REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 734 of 2007

SOLOMON OKEYO OKWAMA &

PHOEBE ANYANGO OKEYO (The Administrators of

the estate of ADAMS OTIENO OKEYO (deceased)…..PLAINTIFFS

VERSUS

KENYA ALLIANCE INSURANCE CO. LIMITED…..…….DEFENDANT

J U D G M E N T

1. This declaratory suit was filed on behalf of the estate of the late Adams Otieno Okeyo who died as a result of a road traffic accident which was the subject matter of the Milimani Commercial CMCC No. 6000 of 2003 (the primary suit). Judgment in the primary suit was entered in favour of the Plaintiff as against the Defendant one Collins Ochogo Otiwo in the sum of Kshs.2,052,880/=. During the hearing hereof the 1st Plaintiff, Solomon Okeyo Okwama died after he had testified on 20/06/2008. By an order given by this court on 7/11/2008, the surviving Plaintiff, Phoebe Anyango Okeyo was allowed to proceed with the suit. The Plaintiff seeks the following reliefs from this court:-

(a) Declaration that the Defendant is liable to satisfy the Judgment and Decree in CMCC No. 6000 of 2003 in Nairobi.

(b) *Judgment be entered accordingly for the Plaintiff as against the Defendant for Kshs.2,052,880/= in terms of the Judgment and Decree [*in the primary suit].

(c) Costs of this suit

(d) Interest on (a) and (b) and (c) above.

The Plaintiffs produced the Limited Grant of Letters of Administration *ad Litem* as PExhibit 4.

2. The facts of this case are that Adams Otieno Okeyo (the deceased) was traveling in car Registration Number KAL 129T. The car which was being driven by Collins Ochogo Otiwo was involved in a road traffic accident from which the deceased sustained serious injuries. The deceased succumbed to those injuries on 1/01/2001. The Plaintiff filed the primary suit against Collins Ochogo Otiwo under the Law Reform Act, Cap 26 and the Fatal Accidents Act, Cap 32 Laws of Kenya. Judgment was entered in the sum of Kshs.1 892 090/= plus costs in the sum of Kshs.138 970/=. The Plaintiff contended that at all times material to this suit the Defendant herein was the insurer of Collins Ochogo Otiwo, hence these proceedings against the Defendant.

3. The Plaintiff's case is also on the ground that upon entry of judgment in the primary suit the Defendant herein was called upon to satisfy the judgment as per the notice produced herein as PExhibit 3. The Plaintiff says that the Defendant did not challenge the judgment in the primary suit and further that having been notified of the said judgment the Plaintiff is under an obligation to satisfy the judgment and decree in the primary suit.

4. The Defendant's defence raised the following issues, namely that:-

(a) The provisions of the Insurance (Motor Vehicles Third Party Risks) Act, Cap 405 was not applicable in this case.

(b) The Defendant did not issue an insurance cover for motor vehicle KAL 129T alleged to have been owned by Collins Ochogo Otiwo in respect of any liability insured by the said Collins Ochogo Otiwo or his agent in respect of death or bodily injury to any person caused by or arising out of the use on the road of the said motor vehicle.

(c) The Defendant was never served with the requisite statutory notice as mandatorily required under Section 10(2) of the Act.

For the above reasons, the Defendant urges the court to dismiss the Plaintiff's suit with costs to itself.

5. Evidence in support of the Plaintiff's case was given by PW1, Solomon Okeyo Okwama (now deceased). PW1 produced the Decree in the primary suit as PExhibit 1, Statutory Notice to the Defendant as PExhibit 2 and a further notice dated 31/08/2007 as PExhibit 3. PW1 also produced the Claim Form – Motor Accident as PExhibit 6. The document shows that the insured of motor vehicle KAL 129T was Collins Ochogo Otiwo under Policy No. 08/MCD 14701/COMP expiring on 24/08/2000. PW1 stated that this policy document contains all the information concerning the date of the accident, the owner and driver of the motor vehicle and the person injured in the accident. On the reverse side of the policy document is a statement by Collins Otiwo who says that just prior to the accident, he was driving at about 100 kph and that he suddenly came upon a bump and was forced to apply emergency brakes as a result of which the car hit the bump. He goes on to say that on impact with the bump, the car was thrown first to the right and in the process he lost control. He says the car then skidded and rolled about 4 to 5 times and landed on its roof in a ditch on the left side. It is worth noting that the place of the accident was a built up market centre, which required the driver to maintain a speed of 50 kph. Collins Otiwo also says in the statement that the deceased was injured during the accident and was taken to Kericho General Hospital. The deceased is said to have suffered a neck spinal injury that resulted in paralysis of his lower limbs and subsequent demise. PW1 said that PExhibit 6 was given to him by Collins Otiwo. PW1 also said that it was as a result of the above information that the lower court gave him judgment in the primary suit.

6. During cross-examination, PW1 stated that his advocates gave notice of intention to sue on his behalf. PW1 also stated that Collins Ochogo Otiwo gave him (PW1) PExhibit 6 as a confirmation that he (Collins) had reported the accident to his insurers.

7. The Defendant did not adduce any oral evidence but put in detailed written submissions. The gist of the Defendant's submissions revolves around its defence to the Plaintiff's claim and in particular that the Plaintiff's claim is not maintainable in light of the exclusion clause of the second proviso to Section 5 of the Insurance (Motor Vehicles Third Party Risks) Act Cap 405 (the Act). The whole of Section 5 of the Act provides as follows:-

"*5. In order to comply with the requirements of section 4, the policy of insurance must be a policy which:*

(a) Is issued by a company which is required under the Insurance Act 1984 to carry on motor vehicle insurance business; and

(b) Insures such person, persons or classes of persons as may be specified in the policy in respect of

any liability which may be incurred by him or them in respect of the death of, or bodily injury to, any person caused by or arising out of the use of the vehicle on the road:

Provided that a policy in terms of this section shall not be required to cover:

(i) liability in respect of the death arising out of and in the course of his employment of a person in the employment of a person insured by the policy or of bodily injury sustained by such a person arising out of and in the course of his employment; or

(ii) except in the case of a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, liability in respect of the death of or bodily injury to persons being carried in or upon or entering or getting on to or alighting from the vehicle at the time of the occurrence of the event out of which the claim arose; or

(iii) any contractual liability."

8. Mr. Masinde, learned counsel for the Defendant argued that no evidence has been placed before the court to show that the subject vehicle was being used for carrying passengers for hire or for reward or that the deceased was traveling in the vehicle pursuant to a contract of employment. He argued further that in light of the provisions of Section 5 of the Act which provisions targets public vehicles, the deceased was not covered and that liability should not be assigned to the Defendant in this case. Mr. Masinde cited the following cases in support of his arguments:-

1. *M'Mairanyi & Others –vs- Blue Shield Insurance Company Ltd. [2005] 1 EA 280*

2. *Gateway Insurance Company Ltd. –vs- Sudan Mathews – Milimani HCCC No. 1078 of 2000.*

3. *Gateway Insurance Company Limited –vs- Martin Sambu [2003] e KLR*

4. *Francis Munyua Wanyoike –vs- General Accident Insurance Company Limited [2007] e KLR.*

9. Learned counsel for the Defendant contended that for the Plaintiff to benefit from the provisions of Section 10(1) of the Act, they must demonstrate that the judgment obtained in the primary suit was in respect of liability covered under paragraph (b) of Section 5 of the Act. In the Defendant's view, the Plaintiffs have not placed evidence before the court to show that they fall within the ambit of the policy in respect of the subject motor vehicle.

10. In the M'Mairanyi case (above) the Appellants were given a gratuitous lift by the owner of a pick-up motor vehicle in order to attend the funeral of a renowned politician in the area. The vehicle, which was being driven by the owner's wife got involved in an accident as a result of which the Appellants suffered injury. The Appellants filed suits for compensation against the owner of the motor vehicle. The Appellants got judgments against the owner of the motor vehicle, but the awards were not satisfied by the owner of the motor vehicle. The Appellants filed declaratory suits against the insurer of the motor vehicle, but the suit was dismissed on grounds that the Plaintiffs had not proved that there was an insurance policy that included cover for injury to passengers. The Appellants appealed.

11. On appeal, it was held that "*since the Appellant's were not fare paying passengers and were being carried in a vehicle not ordinarily used to transport passengers for hire or reward, the insurer*" had "no obligation to cover the Appellants. The question that was considered by the Court of Appeal in the said case was whether passengers ferried in such a vehicle would be compensated for the injuries and or loss sustained. In the instant case, learned counsel, Mr. Masinde contended that the Plaintiffs have not made even the slightest attempt to demonstrate that the Defendant herein is under an obligation to satisfy the decretal amount.

12. The law on the general requirement for insurance of passengers was stated by Lord Donovan in Albert v Motor Insurers Bureau [1971] AII ER 1345 at p. 1352, an authority that was cited with approval

in the M'Mairanyi case (above) at page 286 of the judgment, letters (d) to (g) in the following words:-

"*It would have been very understandable if the Legislature had singled out those engaged in the passenger carrying business and imposed such a liability on them by some separate and independent provision. They are, after all, engaged in the business for profit; the passenger usually has no knowledge about the state of the vehicle in which he embarks, or the reliability of the driver. In these circumstances it is reasonable to require the operators of such vehicles to insure the passengers, the more so as the premiums will be reflected in the fares.*

Neither the 1930 Act nor the 1960 Act (we may add, the Kenya Act) proceeds however, in this direct way. The relevant part of each beings (sic) by compelling all users of motor vehicles to insure against liability to third parties in respect of death or bodily injury by or arising out of the use of a motor on the road. If each Act had stopped there it would have been compulsory to insure all passengers. But the next thing that each Act does is to provide that passengers need not be insured. It then enacts the opposite if the vehicle is one in which passengers are carried for hire or reward. The reasoning behind this legislative structure would seem to be this. Passengers, like the driver himself, can properly be left to look after themselves. After all, if the passenger elects to go by private transport he will know the driver, often have some idea as to the condition of the vehicle, and if he thinks that either presents a risk he need not run it. There is, therefore, no justification for imposing the additional burden on all private car owners to insure all potential passengers. But where public transport is concerned the position is different. The passenger must almost invariably take the vehicle and the driver as he finds them, and the same is true of the private hire vehicle if it is chauffer driven: in these cases it is eminently reasonable that the operator of such vehicles should insure passengers, and this obligation is now expressed by the proviso."

13. Section 4 of the Act makes it mandatory for all motor vehicles to be insured against Thirty Party risks in accordance with the requirements of the Act; and once a motor vehicle is insured under Section 4 of the Act, the insurer is under a duty to satisfy judgment against persons insured under the provisions of Section 10(1) of the Act.

14. In the instant suit, learned counsel for the Defendants argues that no evidence has been placed before court to show that the subject motor vehicle was being used for carrying passengers for hire or reward nor that the deceased was traveling in the said motor vehicle pursuant to a contract of employment. During his evidence in cross examination, PW1 stated the following:-

"*On the fateful day, I do not know whether my son was a fare-paying passenger in Collins' car. I would be surprised if my son paid fare but I can't say whether he paid."*

It should be stated here that PW1 expected his son to travel for free or gratuitously in the subject motor vehicle since the deceased and Collins were childhood friends who once lived in in the same estate in Nairobi during the working lives of PW1 and Collins' father. In this regard, one must fall back on Section 107 of the Evidence Act which provides as follows:-

"*107 (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

Section 108 of the Evidence Act further provides as follows:-

"*108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."*

15. The totality of the above provisions is that in this case, the Plaintiff must prove two things:-

(i) that Collins Ochogo Otiwo used the subject motor vehicle for carrying passengers at a fee or for a reward and

(ii) *that the deceased, Adams Otieno Okeyo was a fare-paying passenger in Collins' car when he was involved in the accident.*

The question to be determined is whether the Plaintiff has proved the existence of the above facts. The Defendant's position is that the Plaintiff has not done so.

16. Learned counsel for the Defendant also put forward a second argument to demonstrate to this court that the Plaintiff is not entitled to the reliefs sought. Learned counsel contended that in the face of denial by the Defendant that it issued the policy in question, then it is incumbent upon the Plaintiff to prove that such a policy existed. Learned counsel further submitted that the Plaintiff's Notice to produce filed under Order X Rule 15 of the Civil Procedure Rules was irrelevant for the following reasons:-

(a) The Defendant did not make reference to any of the documents stated in the notice in its statement of defence. It is the Plaintiff who made reference to the policy document in the Plaint;

(b) Rule 14 bars a party who fails to comply with a notice for inspection from relying on any of the documents which had been requested for by the adverse party for inspection. The spirit behind this provision is to bar a party from ambushing the adverse party with documents which the adverse party has not had an opportunity or inspecting. Since the Defendant did not produce any documents in evidence the notice to produce was inconsequential.

(c) If indeed the Plaintiffs were serious in their belief that the Defendant had in its possession the documents listed in the notice to produce and particularly the policy document then nothing should have been easier for them than to move the court for a specific order under Order X Rule 17(1).

17. I have however considered these submissions in light of PExhibit 6 and the conclusion I have reached is that there is no doubt in my mind that the Defendant herein issued the policy in question and that the policy, issued in the name of Collins Ochogo Otiwo was in respect of the subject motor vehicle Registration Number KAL 129T. I have also reached the conclusion that as at the time of the accident, there was a valid insurance cover in respect of the subject motor vehicle, which policy was expiring on 24/08/2000. In any event, PExhibit 6 does not make provision to show the commencement of the policy. Such an omission is, in my view understandable because at the end of the day, what is important when an accident occurs is whether the policy in question is still valid or not, its date of commencement being of little significance.

18. The final argument put forward by learned counsel for the Defendant is that the Defendant was never served with any Statutory Notice as required by Section 10(2) of the Act which provides as follows:-

"*10 (2) No sum <u>shall</u> be payable by an insurer under the foregoing provisions of this section* – (emphasis is mine)

(a) in respect of any judgment, unless before or within fourteen days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings; or

(b) in respect of any judgment, so long as execution thereon is stayed pending an appeal; or

(c) in connexion with any liability if, before the happening of the event which was the cause of the death or bodily injury giving rise to the liability, the policy was cancelled by mutual consent or by virtue of any provision contained therein, and either –

i. before the happening of the event the certificate was surrendered to the insurer, or the person to whom the certificate was issued made a statutory declaration stating that the certificate had

been lost or destroyed; or

ii. after the happening of the event, but before the expiration of a period of fourteen days from the taking effect of the cancellation of the policy, the certificate was surrendered to the insurer, or the person to whom the certificate was issued made such a statutory declaration as aforesaid; or

iii. either before or after the happening of the event, but within a period of twenty-eight days from the taking effect of the cancellation of the policy, the insurer has notified the Registrar of Motor Vehicles and the Commissioner of Police in writing of the failure to surrender the certificate.

Learned counsel for the Defendant argued that PExhibit 2 cannot stand alone without any other independent evidence as to when the primary suit was filed vis-à-vis the purported notice. PExhibit 2 shows that the notice was given to the Defendant by a letter dated 11/06/2003. The letter was received on the same date by the Defendant. According to the plaint in the instant suit, and in particular, paragraph 6 thereof, the Plaintiff simply refers to CMCC No. 6000 of 2003 in which judgment was entered in favour of the Plaintiff as against the Defendant's insured in the sum of Kshs.2,052,880/= together with costs and interests. In its defence dated 26/11/2007, and filed in court on the same day and in particular paragraph 6 thereof the Defendant pleads:-

"*6. The Defendant is aware of the existence of Milimani CMCC No. 6000 of 2003 but it is not aware of the judgment thereof."*

19. What comes to my mind upon a reading of the above paragraph 6 of the defence is that there is no dispute as to whether or not the primary suit was filed in compliance with Section 10(2) of the Act. The Defendant seemed to take no issue with the notice issued to the Defendant. I think that it is too late in the day for the Defendant to raise the issue at this stage. I am therefore satisfied that the primary suit was properly before the court.

20. Having settled the second and third issues raised by the Defendant against the Plaintiff's claim, I now turn to the Plaintiff's submissions. Mrs. Wambugu, learned counsel for the Plaintiff submitted that the Defendant herein cannot repudiate liability since it has not obtained a declaration that it is entitled to avoid its liability under the Insurance Policy. Mrs. Wambugu argued further that in any event, no appeal has been preferred against the judgment in the primary suit. She relied on a number of authorities among them Civil Appeal No. 107 of 1997 – Blue Shield Insurance Co. Ltd. and Raymond Buuri M'Rimbera (Court of Appeal Nairobi). The facts of the case were that after judgment was entered against the Appellant in Nairobi HCCC No. 2118 of 1994 (the enforcement suit) the Appellant sought a declaration that the Appellant was not bound to honour or satisfy the judgment in the accident suit (HCCC No. 1136 of 1987). The learned Judges of Appeal, after analyzing the relevant provisions of the Act found and held that in the absence of a declaration that the Appellants were absolved from their obligation under the Act, the appeal could not succeed.

21. What is the position in the instant case? My finding is that the Plaintiff has not demonstrated to this court that motor vehicle KAL 129T, owned and driven by Collins Otiwo was being so driven as a passenger ferrying motor vehicle. I also find and hold that there is no evidence before me to show that the deceased herein was traveling in the Defendant's motor vehicle as a fare paying passenger. Section 5 of the Act seems to say that the statutory cover does not cover risks of death or bodily injury to employees of the insured arising out of or in the course of employment, or to the death or injury to passengers save in those cases of motor vehicles in which such persons are carried for reward or hire or by reason or in pursuance of a contract of employment; or to any contractual liability. In the instant case, there is no evidence by the Plaintiff to show that the motor vehicle in question was used for purposes other than personal use by the insured. It is my view therefore that the risk which the deceased eventually suffered was not covered under the policy of insurance that was then in force. That being the case herein, the Defendant is not obliged to satisfy the judgment and the decree in the primary suit.

22. The above being the case, I do not think that it is necessary, as been argued by learned counsel for the Plaintiff for the Defendant to have sought and obtained a declaration that it was not obliged to satisfy the

judgment and the decree in the primary suit, since the risk suffered by the deceased was not required to be covered by the policy under Section 5 of the Act.

23. The upshot of what I have said above is that the Plaintiff has not proved his case on a balance of probability against the Defendant. Accordingly, I have no option to regrettably dismiss the whole of the Plaintiff's case. For reason of the circumstances of this case, each party shall bear their own costs.

It is so ordered.

Dated and delivered at Nairobi this 8th day of May 2009.

R.N. SITATI

JUDGE

Delivered in the presence of:

Miss Kinyua (present) for the Plaintiffs

Mr. Masinde (present) for the Defendant

Njoroge - court clerk