAKAU).....2ND RESPONDENT

(Appeal from the Judgement and order of the Chief Magistrate - Hon. M.W Murage in CMCC No. 42 of 2009 delivered on 7/05/2013)

JUDGEMENT

BACKGROUND

1. By a Plaint dated 4th May, 2004 the Respondents sued **BINSAND AUTOSPARES & HAULIERS** and **DAVID MUTUA NDISII** for general and special damages out of a road traffic accident on 27/3/2000 involving motor vehicle registration number KAL 493W insured by the Appellant and motor vehicle registration number KWC 305 along Kitengela-Kajiado Road wherein one **JOSEPH GAITHO MAKAU** deceased was travelling as a passenger wherein the Judgement was entered against the Appellant insured for a sum of Kshs.1,904,508/= together with costs and interests in Machakos CMCC No. 461 of 2004 with a decree therein drawn for the sum of Kshs.2,226,530.

2. By a Plaint dated 12/1/2009 the Respondents sued the Appellant for declaration that the same was bond to pay the decretal sum herein in CMCC No. 42/2009 together with costs thereon and by a statement of defence dated 28th January 2009, the Appellant denied being the insurer of the Judgement Debtor in CMCC No. 461 of 2004 and stated that it had no legal obligations to indemnify the Respondents under the provisions of Cap 405 Laws of Kenya.

3. By a Notice of Motion dated 31/6/2009 the Respondents moved the court for orders that the defence by the Appellant be struck out and judgement entered against the same and by a ruling dated 20/05/2010 B.T. JADEN – Chief Magistrate as she then was, dismissed the said application leading the Respondents to fix the same for hearing at the end of which M.W. Muragu - Chief Magistrate entered a judgement for the Respondents against the Appellant and found as follows:-

> ***"The Defendant (Appellant) have denied service of notice. However it is clear that they indeed instructed a lawyer to defend the suit. The address used to send the Plaint and summons were the same ones the Plaintiff used to send notice and demand. From their conduct it appears that the Defendants were well aware of the claim against them and they indeed safeguarded their interest and protected their rights and interest by instructing a lawyer upto the appeal level. The judgement in the primary suit still stands and it is too late in the day to repudiate it."***

4. Being dissatisfied with the said judgement and determination the Appellant filed this appeal and raised the following grounds of appeal:-

> ***1) The learned Resident Magistrate erred in law and fact in finding that the Plaintiffs had proved their case against the Defendant and especially on liability and consequently entered judgement for them, yet there was no evidence to support such a finding.***
>
> ***2) The learned Resident Magistrate erred in law and fact in finding that :-***
>
> ***a. The deceased died as a result of injuries inflicted on him by the Appellants yet there was no evidence to support such a***

finding.

b. The 1st Appellant was a legal person capable of being sued yet there was no such evidence. (this point was raised in paragraph 3 of the Appellant's defence)

3) The leave granted to file suit out of time, namely, on the ground that the Respondents did not have money to file suit within the prescribed time, was granted without jurisdiction, as such a reason is not one of the grounds on which leave to file suit out of time can be granted under the Limitation of Actions Act (Sections 27 and 28 thereof).

4) The damages awarded were, in any event, manifestly excessive.

5) The Respondents had not taken out letters of administration. They therefore did not have capacity to sue. Yet the trial court awarded them damages.

6) There was no connection between the 1st Appellant (as the alleged owner of vehicle no. KAL 493W and the 2nd appellant so as to justify the court's finding of vicarious liability against the 1st Appellant.

7) The learned Resident Magistrate erred in law and fact in finding that the Appellants were liable to satisfy the Respondents case and awarded them damages, yet the case was not proved and should therefore have been dismissed with costs.

SUBMISSIONS

5. Directions were given that this appeal be determined by way of written submissions and on 8/5/2018 the appellant filed its written submissions the Respondents having filed theirs on 29/11/2017. It was submitted on behalf of the Appellant that the trial magistrate failed to consider that the same had proved its case to the required standard that the required statutory notice was not served as required in law and that no proof of service was produced by the Respondents for which reliance was placed upon the following High court cases:-

1) Nairobi Hccc No. 1860/2000, DR. JAMES NGANGA MUNGAI v UNITED INSURANCE CO. LTD.

2) Nairobi Hccc No. 15 of 1990, PATRICK OCHOLA v KENINDIA ASSURANCE CO. LTD.

6. It was submitted further that the Appellant had in its defence expressly denied being the insurer of motor vehicle registration number KAL 493 W and that their insured was Kalsi Transporters who were not a party to the suit. It was therefore submitted that the trial court failed to consider and apply the provisions of **Section 10 (11) of CAP 405 (Motor Vehicle Third Party Risks) Act**. It was submitted that it was the motor vehicle registration number KAL 493W which was insured by the Appellant and not the Defendant in the primary suit CMCC No. 461/2004 therefore the trial court erred in declaring that the Appellant was required to satisfy a judgement against a party that was not its insured for which the cases of **PHILIP KIMANI GIKONYO v GATEWAY INSURANCE CO. LTD., HCCA NO. 746/2012 NARIBOI** and **KENINDIA ASSURANCE CO. LTD. v JAMES OTIENDE [1989] 2KAR 162.**

7. It was submitted that there was no proof that the Respondent had served upon the Appellant the requisite statutory notice and that the fact that the Appellant appointed an advocate to represent them was not a sufficient ground upon which the same should have been held liable. It was stated further that the Respondent were required to prove that they had obtained judgment against the Appellant's insured before being held liable to honour the Judgement for which the following cases were submitted:- **DR. JAMES NGANGA MUNGAI v UNITED INSURANCE CO. LTD. NAIROBI HCCC NO. 1860 OF 2000** and **JUBILEE INSURANCE CO. LTD. v OMBAKA NAIROBI HCCC NO. 548 OF 1996.**

8. On behalf of the Respondent it was submitted that there were only two issues for determination that is whether the Defendant in the primary suit was insured by the Appellant and whether the same was under an obligation to honour the terms of the judgement of the primary suit. It was submitted that the police abstract and the insurance sticker produced at the trial showed that the Appellant was the insurer of the suit motor vehicle registration number KAL 493 W. That having served the statutory notice upon the Appellant as is required in law who appointed an advocate to defend their insured, the trial court was right in finding that from its conduct it appears that the same was well aware of the claim against her.

9. This being a first appeal the court is under duty to re-evaluate the evidence tendered before the trial court and to come to its own conclusion though giving allowance to the fact that it did not have the advantage of seeing and hearing witnesses unlike the trial court. I shall proceed to reconsider the evidence as tendered before the trial court while answering the issues identified herein.

10. From the pleadings and submission I have identified the following issues for determination:-

1) Whether the Appellant was the insurer of the Defendant in the primary suit and which statutory notice under Section 10 (1) of CAP 407 Insurance Motor Vehicle Third Party Risks Act was served upon the same.

2) Whether the Appellant is required to honour the judgment obtained in the primary suit 461/2004 Machakos.

3) Whether the Respondent proved their case on a balance of probability against the Appellant herein.

11. The following facts are undisputed from the perusal of copies of proceedings herein:- There was a road traffic accident on or about 27/03/2000 involving motor vehicle registration no. KAL 493W which was insured by the Appellant under police policy number

TP/6/536/03167/92. As at the time of the said accident the registered owner of the said motor vehicle as per certificate of official search at the Registrar of motor vehicle was **BINSAND AUTOPARTS & HAULIERS** of **P.O. BOX 63672 NAIROBI** who was duly sued by the Respondent as such.

12. Upon service of summons to enter appearance the Defendant in the primary suit specifically denied being the owner of the suit motor vehicle herein in a statement of defence filed upon the interlocutory judgement earlier obtained being set aside by consent. It is further not in dispute that the Appellant insured as at the time of the accident herein was **M/s KALSI TRANSPORTERS & COMM. AGENTS** of **P.O. BOX 17775, NAIROBI** as per the policy document produced by the Appellant herein.

13. The issue therefore for court's determination is whether the Appellant under the provisions of Third Party Motor Insurance Act is entitled to honour a judgement obtained against a Defendant who is not their insured but in respect of an accident involving a motor vehicle insured by the same. This question had been answered by Alnashir Visram J. as he then was when the judge had this to say in the case of **PHILIP KIMANI GIKONYO v GATEWAY OF INSURANCE CO. LTD. HCCA NO. 746 Of 2002 Nairobi** as follows at page 6:-

> ***"Now, the next issue is whether there had to be Judgment against the insured in addition to a Judgment against his authorized driver. Let us go back to Section 10(1) of the Act. The critical words of that Section are:-***
>
> ***"If ... judgment is obtained against any person insured by the policy ... the insurer shall ... pay to the persons entitled to the benefit of the judgment ..."***
>
> ***So, then, who is a person "insured by the policy" The answer to that question is found in the insurance policy itself.***
>
> ***Section 2 of the Respondent's insurance policy (page 30 of the Record) stipulates as follows:***
>
> ***"In terms of and subject to the limitations of and for the purposes of this Section the Company will indemnify any Authorised Driver who is driving the Motor Vehicle provided that such Authorised Driver***
>
> > ***(i) shall as though he were the Insured observe fulfill and be subject to the Terms of this Policy insofar as they can apply***
> >
> > ***(ii) is not entitled to indemnity under any other policy"***
>
> ***The person "insured by the policy" is any authorized driver provided he shall as though he were the insured observe the terms of the policy.***
>
> ***It is not in dispute that the driver in this case was indeed the authorized driver. In fact, he was the director of the insured company, and if the insured's corporate veil was lifted, he would emerge as the insured.***
>
> ***So, if he is deemed to be the "insured" in accordance with the terms of the Policy, and the injured third party here, the Appellant, is a person "entitled to the benefit of the Judgment", the inevitable conclusion is that the Appellant's Judgment against the insured's driver is enforceable against the insurer, the Respondent . . ."***

14. Whereas it is not in dispute that the 1st Defendant in the primary suit was not the insured of the Appellant there was no evidence tendered by the evidence before the trial court in the 2nd Defendant therein was not the authorized driver of the insured. The Appellant at the trial through **PW 1 NANCY WAITIRI SHIKUKU** stated in her evidence-in-chief that there was a time the 2nd defendant **DAVID MUTUA NDISII** in CMCC No. 461/2004 brought summons to their office and they instructed J.K. Mwangi & Co. Advocates to act for the Appellant. It was her evidence that motor vehicle registration number KAL 493W was insured by them. There is no evidence tendered before the trial court that the insured of the Appellant had violated any of the terms and conditions of the policy of insurance which was in force as at the time of the accident involving the insured motor vehicle and I therefore find and hold that the Appellant having not avoided the policy of insurance in respect thereof is under statutory obligation to honour the judgment obtained in CMCC No. 461 OF 2004 and therefore find no fault with the trial court's determination as regards the declaration thereon.

15. Section 10 (1) of the Act provides that:-

> ***"If, after a policy of insurance has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of section 5 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments."***

The Appellant is therefore obliged to pay and satisfy judgment obtained by the Respondent unless they had filed a declaratory suit to avoid the policy before the judgement was obtained.

16. The final issue is whether statutory notice had been served upon the Appellant which then triggered the rights under the Act. There are several authorities including those submitted by the Appellant to the effect that the issue of service of evidence is a matter of evidence. In **DR. JAMES NGANGA MUNGAI v UNITED INSURANCE CO. LTD. Supra** the court held that :

"service of such a notice may be by delivery book with acknowledgement noted, prepaid postage or in the absence of such mode if the insurer by any means demonstrated that it got the notice."

17. Whereas it is the Appellant's contention that no statutory notice was served upon it, the same admitted before the trial court that they instructed the firm of **J.K. MWANGI & CO. ADVOCATES** to act for it out of the principle of abundance of caution and that they thereafter discovered that the Defendant was not their insured but failed to exercise the right provided for them under the law by filing a declaration suit to avoid payment.

18. Having found as a fact that the 2nd Defendant was insured under the policy and the motor vehicle the subject of the suit was the insured subject matter and the Appellant having admitted and produced policy document confirming that they had insured the subject motor vehicle and having taken judicial notice of the practice in Kenya of those who purchase motor vehicle not transferring them into their name , I am persuaded and find that the trial court was right and justified in finding that the Appellant had been served with statutory notice before the commencement of the primary suit.

19. Having re-evaluated the evidence tendered before the trial court, the submission and authorities before me, I find no merit on the appeal herein which I hereby dismiss with costs and affirm the judgement of M.W. Murage, Chief Magistrate delivered on 7/5/2013.

Dated and signed at Nairobi this 30th day of October, 2018.

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J. WAKIAGA

JUDGE

Delivered in open court this 5th day of November, 2018 at Machakos by Justice G.V Odunga on behalf of Justice J. Wakiaga in the presence of:-

.....

G.V. ODUNGA

JUDGE