REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CIVIL APPEAL NO. 21 OF 2017

CANNON ASSURANCE CO. LTD..APPELLANT

=VRS=

JOHN MATOKE KERAGIA (Suing as Legal Representative of the Estate of

MIRIAM KEMUNTO KERAGIA)...-RESPONDENT

[Being an Appeal from the Ruling of Hon. J. Mwaniki – SRM delivered on 25th July 2017 in Keroka PM Civil Suit No. 64 of 2017]

JUDGEMENT

The appellant was a defendant in the lower court and had been sued in a declaratory suit to fulfil the amounts awarded in the primary suit. The lower court made a finding that the appellant's defence did not raise any triable issues and thereby struck it off with a declaration that the appellant pays the decretal sum of the primary suit.

The appellant being aggrieved preferred this appeal on the following grounds: -

"1. THAT the Learned Trial Magistrate erred in law in failing to appreciate the Provisions of section 10 (2) of the Insurance (Motor Vehicle Third Party Risks Act).

2. THAT the trial Magistrate failed to make a finding on the issue of a statutory notice.

3. THAT the Learned Trial Magistrate failed to appreciate the Appellant submissions and authorities.

4. The Learned Trial Magistrate failed to provisions of section 4 of Limitations of Action Act.

5. the Learned Trial Magistrate failed to appreciate that the appellant had a defence that raises triable issues.

6. the Learned Trial Magistrate erred in arriving at the decision while no evidence of a policy documents was brought to the courts attention."

The appeal was canvassed by way of written submissions. Both parties filed their submissions on the 5th July 2018. Counsel for the appellant submitted that the appellant was never served with the statutory notice within the stipulated time in the Act. Counsel further submitted that the suit was bad in law as it was time barred and that the defence discloses triable issues. The appellant prayed that the appeal be allowed.

The appeal was vehemently opposed and Counsel for the respondent submitted that the requisite statutory notice of institution of suit was issued to the appellant. Counsel submitted that even though the primary suit was filed out of time, the respondent was granted leave to file the same out of time. It was Counsel's submissions that the appellant's defence did not raise any bonafide triable issues and that the trial magistrate was properly guided in striking out the defence. They relied on several authorities and prayed that the appeal lacks merit and should be dismissed with costs to the respondent.

I have carefully considered all the material placed before me including the rival submissions by the parties. The real issue in controversy in this application is whether the appellant was notified about the primary suit and whether the defence filed raised any triable issues. In its statement of defence the appellant denied that it was the insurer of the motor vehicle that caused the accident the subject matter of the declaratory suit. It also denied having knowledge of the suit in the lower court. This denial is contained in paragraph 6 of its statement of defence filed in that court on 6th April 2017 where it avers: -

“6. The defendant denies having knowledge of what is set out in paragraph 5, that the plaintiff made a claim upon and brought against CLIFF NYAKUNDI OBWOGE at this court vide KEROKA SRM C NO. 143 OF 2012, for damages for such pain, suffering and loss consequent to which judgement was entered in favour of the plaintiff against the said CLIFF NYAKUNDI OBWOGE.”

Section 10 (2) (a) of the Insurance (Motor Vehicles Third Party Risks) Act provides that: -

“(2) No sum shall be payable by an insurer under the aforegoing provisions of this Section –

(a) In respect of any judgement, unless before or within fourteen days after the commencement of the proceedings in which the judgement was given, the insurer had notice of the bringing of the proceedings; or”

Section 10 (3) of the Act makes it the duty of a person who makes such a statutory declaration to cause the statutory declaration to be delivered to the insurer. In my view the purpose of a statutory notice is to inform an insurance company of the institution of a suit and is therefore a key issue in a declaratory suit. It is my finding that denying knowledge of the primary suit as the appellant did in paragraph 6 of its defence was tantamount to denying service of a statutory notice and the trial magistrate therefore misdirected himself when he stated that the issue was not pleaded.

It is my finding that the appellant defence in the declaratory suit raises triable issues. It is trite that where a defence raises even one triable issue the same should not be struck out and that a triable issue need not be one that must succeed. Accordingly I find that this appeal has merit. The same is allowed with costs to the appellant and the matter is remitted to the lower court for hearing on the merits.

It is so ordered.

Signed, dated and delivered at Nyamira this 18th day of October 2018.

E. N. MAINA

JUDGE