



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 39 OF 2015

AFRICA MERCHANT ASSURANCE CO. LTD.....APPELLANT

VERSUS

MICHAEL NDUNGU WAMBUGU

(Deceased and substituted by Stephen KamathoNdungu).....RESPONDENT

JUDGMENT

1. This is an appeal that arises out of the judgment of Hon.Wilbroda Juma Magistrate in Nyeri CMCC No.18 of 2013 wherein the respondent had filed a declaratory suit against the appellant insurer seeking to enforce the judgment in Nyeri CMCC 360/2011; wherein the trial court ruled in the respondents favour and ordered the appellant to satisfy the award which arose from a road traffic accident caused by the appellants insured;

2. Being dissatisfied with the trial court's decision the appellant filed its Memorandum of Appeal; and listed the Grounds of Appeal which are summarized hereunder;

(i) The trial court did not take into account that the primary suit was filed against a deceased person contrary to the law;

(ii) The trial court did not consider the appellant's submissions and did not look at the regularity of the judgment in Nyeri CMCC No.360 of 2011;

3. The respondent filed a Cross Appeal and a Notice of Objection; in the Notice of Objection he listed the following grounds;

(i) The appellant seeks to challenge the regularity of the judgment in the primary suit yet it has neither been appealed against nor reviewed; the appellant was not a party in the primary suit against its insured yet it has filed this appeal;

(ii) The judgment in Nyeri CMCC No.360/2011 remains unchallenged and enforceable;

(iii) No grounds of appeal are set out on the validity of Nyeri CMCC No.18 of 2013; therefore, the appeal ought to be struck out;

(iv) The appeal is res judicata to the judgment in Nyeri CMCC No.360/2011 and Nyeri CMCC No.18 of 2013;

(v) The trial court ordered the substitution of the deceased defendant but the order was not effected as ordered;

4. The respondents' grounds of appeal in the Cross Appeal are as follows;

(i) The trial court erred in awarding Kshs.3,202,304/- as set out in the plaint instead of Kshs.4,448,940/- as the set out in the decree in CMCC No.360/2011;

(ii) The trial court misdirected itself in holding that the respondent did not plead for costs in its primary suit;

5. At the hearing hereof the parties were directed to canvass the Appeal and Cross Appeal and Objection by filing and exchanging written submissions; hereunder is a summary of their respective submissions;

APPELLANT'S SUBMISSIONS

6. The respondent filed a suit against the appellants insured in Nyeri CMCC No.360/2011 even though he knew of the demise of the insured;

and procured judgment against him; a Declaratory Suit was then filed against the appellant seeking to enforce the judgment;

7. The appellant challenged the regularity of the judgment in Nyeri CMCC No.360/2011 on the grounds that it was against a deceased defendant; the trial court declined to set it aside the judgment claiming that was the role of an appellate court; the appellant stated that it could not have appealed against the primary suit as it was not a party to the suit;

8. The appellants' contention was that suits brought against deceased persons were a nullity as no rights or liabilities accrued against them; and any judgments brought against such persons are a nullity; that the appellant was denied an opportunity to challenge the regularity of Nyeri CMCC No.360/2011 through the declaratory suit;

9. Pursuant to Section 10 of the Insurance (Motor Vehicles Third Party Risks) Act the appellant is only liable to satisfy a judgment obtained against its insured under the policy; in this instance a judgment was entered against a dead insured; which would mean that there was no insured against whom a judgment could be given;

10. Case law relied on **Directline Assurance Co. Ltd vs Caroline Nduku Muia [2019]eKLR; Joseph Njenga Njoroge vs Kabiri Mbiti [1986]eKLR; Athman Omar Zuberi vs Manson Asol Apinde [2012]eKLR and Samuel Ogada Yugi vs Yason Oyieke Ogweni & Others [2013].**

11. The appellant prayed that the appeal be allowed and the judgment of the lower court in CMCC 18 of 2013 be set aside and the respondents case be dismissed;

RESPONDENT'S SUBMISSIONS

12. In response the respondent submitted that in the primary case the defendant entered appearance through the firm of Muthoga & Gaturu Advocates; no defence was filed leading to the entry of an interlocutory judgment and thereafter the matter was fixed for formal proof; the respondent made reference to another case Nyeri CMCC No.306/2009 against the same defendant concerning the same accident where the respondent claimed compensation which decree was settled by the appellant without hesitation;

13. The appellant attempted to set aside the judgment in the primary suit CMCC 360/2011 but its application was dismissed by the lower court; which ruled that it was the role of the defendant to make such an application and not the appellant; and the duty of the deceased's legal representatives to do the substitution of the deceased in the matter;

14. That in Nyeri CMCC No.360/2011 there was no proof of death of the defendant; no death certificate was produced; the appellant only produced a burial permit which is not sufficient proof of death;

15. There was no appeal against the judgment of the primary suit neither was there one against the ruling which dismissed the appellants' application to set aside the ex-parte judgment; the appellant did not comply with the courts direction to have the deceased defendant substituted by his legal representatives; that this appeal was res judicata to the judgment and the ruling in Nyeri CMCC No.360/2011;

16. In the declaratory suit Nyeri CMCC No.18/2011 the trial court refused to revisit the primary suit because it would amount to sitting on appeal on a decision of a court with similar jurisdiction; that this primary suit had not abated from the date of death of the defendant and the matter had also reached the stage of execution stage; reference was made to Order 24 Rule 10 of the Civil Procedure Rules;

17. The appellant was made a party in Nyeri CMCC No.360/2011 but did not challenge the regularity of the judgment therein; the duty of the trial court in Nyeri CMCC No.18/2013 was to enforce the judgment in Nyeri CMCC No.360/2011 and nothing more;

18. That this court cannot now deliberate on Nyeri CMCC No.360/2011 when no appeal has been filed against the judgment.

19. The respondent prayed that the appeal be dismissed with costs.

ISSUES FOR DETERMINATION

20. After reading the respective written submissions of learned counsel for the appellant and learned counsel for the respondent this court has framed the following issues for determination;

- (i) Whether there was proof of death of the defendant in the lower court so as to render the proceedings a nullity;
- (ii) Whether the doctrine of res judicata is applicable to this appeal;

ANALYSIS

21. This being a first appeal the duty of this court is to re-evaluate the evidence on record, analyze it and come up with its own findings and conclusion; in the case of **MWANASONIK vs KENYA BUS SERVICES LTD. (Mombasa) Civil Appeal No. 35 of 1985 (unreported)** Hancox, J.A. stated that:-

“Although this Court of Appeal will not lightly differ from the judge at first instance on a finding of fact it is undeniable that we have the power to examine and re-evaluate the evidence on a first appeal if this should become necessary.”

Whether there was proof of death of the defendant in the lower court so as to render the proceedings as a nullity:

22. Before addressing this issue at length this court must point out that the respondent had filed a Notice of Objection and a Cross-Appeal; in his submissions only addressed the contents of the objection as an answer to the appeal;
23. The major ground of appeal relates to the effect of the death of the insured defendant on the declaratory suit Nyeri CMCC No.18/2013;
24. The appellant's contention was that suits brought against deceased persons were a nullity as there no rights or liabilities against them therefore any judgments brought against such persons are a nullity; it relied on the authorities cited in its written submissions to support this position and Section 10 of the Insurance (Motor Vehicles Third Party Risks) Act which provides that the insurer is only liable to satisfy a judgment obtained against its insured under a policy; that in this instance a judgment was entered against a dead insured which would mean that there was no insured against whom a judgment could be given;
25. Whereas the authorities may relate to that contention and may be the correct position in law, however in this instant appeal the cited authorities and the law cited are of no relevance; reason being the primary suit was filed on the; the defendant is alleged to have died on the 11/12/2011; the firm of Muthoga & Gaturu Advocates entered Appearance on the 31/01/2012 by this time one year had not passed and the suit had not abated even at the time judgment was entered; the said firm of advocates failed to file a defence which prompted the respondent to request for judgment in default and then proceeded to formally prove his case;
26. There was mention of a letter from the defendants advocates on the purported demise of the defendant; there was also mention of a burial permit to support the death of the defendant; but it was incumbent upon the person alleging a fact to tender sufficient evidence into court and to the respondent as proof to demonstrate that the defendant was indeed dead;
27. The court record for Nyeri CMCC No.360/2011 reflects that nothing was tendered or produced in evidence; without proof or evidence to support the demise of the defendant in the course of the proceedings in Nyeri CMCC No.360/2011 the respondent formally proved his case and was awarded damages; the appellant after having been enjoined in the proceedings can only be faulted for failing to enjoin the legal representatives as directed;
28. It is not disputed that the appellant filed no appeal against the judgment of the primary suit neither was there one filed against the ruling which dismissed the appellants' application to set aside the ex-parte judgment; which judgment to date remains unchallenged and enforceable; thus this court is satisfied that there is no good reason for interfering with the trial court's finding that the appellant as the insurer is bound to satisfy the judgment in Nyeri 360/2011;
29. This court is satisfied that there was no proof of death of the defendant in the lower court so as to render the proceedings as a nullity; and therefore, this court finds no good reason to declare the proceedings as being a nullity;
30. This court is satisfied that the proceedings in Nyeri CMCC 360/2011 were properly conducted and the purported death of the defendant is found to be of no effect on the subsequent proceedings in the declaratory suit Nyeri CMCC No.18/2013;
31. This ground of appeal is found lacking in merit and it is hereby disallowed;

Whether the doctrine of res judicata is applicable to this appeal:

32. It was the respondents' contention that this instant appeal was res judicata to the judgment and the ruling in Nyeri CMCC No.360/2011;
33. The law on the doctrine of 'res judicata' is found under the provisions of Section 7 of Civil Procedure Act; and reads as follows;

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34. The key elements of this doctrine are set out in the case of **The Independent Electoral Boundaries Commission vs Maina Kiai & 5 others Nairobi CA Civil Appeal No.105 of 2017 [2017]eKLR**; where the court stated the following;

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35. Having perused the court record this court finds no mention of any former primary suit(s) with the same parties being the respondent and the defendant; nor is there any evidence provided by the respondent of a determination made by a court of competent jurisdiction on the same issue which would be a claim for damages arising out of the road traffic accident; the appellant herein was within its rights and at liberty to approach this court on appeal against the decision in the declaratory suit namely Nyeri CMCC No.18/2013;

36. The Notice of Objection is found lacking in merit and is hereby overruled.

37. This court will not belabor itself in addressing the ground of appeal in the Cross-Appeal on the discrepancy in the amounts in the decree differing with the amounts awarded in the declaratory suit; this is due to the fact that no submissions were made by the respondent on this ground of appeal; therefore, this court will treat this issue as having been unprosecuted;

FINDINGS AND DETERMINATION

38. For the afore-going reasons this court makes the following findings and conclusions;

(i) This court finds there was no proof of death of the defendant in the proceedings in Nyeri CMCC No.360/2011 which are found to be proper; and finds the '**alleged death**' (emphasis mine) of the defendant is found to be of no effect on the subsequent proceedings in the declaratory suit Nyeri CMCC No.18/2013;

(ii) The appellant is at liberty to file an appeal against the decision of the lower court in Nyeri CMCC No.360/2011;

(iii) The appeal is found lacking in merit in its entirety and it is hereby dismissed;

(iv) The respondent is at liberty to request for the release of the decretal sums in execution of the decree in Nyeri CMCC No.18/2013;

(v) The doctrine of res-judicata is found to be inapplicable to the appeal; the objection is overruled;

(vi) The cross-appeal is hereby marked as having been abandoned.

(vii) Each party shall bear their own costs.

It is so Ordered.

Dated, Signed and Delivered Electronically at Nyeri this 17th day of December, 2020.

HON.A.MSHILA

JUDGE