



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 665 OF 2011

CANNON ASSURANCE LTD.....APPELLANT

- V E R S U S -

NGUGI MBUGUARESPONDENT

(Being an appeal from the judgement of the learned magistrate,

Hon.M. R. Gitonga SRM, in the Chief Magistrate's Court

of Kenya at Thika in Civil Case No. 891 of 2005

delivered on 1st November 2011.)

JUDGEMENT

1. Ngugi Mbugu, the respondent herein, in his capacity as the legal representative of the Estate of Daniel Mwangi Ngugi, deceased, filed a compensatory suit before this court for the fatal injuries suffered for the benefit of the dependants under the Fatal Accidents Act and under the Law Reform Act against James Maina Ng'ang'a, who is alleged to be the registered owner of motor vehicle registration no. KWR 092. The aforesaid motor vehicle is alleged to have been insured by Cannon Assurance Ltd, the appellant herein. One James Kamau Kimani was named as the 2nd defendant. Default judgment was obtained against the defendants namely James Maina Ng'ang'a and James Kamau Kimani. The suit therefore proceeded for hearing exparte culminating to the judgment entered in favour of the respondent and against the defendants.

2. The respondent thereafter filed a declaratory suit before the Chief Magistrates court claiming payment of kshs.307,066/=. Hon. M. R. Gitonga, learned Senior Resident Magistrate, heard the suit and entered judgment in favour of the respondent and against the appellant. Being dissatisfied, the appellant preferred this appeal.

3. On appeal, the appellant put forward the following grounds in its memorandum of appeal;

1. That the learned senior principal magistrate erred in law and fact in holding the defendant liable to satisfy the decree in Nairobi HCCC no. 5727 of 1989 contrary to the evidence on record whereby the plaintiff had produced no evidence of serving the defendant with a statutory notice as required under Section 10(2) (a) of the Insurance (Motor Vehicles Third Party) Risks Act Cap 405 of the Laws of Kenya.

2. That the learned senior principal magistrate erred in failing to hold that the plaintiff had failed to prove that the decree in Nairobi HCCC No. 5727 of 1989 had been entered against the defendant's insured as required under Section 10(1) of the Insurance (Motor Vehicles Third Party) Risks Act.

3. That the learned senior principal magistrate erred in law and fact in failing to appreciate that the evidence produced in court by the defendant in respect of ownership of motor vehicle KWR 092 was contradictory and that whereas the police abstract referred to James Maina Ng'ang'a as the owner the plaintiff contradicted this in his testimony by stating that Joseph Maina Ng'ang'a was the owner and in fact the decree in Nairobi HCCC No. 5727 of 1989 was against the latter whereas there was no documentary evidence to proof his relation to the said vehicle.

4. That the learned senior principal magistrate erred in law and fact in failing to find that no letters of administration was produced by the plaintiff to prove his locus standi and in fact the plaintiff failed to disclose his locus which was not pleaded.

5. That the learned senior principal magistrate erred and misdirected herself in law and fact by referring to an alleged statutory notice in her judgment which was not produced in evidence and did not therefore form part of the record and in any event the plaintiff had not pleaded the same in the plaint and is bound by his pleadings.

6. That the learned senior principal magistrate erred in law and fact and failed to give a reasoned judgment on when the alleged statutory notice was served as no such findings are made and whether this complied with the Section 10(2) (a) of the Insurance (Motor Vehicles Third Party) Risks Act.

7. That the learned Senior Principal Magistrate erred in failing to adequately consider the written submissions filed by the defendant's counsel.

8. That the learned senior principal magistrate erred in failing to dismiss the plaintiff's claim wholly in view of the inconsistent evidence of the plaintiff vis-a-vis the pleading in the plaint and failure by the plaintiff to prove his case as required by law.

4. When the appeal came up for hearing, learned counsels recorded a consent order to have the suit disposed of by written submissions.

5. I have re-evaluated the case that was before the trial court. I

have further considered the rival written submissions. Though the appellant put forward eight grounds of appeal, it ended up arguing the following three main grounds;

i. Whether statutory notice was effected upon the appellant.

ii. Who is the actual owner of motor vehicle registration no KWR 092.

iii. Whether the respondent had the locus standi to bring the suit appealed against.

6. On the first issue as to whether or not the statutory notice was effected upon the appellant, it is the submission of the appellant that the respondent had failed to tender reliable evidence to prove service of such a notice at the time of filing the initial suit. It was pointed out that the purported evidence of service of such a notice was rejected by the trial magistrate. This court was urged to find that the failure to issue such a notice pursuant to the provisions of Section 10(2) (a) of the Insurance (motor vehicles third party risks) Act rendered the suit incompetent. The respondent was of the view that there was sufficient evidence of service of such a notice therefore the ground lacks merit. I have carefully re-evaluated the case that was before the trial court. It is clear from the proceedings in respect of Nairobi H.C.C.C. No. 5727 of 1989 that a statutory notice dated 27th December 1989 had been issued to the appellant by the

firm of M/s Vohra and Gitau Advocates. It is clear that the respondent issued a notice to produce before being permitted to produce a copy of the statutory notice. On the basis of the aforesaid reason I find no merit in this ground.

7. On the second ground as to whether or not there was sufficient evidence to prove ownership of motor vehicle registration no. KWR 092, it is the appellant's submission that the police abstract adduced in evidence by the respondent shows that the owner of the aforesaid motor vehicle is one James Maina Ng'ang'a who has never being the appellant's insured. It was pointed out that no search at the registrar of motor vehicles was conducted to determine the actual owner of the aforesaid motor vehicle therefore the trial magistrate erred when she failed to interrogate the issue. The respondent has admitted on appeal that the name of the owner is indicated as James Maina Ng'ang'a.

8. The respondent has urged this court to find that the respondent tendered credible evidence showing that the insured motor vehicle was KWR 092. It is further the submission of the respondent that had the issue been raised before the trial court it could have been clarified that the appellant's insured was one Joseph Maina Ng'ang'a and not James Maina Ng'ang'a. Having considered the rival submissions, I am convinced that the respondent's submission is persuasive. It is not in dispute that the insured motor vehicle is KWR 092. The record shows that the appellant participated in the proceedings before the trial court but it failed to tender evidence to controvert that of the respondent. Had the appellant tendered evidence, the issue touching on the insured's first name could have been resolved but unfortunately the appellant waited only to raise the issue late in these proceedings. I find this ground to be without merit. It is also clear from the record that the plaint in Nairobi H.C.C.C no. 5727 of 1989 was amended to include the name of Joseph Maina Ng'ang'a as the 1st defendant.

9. The final issue to be determined on appeal is the question in respect of the respondent's locus standi. It is the appellant's submission that the respondent lacks the necessary locus standi to file this suit. It is pointed out that the respondent is not the victim nor the legal representative of the estate of the deceased. The respondent has pointed out that the appellant has raised the issue in dispute for the first time on appeal having failed to do so before the trial court. It is apparent from the recorded proceedings that the issue touching on the respondent's locus standi was never raised nor argued before the court which heard the primary suit which gave rise to the award of ksh.307,066/= vide Nairobi H.C.C.C no. 5727 of 1989 through the judgement of the Hon. Mr. Justice E. M. Githinji (as he then was) delivered on 16th November 1995. At that time, the suit proceeded as a formal proof since a default judgement had been obtained against the defendants. The aforesaid judgement has not been challenged on appeal. This ground finds no favour from this court. The same is rejected.

10. In the end and on the basis of the above grounds, this appeal is ordered dismissed in its entirety.

Dated, Signed and Delivered in open court this 26th day of January, 2018.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent