



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 558 OF 2017

THE MONARCH INSURANCE CO. LTD.....APPELLANT

-VERSUS-

DAVID NJERU WAICERI.....RESPONDENT

(Being an Appeal from the Judgment of Hon. Mbeja Senior Resident Magistrate made on the 29th September, 2017 in Nairobi Chief Magistrate's Court Civil Suit No. 3139 of 2017)

JUDGMENT

1. The history of this appeal begun when David Njeru Waiceri, the Respondent herein, filed a compensatory suit against Huka Alinoor and Hassan Isaac for the injuries he sustained when Motor Vehicle registration No KBA 807N knocked him while lawfully walking along Biafra Road.

2. The aforesaid motor is alleged to be by then registered in the name of Huka Alinoor while Hassan Isaac was the beneficial owner, driver and or user of the aforesaid motor vehicle. The trial court entered judgment in default of appearance and defence vide Nairobi Milimani Commercial court No 4569 of 2015. The suit proceeded for hearing as undefended and Judgment was eventually entered in favour of the Respondent in the sum of ksh. 623,500/= plus costs and interest bringing the total amount to be ksh. 738,828/=.

3. Upon obtaining the aforesaid judgment the Respondent filed a declaratory suit against Monarch Insurance Co.Ltd, the Appellant herein and the insurers of motor vehicle registration No KBA 807N pursuant to the provisions of Section 10(l) of the Insurance Act Cap 405, Laws of Kenya Vide Nairobi (Milimani Commercial Court), CMCC No 3139 of 2017.

4. The Appellant filed a defence to deny the Respondent's claim. The Respondent took out the motion dated 28th June 2017 and successfully sought for the Appellant's defence to be struck out and for entry of Judgment in his favour.

5. The Appellant being aggrieved by the aforesaid decision filed this appeal and put forward the following grounds:

i) THAT the learned trial Magistrate erred in law and facts by failing to properly scrutinize and evaluate the pleadings and submissions tendered by the Appellant and correctly relate the same to the case law cited herein and thereby failed to arrive at a fair and reasonable assessment on the issue of dismissing the Appellant's Statement of Defence.

ii) THAT the Trial Magistrate erred in law and in fact in striking out the Statement of Defence filed by the Appellant. That the learned Magistrate erred in law and fact in doing so without consideration of the Defendants/Appellants submissions, decided case law precedent.

iii) THAT the Trial Magistrate erred in law and in fact in failing to properly take into account the proper legal principles in cases of similar nature regarding whether or not the Appellant's Statement of Defence be struck off while considering the ruling.

iv) THAT the learned Magistrate erred both in law and fact in failing to take into account that the Applicant/Defendant has a strong defence which raises triable issues, and the same ought to be determined on its merits as it would be unjust to lock the Appellant/ Defendant out.

v) THAT the learned Magistrate erred both in law and fact in failing to take into account the written submissions and authorities of the defendant/appellant's advocates whilst making the ruling.

vi) THAT the learned Magistrate erred in law and fact by making an award on general damages that was unjust in favour of the Plaintiff/Respondent without the issue of responsibility being determined amounting to a miscarriage of justice and

against natural justice.

6. When this appeal came up for hearing, this court gave directions to have the same disposed of by written submissions. At the time of writing this judgment, the Respondent was the only party who had filed his submissions.
7. I have re-evaluated the arguments put forward by the parties before the trial court in support and against the motion dated 28th June 2017. I have also considered the grounds of appeal plus the Respondent's written submissions. Though the Appellant put forward a total of six grounds of appeal, those grounds may be argued together. The key issue which should be determined is whether the learned Senior Principal Magistrate was justified to allow the motion by striking out the Appellant's defence and consequently entering Judgment in favour of the Respondent.
8. In the motion dated 28/6/2017, the Respondent had argued that the Appellant was the insurer of the motor vehicle registration No KBA No 807N at the time of the accident i.e as of 10th October 2014 and was therefore required by law to settle the decree.
9. The Respondent expressly stated that the Appellant had been served with the statutory notice before the commencement of the compensatory suit. The Respondent annexed a copy of the notice to the supporting affidavit of the Respondent.
10. The Appellant filed grounds of opposition and the affidavit of Philomena Theuri to oppose the Respondent's motion. The Appellant admitted that it was the insurer of motor vehicle registration No. KBA 807 N. It however denied knowledge of the participation of its insured in the primary suit i.e Nairobi CMCCC No. 4569 of 2015. The Appellant further stated that the motor vehicle was insured in the name of Hassan Khalif and denied knowledge of Huka Alinoor and Hassan Isaak. The Appellant also argued that its defence raised serious triable issues.
11. Hon.Mbeja, Learned Senior Resident Magistrate, took into account the rival arguments and came to the conclusion that the question as to whether one Khalif Hassan was the Appellant's insured should have been dealt with in the primary suit. The learned Senior Resident Magistrate also came to the conclusion that the Appellant had been served with the statutory notice.
12. The trial Magistrate also alluded that there was no evidence to suggest that Hassan Isaak and Hassan Khalif is not one and the same person. The Appellant's denial was therefore treated with a pinch of salt. The defence was treated as a mere denial.
13. On appeal, the Appellant put forward its grounds in which it accused the Learned Senior Resident Magistrate of failing to take into account its submissions and the fact that its defence raised trial issues.
14. The Respondent urged this court not to interfere with the trial court's decision arguing that the Appellant was served with the statutory notice and the pleadings in the primary suit hence the Appellant had knowledge of the primary suit.
15. Having considered the rival submissions, there is no dispute that the Appellant was the insurer of the motor vehicle in dispute. The question which needed to be interrogated is whether the motor was insured in the name of Hassan Isaak or Hassan Khalif.
16. According to the records of registration of motor vehicle Registration No. KBA 807N, the registered owner is indicated to be Hassan Alinoor. According to the police abstract, the registered owner is indicated to be Hassan Isaak. The certificate of insurance indicates that the insured is Hassan Khalif.
17. When faced with the conflicting facts, the learned Senior Resident Magistrate stated that the Appellant had failed to present evidence to show that Hassan Isaak and Hassan Khalif was not one and the same person.
18. With respect, I am persuaded by the arguments put forward by the Respondent. The Appellant was bound to discount the averment that was Hassan Khalif one and the same person as Hassan Isaak.
19. In the case of **Pan Africa Co. Ltd Vs Grace Washo [2007] eKLR**, the court of Appeal was faced with a similar issue and went ahead to hold *inter alia* as follows:

“The Appellant which admitted having issued a policy to Stephen Cheptoo did not show that Stephen Kiptoo was a different person from Stephen Cheptoo as the vehicle was the same and it is hardly likely that if there were two different and separate persons, they would both have insured the same vehicle at the same time and for the same period averred by the policy..... In denying that it had insured the motor vehicle belonging to Stephen Cheptoo, the Appellant was splitting hairs for the simple reason that the policy related to the same vehicle and there was no evidence that Stephen Cheptoo was not one and the same person as Stephen Kiptoo....”
20. I am therefore convinced that the Learned Senior Resident Magistrate came to the correct decision. There is no doubt that the trial Magistrate considered the submissions of the appellant.
21. In the end, this appeal is found to be without merit. The same is ordered dismissed with costs to the Respondent.

Dated, Signed and Delivered at Nairobi this 28th day of February, 2020.

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J.K. SERGON

JUDGE

In the presence of:

..... for the Appellant

.....for the Defendant