



REPUBLIC OF KENYA



**Cannon Assurance Limited v Gakau (Civil Appeal 94 of 2020)  
[2023] KEHC 2714 (KLR) (Civ) (31 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2714 (KLR)

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

**CIVIL**

**CIVIL APPEAL 94 OF 2020**

**PM MULWA, J**

**MARCH 31, 2023**

**BETWEEN**

**CANNON ASSURANCE LIMITED ..... APPELLANT**

**AND**

**JOSEPH MUGAMBI GAKAU ..... RESPONDENT**

*(Being an appeal from the ruling and order of Honourable P. Muboli (Mr.) (Senior Resident Magistrate) delivered on 30th January, 2020 in CMCC No. 1403 of 2019)*

**JUDGMENT**

1. By way of a plaint dated February 26, 2019 the respondent herein instituted a civil suit against the appellant namely CMCC No 1403 of 2019 (“the declaratory suit”) and sought a declaratory order to the effect that the appellant be held liable to satisfy the decree issued in CMCC No 8146 of 2016 (“the primary suit”) plus costs of the declaratory suit and interest thereon, arising out of a road traffic accident involving the respondent and the registered owner and/or driver of the motor vehicle registration number KAH 690F (“the subject motor vehicle”) insured by the appellant.
2. Upon being served with summons and a copy of the pleadings, the appellant entered appearance and filed its statement of defence dated April 8, 2019 to deny the averments made in the plaint.
3. Subsequently, the respondent filed the Notice of Motion dated June 18, 2019 (“the application”) and sought inter alia, to have the statement of defence filed by the appellant struck out and for the entry of judgment against the appellant on the declaratory sum as prayed in the plaint.
4. To oppose the application, the appellant put in the replying affidavit sworn by its Legal Manager, Martha Mutoro on October 1, 2019.



5. In the end, the application was allowed, with the trial court striking out the statement of defence and entering judgment as prayed, in its ruling delivered on January 30, 2020.
6. The appellant has now moved this court by way of an appeal against the aforesaid decision. The memorandum of appeal dated February 25, 2020 is premised on the grounds of appeal hereunder:
  - (i) That the honourable learned trial magistrate erred in law and in fact by failing to appreciate the fact that the appellant’s statement of defence raised triable issues worthy to be determined in an interparties hearing.
  - (ii) That the honourable learned magistrate applied wrong principles of law in arriving at the decision to strike out the appellant’s statement of defence and entering judgment as against the appellant.
  - (iii) That the honourable learned trial magistrate erred in law and in fact in failing to appreciate the issues raised in the appellant’s replying affidavit, particularly that the respondent was not a person covered under the provisions of Cap 405 Laws of Kenya.
  - (iv) That the honourable learned trial magistrate erred in law and in fact in finding that the appellant was statutory bound to satisfy the judgment and decree in Nairobi CMCC No 8146 of 2016 in view of the evidence and pleadings placed before him.

7. When the appeal came up before the court for directions, the parties were directed to file and exchange written submissions. On its part, the appellant argues that though the respondent pleaded before the court in the primary suit that he was traveling aboard the subject motor vehicle as a lawful passenger, he did not bring any evidence to support this claim in order for the provisions of the *Insurance (Motor Vehicles Third Party Risks) Act*, Cap 405 Laws of Kenya (“the Act”) to apply to him. To support its arguments here, the appellant has cited the case of *Kenya Orient Insurance Co Ltd v Benjamin Ochina [2013] eKLR* where the court reasoned that:

“The respondent, I find, was not a third party. The policy, if it was a compulsory third party cover, did not cover every risk to everybody in respect of death or injury. If the insured wanted that the respondent be covered it was required that the policy respectfully states so. If he wanted his employees covered that had to be reflected in the contract signed between him and the appellant. The policy document was not produced and therefore its extent was not shown. It was up to the respondent to produce the policy and to show that under the document, in consideration of premiums paid, the appellant agreed to indemnify the insured and/or to satisfy any judgment and decree passed against him.”

The appellant further argues that the trial court ought to have considered its pleadings which state that it denies having insured the subject motor vehicle at all material times and therefore urges this court to apply a similar rendition as that applied by the court in the case of *Cannon Assurance Limited v Juliet Moraa Nyamari (suing as the legal Administrator of the Estate of Johnson Jumanne Ongoro Deceased) [2016] eKLR* when it held thus:

“I have carefully considered the rival arguments. I have taken time to re-examine the impugned amended defence dated March 24, 2014. In paragraph 4 of the aforesaid defence the appellant specifically denied being the insurer of motor vehicle registration number KAU 953K. In the primary suit i.e CMCC 7512 of 2009, it was alleged that the aforesaid



motor vehicle belonged to the defendant. In the premises, the appellant was of the view that it had no statutory duty to satisfy the judgement. In paragraph 5 of the same defence, the appellant also denied knowledge of the defendants in primary suit. In other words the appellant denied that the defendants were its insured. Further in paragraph 6 of the amended defence, the appellant stated that the deceased was not a person covered under the subject policy of insurance under Section 5(b) of the *Insurance (motor vehicles third Party Risks) Act* Chapter 405 Law of Kenya...First, is whether the insurance policy over the aforesaid motor vehicle covered the deceased. Secondly, he also failed to consider whether the persons named as the owners of the aforesaid motor vehicle were actually the persons who procured the insurance cover of the ill-fated motor vehicle. In my humble view the above issues among other issue were serious triable issues which could not be summarily determined without being tested via a trial. I am convinced that the learned principal magistrate wrongly exercised his discretion to strike out the appellant’s defence.”

8. For the above reasons, the appellant urges this court to allow the appeal by setting aside the decision striking out its statement of defence summarily.
9. The respondent on his part submits that he had tendered sufficient evidence in the primary suit to demonstrate that the appellant was at all material times the insurer of the subject motor vehicle and that the appellant was duly served with a statutory notice during the pendency of the primary suit but it did not challenge the claim in the primary suit, citing the judicial authority of *APA Insurance Limited v Theodora Atieno Okal [2012] eKLR* in which the court held as follows:

“I further see no reasonable ground to interfere with the magistrate’s other finding, that the Appellant, having been served with a Notice under Section 10(4) of Cap 405, but having failed to file a relevant objection as prescribed therein, was thereafter, statutorily barred from raising the same objection whether under the Act or thereafter, in court in this suit. Indeed, it is my further view and finding, that where the Insurance Company has failed to file an objection within three months after being served with notice to satisfy such a decree it cannot have the benefit of the envisaged declaration to avoid the liability.”

10. The respondent further submits that he is a third party within the meaning of Section 5 of the Act which stipulates that:

“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 (Cap 487) 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 a 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 claims arose; or
- (iii) any contractual liability;
- (iv) liability of any sum in excess of three million shillings, arising out of a claim by one person. [Act No 46 of 1960, s 48, Act No 10 of 2006, s 34.]”

11. It is therefore the submission by the respondent that the trial court acted correctly in deciding to strike out the appellant’s statement of defence and in entering summary judgment in the declaratory suit. On those grounds, the respondent urges that the appeal be dismissed with costs.
12. I have considered the grounds of appeal as laid out in the memorandum of appeal and the contending submissions and authorities cited in support thereof. I have equally re-evaluated the evidence tendered before the trial court in support of and in opposition to the Motion.
13. The grounds of appeal all revolve around the learned trial magistrate’s analysis and decision to enter summary judgment in favour of the respondent upon striking out the appellant’s statement of defence. I shall therefore address the four (4) grounds contemporaneously.
14. The key issue for determination on appeal has to do with whether the appellant’s statement of defence raises triable issues.
15. Turning to the application for summary judgment filed before the trial court, the same was premised on the grounds that the defence is frivolous, constitutes mere denials, lacks merit and is purely aimed at delaying the respondent’s enjoyment of the fruits of his judgment.
16. The application was also premised on the grounds that judgment was entered in the primary suit and which judgment remains unchallenged, and hence the respondent is entitled to the reliefs sought in the declaratory suit.
17. The respondent further stated that the appellant was at all material times aware of the existence of the primary suit upon being served with a statutory notice and yet it did not challenge the claim on behalf of its insured.
18. In reply, Martha Mutoro stated that the appellant was not served with the statutory notice and that the respondent has no reasonable cause of action against it.
19. The advocate also stated that the appellant did not insure the subject motor vehicle but that the insurance policy cover referenced by the respondent; namely Policy Number 0108/12164/15 was registered in the name of Kelly Construction Limited and not in the name of the defendants in the primary suit, and which insurance cover did not extend to passengers.
20. For those reasons, the advocate urged the trial court to decline to strike out the appellant’s statement of defence.
21. In his ruling, the learned trial magistrate reasoned that the respondent had demonstrated to the court that service of the demand letter and statutory notice had been effected upon the appellant by way of registered post and that the appellant did not object to the averments made in the pleadings in the primary suit.



22. The learned trial magistrate further reasoned that the primary suit was defended and hence the appellant being the insurer of the subject motor vehicle cannot argue that it was not aware of the existence of the primary suit and hence the appellant ought to satisfy the decretal sum issued in the primary suit.
23. Upon considering the above, I now seek to define the term ‘triable issue.’ In so doing, I am guided by the Court of Appeal’s rendition in the case of [\*Job Kilach v Nation Media Group Ltd & 2 others \[2015\] eKLR\*](#) thus:

“A bona fide triable issue is any matter raised by the defendant that would require further interrogation by the court during a full trial.”
24. The court further observed that a triable defence need not be one that will ultimately succeed.
25. I have had the opportunity of perusing the appellant’s statement of defence and noted that the issues raised therein pertain to service of the statutory notice and whether it had insured the subject motor vehicle at all material times. The appellant also challenged the validity of the respondent’s claim by pleading that the respondent was not covered under the policy.
26. On the subject of the statutory notice, upon my study of the record, I observed that the respondent had brought credible evidence to show that service of the statutory notice had been duly effected upon the appellant but that the appellant did not object to the averments which were made in the primary suit.
27. I am therefore satisfied that the learned trial magistrate acted correctly in determining that the appellant could not deny service of the statutory notice by way of the declaratory suit.
28. Upon my re-examination of the pleadings and material placed before the trial court, it is apparent that the subject motor vehicle was at all material times insured by the appellant herein and that the subject motor vehicle was involved in the material accident.
29. Moreover, the respondent tendered a police abstract to support his averments that the subject motor vehicle was insured by the appellant. It is also apparent that the policy cover referenced by the appellant in its statement of defence varies from that which was referenced by the respondent both in the primary and declaratory suits and is in respect to a different motor vehicle from the subject motor vehicle.
30. I therefore concur with the reasoning arrived at by the learned trial magistrate that the respondent had tendered credible evidence linking the appellant and the subject motor vehicle in the primary suit, and that this was not an issue that could be challenged by way of the declaratory suit.
31. Upon my further re-examination of the pleadings and material presented at the trial, it is also not in dispute that the primary suit was decided in favour of the respondent, who would be covered under the proviso of Section 10(1) of the [\*Act\*](#) which expresses 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.



Provided that the sum payable under a judgment for a liability pursuant to this section shall not exceed the maximum percentage of the sum specified in section 5(b) prescribed in respect thereof in the Schedule.”

32. Going by the record, there is also nothing to indicate that an appeal has been filed to challenge the judgment in the primary suit.
33. In view of all the foregoing circumstances, I am satisfied that the learned trial magistrate correctly found that upon being faced with a declaratory suit, the statement of defence on record did not raise triable issues that would necessitate a determination on merit.
34. Upon arriving at the above finding, I am persuaded that the learned trial magistrate acted correctly in allowing the respondent’s application and in consequently entering judgment as prayed in the plaint relating to the declaratory suit.

**Determination**

35. The appeal lacks merit and it is therefore dismissed with costs to the respondent.
36. The ruling delivered by the trial court on January 30, 2020 and consequent orders are hereby upheld.

**JUDGMENT DELIVERED VIRTUALLY, SIGNED AND DATED AT MILIMANI THIS 31<sup>ST</sup> DAY OF MARCH, 2023**

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**P M MULWA**

**JUDGE**

**In the presence of:**

**Aden – Court Assistant**

No appearance for Appellant

No appearance for Respondent

