



REPUBLIC OF KENYA

**IN THE COURT OF APPEAL
AT NAIROBI**

CIVIL APPEAL NO. 41 OF 1996

INTRA AFRICA ASSURANCE COMPANY LIMITED.....APPELLANT

VERSUS

SIMON N. NJOROGE AVERTANO DA COSTA.....RESPONDENTS

(Appeal from the Judgment of the High Court of Kenya at Nairobi (Hon. Mr. Justice Bosire) dated 5th October, 1995

in

H.C.C.C. NO. 2761 OF 1983

JUDGMENT OF THE COURT

This is an appeal from the judgment of the High court of Kenya at Nairobi (Bosire J as he then was) dated 5th October, 1995 in Civil Case No.2761 of 1983 in which Intra Africa Assurance co. Ltd (the appellant) sued Simon N. Njoroge (the first respondent).

The appellant is an insurer within the meaning of s.5 of Insurance (Motor Vehicles Third Party Risks) Act (Cap.405) of the Laws of Kenya (the Act). In pursuance of a proposal form signed by the 1st respondent and in reliance upon the truth of the representations contained therein and in consideration of the payment of Shs.400/= as the premium, on the 17th November, 1980 the appellant issued an insurance policy to the 1st respondent agreeing thereby that for one year namely from 31st October, 1980 to 30th October, 1981 it would indemnify the 1st respondent against liability to third parties in the event of an accident caused by or through or in connection with the 1st respondent's motor vehicle registration number KMB.695 against all sums including costs and expenses which the 1st respondent should become liable to pay in respect of death or bodily injury to any person in accordance with s.5 of the Act.

On 19th June, 1981 while the said insurance policy and the relevant certificate of insurance were effective and in full force the 1st respondent's said vehicle was involved in an accident in which one Avertano R.C.D'Costa (the 2nd respondent) suffered bodily injuries.

Anticipating a claim for damages by the 2nd respondent against the 1st respondent on the ground that his bodily injuries were sustained by him through the negligent driving of the 1st respondent of the said motor vehicle and that being a claim in respect of a liability as covered by the terms of the said policy, the appellant sued the 1st respondent in the above mentioned suit on or about 3rd August, 1993 claiming that apart from any provision contained in the policy, the appellant is and at all material times was entitled to avoid its liability on the ground that the policy was obtained by the 1st respondent by non-disclosure of certain material facts and or misrepresentation of material facts.

Consequently the appellant sought a declaration that it is and at all material times was entitled to avoid the policy under s.10(4) of the Act.

On 8th June, 1989 Lady Justice Owuor allowed the 2nd respondent to participate in the said proceedings and ordered him to file his defence within 15 days which he did seeking that the appellant's suit should be dismissed with costs.

By his judgment dated 5th October, 1995 which is subject matter of this appeal the learned trial Judge granted the said declaration as prayed in the plaint and went on to say as follows:

"but (I) wish to add, that the declaration only entitles the plaintiff to claim indemnity from the defendant but in no way protects it against third parties who are able to satisfy requirements of s.10 above."

In support of his said remarks regarding the third parties the learned trial Judge said:-

"I have evidence before me that this suit was filed over nine months before the action whose decree the plaintiff herein would like to avoid to pay. However no judgment was obtained herein within three months after that action was filed. That is a condition precedent. For an insurer to be entitled to rely on the sub-section a declaration of the nature prayed for here must be obtained either before or within three months after the action in which decree is sought to be satisfied pursuant to s.10 above" (underlining has been provided by us)

The sub-section which the learned Judge had alluded to is subsection (4) of section 10 of the Act which reads as follows:-

10(4) "No sum shall be payable by an insurer if, in an action commenced before, or within three months after, the commencement of the proceedings in which the judgment was given, he had 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 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".

The first two grounds of appeal involve the interpretation of section 10(4) of the Act which we have reproduced above. The first ground (para materia) is that the learned Judge erred in law and fact in interpreting s.10(4) of the Act and concluding that the appellant had to obtain a declaration within three months after the suit by the injured for damages had been partly filed. The short title of the Act is "An Act of Parliament to make provisions against Third Party Risks arising out of the use of motor vehicle." Under s.4 of the Act it is an offence to use or cause to be used a motor vehicle on the road unless there is in force in relation to the user of the vehicle such a policy of insurance or such a security in respect of third party risks as complies with the requirements of the Act. Under s.5 in order to comply with the requirements of s.4 the policy of insurance must be subject to the exceptions mentioned in s.5 issued by a company authorised under the Insurance Act to carry on motor vehicle insurance business and it insures such person or persons as may be specified in the policy in respect of any liability which may be incurred by him in respect of death of, or bodily injury to, any person arising out of the use of the vehicle on the road. Under s.10(1) if, after a policy of insurance has been effected, judgment in respect of any such liability as is required to be covered by s.5 of the Act, is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel the policy or may have avoided or cancelled the policy, the insurer shall, subject to the provisions of that section, pay to the person so entitled to the benefit of the judgment any sum payable thereunder in respect of the liability. However, section 10(4) (hereinabove set out) is an exception to the above general rule enunciated by s.10(1) of the Act. Plain meaning of s.10(4) is that no sum shall be payable by an insurer under the earlier provisions of s.10 if (a) he has filed an action either before, or within three months after, the commencement of proceedings in which the judgment for damages was given and (b) has obtained a

declaration that apart from any provisions contained in the policy he is entitled to avoid it on the ground that the policy was obtained by the non disclosure of a material particular or by a representation which was false in some material fact. With respect to the learned trial Judge this sub-section cannot be interpreted as laying down a precondition that the aforesaid declaration must be obtained either before or within 3 months of the commencement of the proceeding in which the judgment sought to be enforced was given.

The second ground of appeal is that the learned Judge misconstrued s.10(4) as enjoining that the appellant must obtain a declaration within three months from the filing of the declaratory suit. It is obvious, however, that the learned trial Judge distinguished the appellant's proceedings for the declaration "as the suit" from the 2nd respondent's proceedings for damages "as the action". He did not say that the declaration of the nature prayed for by the applicant must be obtained within three months of the filing of the "suit" for that declaration. He has clearly said that in his view the declaration must be obtained either before or within three months after "the action" in which the decree sought to be satisfied was obtained. So we do not find any merit in that ground of appeal. The third ground of appeal is that the learned trial Judge erred in law that having granted the declaration as prayed in the plaint, he went further to hold that the declaration only entitled the appellant "the claim indemnity from the defendant but in no way protected it against third parties who were able to satisfy the requirements of s.10 above". We understand that by the "indemnity from the defendant" the learned Judge meant to say that the appellant was entitled to avoid the said insurance policy as he had granted the declaration as prayed in the plaint. We agree with Mr. Parikh that once he had granted the declaration and found for the appellant on the issues before him which are set out at page 13 of the record he did not have to express an opinion on an issue which was not before him. There was no issue before him to the effect whether or not the declaration granted by him would protect the appellant against third parties who, if at all, were able to satisfy the requirements of s.10 of the Act. That opinion or holding was purely gratuitous. The fourth ground of appeal is that the learned Judge erred in law and failed to appreciate that s.10 of the Act aimed at allowing an insurer to have a declaration that he is entitled to avoid a policy on the ground that it was obtained either by non disclosure of a material fact or by misrepresentation of a material fact. We do not see any point in the appellant urging this ground as the learned Judge had granted the said declaration in terms of its own prayer in the plaint. In the result we allow the appeal and set aside the gratuitous opinion of the trial Judge namely, "the declaration entitles the plaintiff to claim indemnity from the defendant but in no way protects it against third parties who are able to satisfy the requirements of s.10 above."

The appellant shall have three fourths of the costs of the appeal against the 1st respondent. As the 2nd respondent did not oppose the appeal we do not make any order of costs against him.

Dated and delivered at Nairobi this day of 1997.

J.E. GICHERU

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JUDGE OF APPEAL

A.M. AKIWUMI

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JUDGE OF APPEAL

G. S. PALL

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JUDGE OF APPEAL