Mugo v Kenya Alliance Insurance Co. Ltd (Civil Appeal 203 of 2010) [2013] KECA 548 (KLR) (30 May 2013) (Judgment)

Neutral citation: [2013] KECA 548 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPEAL 203 OF 2010

MSA MAKHANDIA, SG KAIRU & JO ODEK, JJA

MAY 30, 2013

BETWEEN

JAMES MURIITHI MUGO ..... APPELLANT

AND

KENYA ALLIANCE INSURANCE CO. LTD ..... RESPONDENT

(An appeal from a Judgment of the High Court of Kenya at Nakuru (Ouko, J) dated 24th June, 2010 in H. C. C. C. No. 129 of 2008)

JUDGMENT

1. This appeal, which was well argued by counsel for both parties, raises a question of interpretation of section 5 of the Insurance Motor Vehicle Third Party Risks Act, Cap 405.

Background.

2. One Bernard Macharia Mahungu had a fleet of vehicles. He employed the appellant as what has been referred to as a turnman. On 25th January, 2005, the appellant was assigned to work in one of his employer's vehicle registration number KAN 1X0C, make, Mercedes Benz lorry. The Respondent was the insurer of that vehicle. We will refer to that vehicle as the insured vehicle. Unfortunately, the insured vehicle was involved in a road traffic accident on that date along Maai Mahiu-Longonot road. As a result of the accident the appellant sustained serious injuries.

3. By a plaint dated 25th October, 2005, which was subsequently amended on 26th October, 2006, the appellant filed suit in the High Court of Kenya at Nakuru being Civil Case No. 261 of 2005 Nakuru (hereafter referred to as the primary suit) against the driver and owner of the insured vehicle to recover general damages for the injuries sustained arising from the road accident.

4. In a judgment delivered on 7th March 2008, the High Court (Koome, J) (as she then was) awarded the appellant a total of Kshs.4,400,000.00 made up of general damages for pain and suffering of

Kshs.2,000,000.00 and damages for loss of future earning of Kshs2,400,000.00. We understand the owner of the insured vehicle died before that judgment was satisfied.

5. In July 2008 the appellant filed suit in the High Court of Kenya at Nakuru being Civil Case No. 129 of 2008 against the respondent seeking a declaration that the respondent is under a statutory obligation, under the provisions of the Insurance (Motor Vehicle Third Party Risks) Act Cap 405, (hereafter referred to as the Act) to satisfy the judgment given in Nakuru Civil Case No. 261 of 2005 in favour of the appellant.

6. After hearing, judgment was delivered by the High Court (Ouk, J) (as he then was) in Nakuru in High Court Civil Case No. 129 of 2008 on 24th June, 2010 by which the appellant's suit was dismissed with costs.

7. In that judgment the court:

   (a) Found that the appellant sustained injuries in the course of his employment with the owner of the insured vehicle.

   (b) Took the view that sections 5(b)(i) and 5(b)(ii) of Cap 405 distinguish between two categories of employees. The first category being employees whose nature of work is not connected to the motor vehicle causing the accident. The second category being employees whose terms of employment relate to the motor vehicle.

   (c) Held that the appellant was an employee of the insured and was travelling in the insured vehicle by reason of or in pursuance of a contract of employment within the meaning of Section 5(b)(ii) of the Act.

   (d) Held that the respondent had the requisite notice of institution of suit under Section 10(2)(a) of the Act.

   (e) Held that the respondent is not liable for the appellant's claim as it is in excess of Kshs.3,000,000.00 because under Section 5(b)(iv) of the Act, which was introduced by *Act No. 10 of 2006*, a policy of insurance under the Act is not required to cover liability of any sum in excess of three million shillings.

8. Aggrieved by that judgment the appellant has appealed against that same on the grounds set out in the memorandum of appeal dated 19th July, 2010. The substance of the appellant's complaints against the judgment of the High Court is that the High Court erred in that:

   (a) The court, on its own motion, and without hearing the parties, raised the matter of Section 5(b)(iv) of the Act, and proceeded to make a finding on it.

   (b) The court's interpretation of Section 5(b)(iv) of the Act as negating, (as opposed to limiting) liability for claims in excess of Kshs.3,000,000.00 was wrong.

   (c) Section 5(b)(iv) of the Act, having been introduced after the occurrence of the event for which insurance was taken, did not apply retrospectively.

9. Based on those grounds, the appellant seeks orders from this Court for the judgment of the High Court in Civil Case No. 129 of 2008 Nakuru to be reversed and be substituted with an order declaring that the respondent is under statutory obligation to satisfy the decretal sum in favour of the appellant against the owner of the insured vehicle.

10. On 17th August, 2010 the respondent filed a notice of grounds for affirming the decision of the High Court under rule 91 of the Rules of this Court by which the respondent contends, firstly, that the

appellant, being an employee of the owner of the insured vehicle, is expressly excluded from cover under section 5(b)(i) of the Act and cannot therefore enforce the judgment against the respondent under section 10 of the Act. Secondly, that the appellant had not sufficiently demonstrated that due notice was served on the respondent either before the commencement of the primary action or within 14 days after commencement of the primary action.

11. By a notice of cross appeal under rule 93 of the Rules of this Court dated 11th November, 2011 which was admitted out of time by consent, the respondent has cross appealed against the decision of the High Court on the grounds that the High Court erred in failing to uphold the respondent's Defence that:

    (a) That the appellant was excluded from cover under Section 5(b)(i) of the Act.

    (b) That the appellant had not demonstrated that notice of commencement of the primary action had been served in accordance with Section 10(i)(a) of the Act.

12. The respondent accordingly seeks orders from this Court that the appellant's appeal be dismissed, the cross appeal be allowed and the defenses raised by the respondent be upheld.

Submissions by Counsel.

13. Mr. Githui learned counsel for the appellant urged us to allow the appeal. He narrated the background of the matter to us and submitted that:

    (a) The learned trial judge erred in law in considering, of his own motion, section 5(b)(iv) of the Act and in dismissing the appellant's action on the basis that the appellant's claim exceeded the ceiling of Kshs.3,000,000.00 imposed under that provision.

    (b) Under section 23(3)(c) of the *Interpretation and General Provisions Act* Cap 2 of the Laws of Kenya, where a written law repeals another written law, the repeal shall not affect a right acquired under the written law so repealed.

    (c) Section 5(b)(iv) of the Act came into effect on 1st January, 2007 and could not have retrospective effect so as to affect insurance policies that had already been issued.

    (d) The accident giving rise to the appellant's claim occurred in January 2005 and a subsequent change in the law cannot affect the policy to which a right had already attached.

    (e) On the strength of the case of the Privy Council decision in Free Lanka Insurance Co. Ltd vs. Ranasinghe [1964] 1 ALL E R 457, by the time Section 5(b)(iv) of the Act came into effect on 1st January, 2007, the appellant had already acquired a right, when the accident took place, which could not be affected by the limitation imposed under that provision. Reference was also made to the case of Govindji Popatlal vs. Premchand Raichand Limited [1963] E A 69 and also the case of Suleiman Ibrahim vs. Awadh Said [1963] E A 179 to the effect that amendments to legislation do not, under the Interpretation and General Clauses Act, have retrospective effect, unless a contrary intention appears.

14. Mr. Masinde learned counsel for the respondent stated that grounds 2, 3, 4 and 5 and prayer (a) in the memorandum of appeal are not contested with the result that it is conceded that the learned trial judge erred in:

    (a) Holding that section 5(b)(iv) of the Act negated, liability for claims above Kshs. 3,000,000.00 as opposed to limiting liability to that amount.

    (b) Holding that section 5(b)(iv) of the Act had retrospective effect on an insurance policy taken out before the provision was introduced.

15. As regards ground 1 of memorandum of appeal, in which the appellant complains that the learned trial judge erred in making a finding on an issue not raised by either party and on which the parties did not make submissions, Mr. Masinde submitted that the court can raise an issue suo motto, provided that neither parties is awarded costs. He accordingly submitted that there was no error on the part of the judge in doing so.

16. Mr. Masinde further submitted that:

    (a) The appellant can, despite the death of his employer, pursue his claim and enforce the judgment in his favour against the estate of the deceased.

    (b) Section 23 of Chapter 2 of the Laws of Kenya is not applicable in this case as that provision anticipates a situation where there is repeal. In this case there was no appeal but rather an additional provision was introduced.

17. With regard to the first ground of cross appeal, Mr. Masinde submitted that:

    (a) The High court erred in failing to uphold the respondent's submission in the High Court that the appellant, having been an employee of the respondent's insured, was expressly excluded from cover under section 5(b)(i) of the Act.

    (b) In paragraph 6 of his plaint in High Court Civil Suit No. 129 of 2008, the appellant pleaded that he sought damages for pain suffering and loss of amenities from his employer in the primary suit as an employee under the Workmen's Compensation Act and that the appellant is bound by that pleading.

    (c) The High Court, in the primary suit, found that the appellant was travelling as an employee of insured.

    (d) The appellant was admittedly injured, but he was injured in the course of his employment within the meaning of section 5(b)(i) of the Act.

    (e) Cover with respect to the appellant, being an employee of the insured, is excluded under section 5 of the Act.

18. As for the second ground in the notice of cross appeal Mr. Masinde submitted that the appellant did not demonstrate that notice under section 10A of the Act was issued to the respondent either before commencement of primary action [page 5 of record] or within 14 days after commencement of that action. That step, he contended, is the first step one must take before considering enforcing the judgment under the Act.

19. In reply on the cross appeal, Mr. Githui for the appellant submitted that:

    (a) The award given by the High Court for general damages makes no reference to workmen's compensation despite the pleading in paragraph 6 of plaint. Accordingly, Judgment merged with the pleading.

    (b) The addition of section 5(iv) in the Act is for purposes of section 23(3) of the *Interpretation and General Provisions Act* a repeal and reenactment.

    (c) Section 5 of the Act should be interpreted in the context of the spirit of the statute. The spirit of the statute is that, in the event an insured person becoming bankrupt, or in the event of a company becoming insolvent, the injured third party does not go without a remedy. In that

regard Mr. Githui referred us to the case of Presidential Insurance Co. Ltd vs. Stafford [1997] 4 L R C 595.

(d) To the extent that section 5(b)(ii) of the Act contains an exception to an exception, passengers injured in the course of employment are excluded from the exception and are therefore covered. In that regard learned counsel referred us to the case of Izzard vs. Universal Insurance Co. Ltd [1937] 3 ALL E R 79 and the case of Tan Keng Hong and another vs. New India Assurance Co Ltd [1978] 2 ALL E R 380.

(e) As the appellant was employed as a turnman, he was therefore a passenger by reason of or in pursuance of his employment and therefore covered. Reference was also made to the case of M'Mairanyi and others vs. Blue Shield Insurance Co Ltd [2005] 1 E A 280 and Gateway Insurance Company Ltd vs. Sudan Mathews High Court Civil Suit 1078 of 2000.

(f) With regard to the question of service of notice, Mr. Githui submitted that section 10 (2) of the Act does not require service of a notice. What is required is for the insurer to have had notice of the proceedings. The question is not whether the insurer was served with notice. The question is whether the respondent had notice?

(g) The insurer was served with notice twice. There is a letter dated 11th October 2005, addressed to the appellant's employers business name, Berjan, under which name the insured used to operate. There is evidence the respondent knew. The trial judge was therefore right in holding that service was proved.

20. In reply Mr. Masinde submitted that it is not denied that the respondent got notice. The contention is that notice was not served within the period stipulated under section 10 (1) of cap 405. The appellant did not discharge his burden of proof to show whether service was within time.

Our Decision.

21. We have considered the appeal and the submissions. Our task in this appeal, as stated by this Court in Selle v Associated Motor Boat Compan Limited [1968] E A 123, is to review the evidence before the High Court and to draw our own conclusions bearing in mind that we have not heard or seen the witnesses. Based on the memorandum of appeal, the cross appeal and the submissions by learned counsel, there are three questions that require determination in this appeal. The first is whether the learned trial judge erred in holding that the appellant was covered under section 5(b)(ii) of the Act. The second question is whether the learned trial judge erred in finding that the respondent had notice of institution of the primary suit. And the final question is whether the learned trial judge erred in invoking section 5(b)(iv) of the Act, on his own motion, and in holding that appellant's claim for Kshs.4,400,000.00 is excluded under that section of the Act.

22. As regards the question whether the appellant was covered under section 5(b)(ii) of the Act, the learned trial judge after reviewing the matter found, as did the judge in the primary suit, that the appellant sustained injuries in the course of his employment.

23. After considering the authorities that were cited before him, the trial judge had this to say:

> " I come to the conclusion that the plaintiff was an employee of the insured, Bernard Macharia Mahungu. That as a turn-boy, he was travelling in the lorry by reason of or in pursuance of a contract of employment within the meaning of Section 5(b)(ii) of the Act.

24. Having come to that conclusion, the learned judge was of the view, in keeping with the decision of this Court in the case of M'Mairanyi and others vs. Blue Shield Insurance Co Ltd that the appellant was in the category of passengers required to be insured under the Act.

25. According to the appellant, the learned trial judge was right in arriving at that conclusion. The respondent on the other hand, considers that the appellant, being an employee, was expressly excluded from cover under section 5(b)(i) of the Act and could not therefore enforce the judgment in the primary suit, against the respondent.

26. The learned trial judge took the position, correctly in our view, that sections 5(b)(i) and 5(b)(ii) of the Act recognized two categories of employees. The first category of employees being those under sections 5(b)(i) of the Act who are not required to be covered and the second category, of employees under sections 5(b)(ii) of the Act who are required to be covered. The first category of employees under section 5(b)(i) of the Act "would be employees' nature of whose work is not connected to the motor vehicle causing the accident" while the second category under Section5(b)(ii) "includes the driver and/or turn boy, whose terms of employment relate to the motor vehicle."

27. We think the learned trial judge was right in arriving at the decision that the appellant was covered under sections 5(b)(ii) of the Act. The appellant in our view, is a third party by virtue of the fact that he was being carried in the subject motor vehicle by virtue of his contract of employment. According to McGillivray on Insurance Law at paragraph 2069;

> " a person is carried " pursuance of" a contract of employment if it is a term that he shall be carried and; A person is carried "by reason of" a contract of employment if, for instance, he is directed by his employee to travel in a vehicle, and the employer is able to give that order because of the relationship of employer and employee."

28. In construing provisions similar to our own the court in Tan Ken Hong & another Vs. New India Assurance [1937] 3 ALL ER 79, held;

> " The words "by reason of...a contract of employment" in the exception had to be read in conjunction with the words "in pursuance of" and so were to be construed as meaning that the passenger was being carried because his contract of employment expressly or impliedly required him, or gave him the right, to travel as a passenger in the motor vehicle concerned. Whether a passenger was being carried by reason or in pursuance of a contract of employment within the exception depended solely on the terms of his employment."

29. This Court with reference to section 5 of the Act in the case of M'Mairanyi and others vs. Blue Shield Insurance Co Ltd stated:

> " It is a section that is perhaps unhappily worded and which has over time generated differing judicial interpretation. On our part, we think the meaning conveyed is fairly plain. The latter part of proviso (ii) of the section makes it clear that compulsory insurance is not required in respect of risks to passengers. The first part however, which could well have been a separate provision, exempts "passengers carried for hire or reward or by reason of or in pursuance of a contract of employment." That is to say, for that category of passengers it is compulsory."

30. The interpretation of sections 5(b)(i) and 5(b)(ii) of the Act by the learned trial judge, accords in our view, with the interpretation given by this Court in M'Mairanyi and others vs. Blue Shield Insurance

Co Ltd. Accordingly we are satisfied that the learned trial judge came to the right conclusion in holding that the appellant was covered under section 5(b)(ii) of the Act.

31. Having said that, it is perhaps time that Parliament re-looked at the language of section 5 of the Act to rid it of any ambiguity and of unhappy wording.

32. On the question of notice the respondent's complaint as captured in the notice of cross appeal is that the learned trial judge erred in failing to sustain the respondent's Defence that the appellant had not sufficiently demonstrated that due notice under section 10(i)(a) of the Act was served on the respondent either before commencement of the primary action or within 14 days after commencement of the primary action as required under the Act.

33. In his submissions before us, Mr. Masinde for the respondent emphasized that the complaint by the respondent is that the notice given, if any, was not given either before or within 14 days of the commencement of the primary action.

34. After considering the material before him the learned trial judge found:

> "From the totality of the evidence including pleadings in Nakuru HCCC No. 86 of 2008, Bernard Macharia Mahungu vs. Kenya Alliance Insurance Company Limited, I am persuaded on a balance of probability that the defendant had the requisite notice. Indeed section 10(2)(a) of the Act does not specify the nature of notice."

35. The primary suit, being Nakuru Civil Case No. 261 of 2005 was commenced by a plaint dated 25th October, 2005. Before that, a demand letter dated 11th October, 2005 written by the appellant's advocates, which is at page 66 of the record, was addressed to the Managing Director, Berjan Suppliers Ltd, giving notice of intended commencement of civil proceedings. Counsel for the appellant stated from the bar that Berjan Suppliers Ltd was the appellant's employer's business name.

36. That notice was, on the face of it, copied to the respondent with the particulars of the Policy reproduced.

37. By an affidavit of service sworn on 16th May, 2009 in High Court Civil Case No. 261 of 2005 by one Douglas Mungai, a process server, he deposed that on 12th October, 2005 he served notice on the respondent.

38. All that evidence was before the trial judge. The learned judge carefully considered the evidence before him including the affidavits of service and came to the conclusion that "the defendant had the requisite notice."

39. We see no reason to interfere with that finding.

40. The next issue is whether the learned trial judge erred in invoking section 5(b)(iv) of the Act, on his own motion, and in holding that appellant's claim for Kshs.4,400,000.00 is excluded under that section.

41. Section 5(b)(iv) of the Act was introduced through an amendment to section 5 of the Act under section 34 of the Finance Act, *Act No. 10 of 2006*. That provision came into operation on 1st January, 2007.

42. Could that provision affect or defeat the appellant's claim? The cause of action in favour of the appellant against his employer arose on 25th January, 2005 when the road traffic accident occurred. The appellant's suit against the employer being HCCC 261 of 2005 was filed in October 2005. Section 5(b)(iv) of the Act came into effect on 1st January, 2007.

43. By the time section 5(b)(iv) of the Act came into effect on 1st January, 2007, the appellant had, in the language used in Free Lanka Insurance Co. Ltd vs. Ranasinghe, already acquired a right. That right was acquired when the accident took place on 25th January, 2005. It was not be affected by the limitation imposed subsequently by that provision.

44. In effect we are not persuaded that the introduction of section 5(b)(iv) of the Act, which came into effect on 1st January, 2007, had retrospective effect.

45. There are many authorities to which we were referred for the proposition that amendments to legislation do not, under the Interpretation and General Clauses Act, have retrospective effect, unless a contrary intention appears. Sir Charles Newbold, P in Jivraj vs. Devraj [1968] E. A. 263 referred to the principle behind that proposition as "a basic principle of the common law and to the principle contained in section 23 of the *Interpretation and General Provisions Act*."

46. In Ngobit Estate Ltd vs. Carnegie [1982] K L R 437 this Court held that a new provision to the *Land Control Act* could not be applied to that suit because the amendment or change in law can only have retroactive effect if expressly declared by the legislature or if it is so by necessary intendment. Those requirements are not met with respect to the amendment or change to the Act brought about by introduction of section 5(b)(iv) of the Act.

47. In answer to the question whether section 5(b)(iv) of the Act affected or could defeat the appellant's claim, the answer is in the negative.

48. In our view therefore, the learned trial judge was wrong in coming to the conclusion that he did, that section 5(b)(iv) of the Act defeated the appellant's claim.

49. For that reason we allow the appellant's appeal and reverse the judgment of the High Court in Nakuru HCCC No. 129 of 2008 and substitute the order dismissing the appellant's suit with costs with an order declaring that the respondent is under a statutory duty to satisfy the decree given on 7th March, 2008 and issued at Nakuru on 12th March, 2008 in favour of the appellant against Francis Kimani Muni and Benard Macharia Mahungu in Nakuru HCCC No. 261 of 2005.

50. The respondent's cross appeal fails and is dismissed.

51. The appellant shall have the costs of the appeal and of the cross appeal.

DATED AND DELIVERED AT NAKURU THIS 30TH DAY OF MAY, 2013.

M. S. A. MAKHANDIA

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JUDGE OF APPEAL

S. GATEMBU KAIRU

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JUDGE OF APPEAL

J. OTIENO-ODEK (PROF)

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR