



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. 97 OF 2016

MACHARIA MWANGI TOTO.....APPELLANT

-VERSUS-

GEMINIA INSURANCE CO LTD.....RESPONDENT

(Being an Appeal against the ruling/order of the Hon. Munyi – Senior Resident Magistrate dated 31st August 2016 in Nakuru CMCC no 382 of 2015 – Macharia Mwangi Toto -vs- Geminia Insurance Company)

JUDGMENT

Brief Background

1. The Appellant Macharia Mwangi Toto was the plaintiff in **Nakuru CMCC No. 382 of 2015**, a declaratory suit between himself and Geminia Insurance Company Ltd, the Respondent.

The cause of action was a road traffic accident that occurred on the 25th February 2001 along Eldoret-Nakuru Road involving motor vehicle Registration No. KAE 397 B insured by the Respondent and owned by Gabriel M. Mugambi(insured) and a cyclist Peter Mwangi Murage (passenger)who sustained bodily injuries.

The Insurance Policy was to expire on the 3rd April 2001 and therefore the accident occurred during the validity of the Policy No. PC/03/037773/1 TPO.

2. The cyclist instituted two suits against the owner and insured of the vehicle being Nakuru CMCC No.913 of 2003 and Nakuru CMCC No.1427/2003. Judgments were entered in his favour. It is submitted that no appeals were preferred against the judgments.

3. By the primary suit the Appellant sought declarations that the Respondent by virtue of **Section 10(1) of Cap 405** Laws of Kenya is bound to pay the plaintiff the total decretal sums, all conditions stipulated thereunder having been met.

4. By a ruling dated 31st August 2016 the trial court struck out the suit for disclosing no cause of action against the defendant (insured) and held that the plaintiff's case (Appellant) did not disclose any reasonable or justifiable action against the Respondent (Insurance Company), citing **HCCC NO. 299 of 2004 e KLR, Geminia Insurance Co. Ltd -vs- Gabriel M. Mugambi.**_____

5. **HCCC No.299 of 2004** (Nakuru)stated above was filed by the insured against the insurance company but following an accident involving motor vehicle registration No. KAE 397B and the appellant, while in **CMCC 913/2003** involved the same vehicle, same owner but accident stated to have occurred on the 25th February 2001.

It is out of the trial court's ruling dated 31st August 2016 striking out **Nakuru CMCC No. 382 of 2015** that this appeal was filed.

6. Several grounds for the appeal are stated.

In their totality, the appellant challenges the trial magistrates ruling in the application of **Section 10(2) (c) (ii) of the Insurance (Motor Vehicle Third Party Risks) Act, Cap 405** Laws of Kenya as to **when liability arises after an accident occurs causing bodily injury to passengers and time lines in filing of court process. Also at issue is whether repudiation of the insurance policy in one suit ought to bind other suits where the parties (injured persons) are not parties to the said suit, where such repudiation has been ordered.**

7. A further issue is whether the trial magistrate erred in striking out the appellants suit upon reason that it disclosed no reasonable cause of action as it was supported by affidavit evidence.

8. Each party filed submissions in support of their rival positions. **Nakuru CMCC No. 382 of 2015** was a declaratory suit by the insurer of the accident vehicle. The court having entered judgment against the insured in favour of the injured party, it was urged that the insurance company was pursuant to Section 10(4) Cap 405 under an obligation to settle the claim.

9. The Respondent applied to have the suit struck out under **Order 2 Rule 15 of Civil Procedure Rules and Section 1A, 1B and 3A Civil Procedure Act**, as well as **Section 10(4) of Cap 405**, which the court did.

10. I have considered grounds upon which the application was grounded on. In **Nakuru CMCC No. 1427 of 2003**, the Insurance company (Respondent) had obtained a declaration that it was not liable to indemnify the insured in the case for any claims of injury following the **accident that occurred on the 25th February 2001**, and further that the suit did not disclose a reasonable cause of action against the insurance company.

11. The application was opposed and upon consideration, the trial court was not persuaded that any cause of action existed for reasons given in the ruling.

I want to state here that there were numerous cases filed in respect of the **25th February 2001** accident. Some were heard and determined. I have considered the application.

What was before the trial court was affidavit evidence for and against the application.

12. I have noted that the suits are related in one aspect or the other, all involving the application of **Section 10 of Cap 405**. These were the primary suits by the injured persons for damages arising from the accident. Others were against the insurer and others against the insurance company and others by the insurer against its insured. I have also noted that on the face of the record, it appears that there were two accidents involving the vehicle Reg. No. KAE 397B on two different dates the **25th February 2001 and 25th February 2002**, but which each party defends, stating that it was only one accident, subject of the primary suit.

13. I have also considered the findings in **HCCC No. 299 of 2004 and the judgment dated on the 8th April 2011**, to the effect that the plaintiff (Respondent herein) is entitled to avoid the **Policy No. PC/03/0037773/1 dated 4th April 2000 in relation to the accident that occurred on 25th February 2002 involving the said motor vehicle KAE 397B and the 3rd party cyclist**. (emphasis mine).

14. Without further details on the judgment(not provided) and rightfully captured by the respondent it refers to an accident that occurred on the **25th February 2002**, and not the accident subject of all the cases cited and all proceedings thereto that occurred on the **25th February 2001**.

Clearly at the face of the matter before the trial Magistrate there were many issues for trial that I cannot see how a ruling that the suit demonstrated no cause of action could have been reached and summarily struck out the suit including whether or not there were two accidents or one involving the subject motor vehicle.

15. I agree with the Learned Magistrate's finding that a suit ought not be dismissed summarily unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and it is too weak to be redeemed. - **D.T Dobbie and Company (Kenya) Ltd -vs- Muchina (1982) KLR**. Reading through the judgment it is more apparent that the trial magistrate did not consider the **High Court decision in HCCC No. 299 of 2004** (that she cited with approval) **yet it was clear that the said judgment referred to accidents on two different dates, the 25th February 2002 and 25th February 2001**. the parties needed to do was to seek for a calcification by way of an order of review or variation.

16. None of the parties moved the Judge for a review **order under Order 45 of Civil Procedure Rules** or under **Section 99 of Civil Procedure Act** before the judge who delivered the judgment. As things stand, that judgment remains as it is.

17. I further find that the striking out of a suit without consideration of the effects and prejudice that such order would occasion to the parties is against the principles of fair trial guaranteed under **Articles 25 and 50** of the Constitution of Kenya.

In **Yaya Towers Ltd -vs- Trade Bank Ltd** (in liquidation) **C.A No. 35 of 2000** the court rendered that:

“a plaintiff is entitled to pursue a claim in our courts however implausible and however improbable his chances of success, unless the defendant can demonstrate shortly and conclusively that the claim is bound to fail---”

18. Looking at the pleadings and documentation filed by each of the parties, it cannot be seen or even alleged that there existed no cause of action or at all to warrant an order of striking out the plaintiff. The contract between the insurer and the insured, and a 3rd party is a matter that ought to be interrogated carefully. The small print must be properly read and understood and its import and purpose properly explained before a verdict is passed. Further a matter like the present one is not one that can be adequately determined on affidavit evidence. A party ought to be given a right to be heard by a court and to be accorded all opportunity to produce all available evidence before hasty determination is reached.

19. A subordinate court cannot by any chance purport to overrule, review or vary a decision of the superior court as is the case in the matter under review. This was ably stated in **Nairobi High Court Review No. 342 of 2011 – Gateway Insurance Co. Ltd -vs- Thomas Njenga Gitau and Another (2014) e KLR**.

20. For those reasons I find the ruling dated the **31st August 2016** by the trial magistrate not to have been based on any sound facts or legal principles and must be set aside.

I proceed to set aside the said ruling dated 31st August 2016 and substitute it with an order dismissing the Notice of Motion application dated 24th November 2015 with costs.

21. Consequently the appellant's suit Nakuru CMCC No. 382 of 2015 is hereby reinstated for hearing and determination before the Chief Magistrates Court by any other magistrate other than the trial magistrate.

Costs of the appeal are awarded to the appellant.

Dated, signed and delivered this 13th Day of December 2018.

J.N. MULWA

JUDGE