



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO 199 OF 2013

JUBILEE INSURANCE COMPANY LTDAPPELLANT

VERSUS

PENNINAH MWONGELI MUSILIRESPONDENT

(An Appeal arising out of the judgment of Hon. H. Nyakweba PM delivered on 18th September 2013 in Kilungu Principal Magistrate's Court Civil Case No. 69 of 2013)

JUDGMENT

The Appellant was the original Defendant in Civil Case No. 69 of 2013 at Kilungu Principal Magistrate's Court, and has appealed against a ruling of the learned trial Magistrate, which was delivered in the said suit on 18th September 2013. The said ruling was on an application brought by the Appellant in the trial Court by way of a Notice of Motion dated 20th June 2013, seeking a stay of the time of filing a defence in the suit therein pending the hearing and final determination of Nairobi HCCC No. 311 of 2011, and that the costs of the application abide the outcome of Nairobi HCCC No. 311 of 2011. The learned magistrate in his ruling dated 18th September 2013 dismissed the said application and ordered the Appellant to file its defence within six days of the date of the said ruling.

The Appellants subsequently moved this Court through a Memorandum of Appeal dated 4th October 2013, wherein their grounds of appeal are as follows:

- The learned Magistrate erred in law and fact and misdirected himself in making in making a finding that there are no circumstances under which the court may make an order for stay of time of filing a defence in view of the provisions of Order 50 Rule 6 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act.
- The learned Magistrate erred in law and fact in making a finding that the outcome of HCCC No. 311 of 2011 Nairobi would only be relevant in an application for stay of proceedings.
- The learned Magistrate erred in law and fact in finding that the decision in HCCC No. 311 of 2011 Nairobi would not affect the outcome in SRMCC No. 69 of 2013 Kilungu, as the suit filed in the High Court was a declaratory suit under the provisions of Section 10(4) of the Insurance Act (Third Party Risks) and it seeks to avoid any claim arising out of the accident that occurred on 10th October 2009 and the Respondent's suit was one such claim.
- The learned Magistrate erred in law and fact in failing to appreciate that the outcome in HCCC No. 311 of 2011 Nairobi would determine whether or not the Appellant had a defence in SRMCC No. 69 of 2013 Kilungu hence the application by the Appellant to stay the filing of the defence in SRMCC No. 69 of 2013-Kilungu pending the hearing and determination of HCCC No. 311 of

2011 Nairobi.

The Appellant prays for orders that it be at liberty to withdraw the defence already filed in SRMCC No. 69 of 2013 Kilungu within 14 days; that the proceedings in PMCC No. 69 of 2013 Kilungu be stayed pending the hearing and determination of HCCC No. 311 of 2011; and that the Appellant be at liberty to file a defence in SRMCC No. 69 of 2013 Kilungu within 14 days from the date of the judgment to be delivered in Nairobi HCCC No. 311 of 2011.

The Submissions

The facts giving rise to the Appellant's application in the trial court for stay of filing its defence were as follows. The Respondent had filed a declaratory suit in the trial Court after she got judgment in her favour in the primary suit namely Kilungu SRMC No. 91 of 2010 against the Defendant therein, arising from an accident involving motor vehicle KAY 458E in which she was injured. The Appellant who had insured the said motor vehicle was served with a third party notice in the said primary case by the Respondent, for purposes of indemnity .

The reasons given by the learned trial magistrate in dismissing the Appellant's application were that the Respondent and the primary suit, namely Kilungu SRMC No. 91 of 2010, were not mentioned in the plaint in Nairobi HCCC. No. 311 of 2011, and that the outcome in Nairobi HCCC. No. 311 of 2011 would therefore not affect the trial Court's decision in the declaratory suit. The Appellant's application was thus found by the trial magistrate to be frivolous and an abuse of the Court, as there was no harm in filing a defence and thereafter seeking a stay of proceedings.

Kairu & McCourt Advocates, the Appellant's learned counsel, filed submissions dated 9th February 2016 on this appeal, wherein it was argued that its application in the trial Court was meritorious and made in good faith, as the Respondent would be saved from incurring any further legal costs and time in pursuing the declaratory suit, and the court's time would be saved if the appeal is allowed. The Appellant noted that the decretal amount awarded in the primary suit was not substantial, and it would be able to settle the same as it is a reputable company.

Secondly it was stated that the Respondent together with her advocate were aware of the existence of the suit filed in the High Court, well before the filing of the declaratory suit as a statutory notice had been served on them. It was argued that it would be an abuse of the court process to allow the declaratory suit to proceed during the pendency of the suit in the High Court. They referred to the decisions in **Phoenix Properties Ltd vs Equip Agencies Ltd & 6 Others, (2006) eKLR** and **Jadva Karsan vs Harnam Singh Bhogal,(1952) EACA 74** in this regard.

Thirdly it was submitted that the Appellant's application in the trial Court dated 20th June 2013 was not overtaken by events and could not have been filed in the primary suit since an insurance company is never enjoined as a party in tort suit before the determination of liability and quantum. Reference was made to the case of **Kenindia Assurance Company Ltd V Otiende, (1990 -1994) EA 200** for this position. Finally it was their submission that the suit filed in the High Court was of consequence to the Plaintiff as its outcome would determine the outcome of the declaratory suit.

The Respondent's learned counsel, Anne M. Kiusya & Company Advocates argued in submissions dated 14th March 2016 that the appeal was bad in law and had no merit since the case in Nairobi HCCC No. 311 of 2011 did not concern the Respondent. In addition it was submitted the Appellant filed Nairobi HCCC No. 311 of 2011 so as to avoid the decree that was awarded to the Respondent in the primary suit being Kilungu PMCC No. 91 of 2010.

The Respondent further submitted that if the suit in the High Court was filed after the primary suit and the Respondent herein was a party in the said case, then the matter was *res judicata*. Reliance was placed on the decision in **Edwin Thuo vs Attorney General and Another, Nairobi Petition No. 212 of 2012 (unreported)** in this regard. In addition it was argued that the Appellant cannot have the protection of section 10(4) of the Insurance(Motor Vehicle Third Party Risks) Act (Cap 405 of the Laws of Kenya)

since the he ought to have filed suit to avoid the policy within 3 months of filing of the primary suit, which was commenced on 12th October 2011.

Lastly, it was argued that the Appellant cannot have the benefit of the notice it served on the Respondent for lack of compliance with the statutory provisions that the notice should have been served 14 days to or after the filling of the primary suit.

The Issues and Determination

It is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts and come up with its findings and conclusions. See in this regard the decisions in this respect **Jabane vs. Olenja [1986] KLR 661** , **Selle vs Associated Motor Boat Company Limited [1968] EA 123** and **Peters vs. Sunday Post [1958] E.A. 424**.

From the grounds of, and relief sought in this appeal, and the submissions made thereon by the parties, the issue that is sought to be determined in this appeal is whether the trial magistrate erred in finding that the defence in the trial Court could not be stayed pending the outcome of the declaratory suit in the High Court. The other issues raised by the appeal as regards the serving of notice and time of serving notice under the Insurance(Motor Vehicle Third Party Risks) Act (Cap 405 of the Laws of Kenya) go to the merit of the declaratory suit suits before the High Court and the trial Court that are yet to be heard and determined, and cannot therefore be decided in this appeal.

Coming to the issue before this Court, the provisions as to filing of Defence are provided in the Civil Procedure Rules in Order 7 Rule1 as follows:

“Where a defendant has been served with a summons to appear he shall, unless some other or further order be made by the court, file his defence within fourteen days after he has entered an appearance in the suit and serve it on the plaintiff within fourteen days from the date of filing the defence and file an affidavit of service.”

Therefore a Court has discretion and powers under the said Order to make orders staying the filing of a Defence quite apart from a stay of proceedings contrary to the finding by the trial magistrate.

In the present appeal the main reason for refusing the stay was that the matter in the Nairobi High Court in HCCC No. 311 of 2011 did not concern the Respondent or the primary suit in Kilungu PMCC No. 91 of 2010. A perusal of the Plaintiff filed on 5th August 2011 in Nairobi HCCC No. 311 of 2011 dated 22nd July 2011 however shows that it concerns the indemnity of the Defendant therein who was the Appellant’s insured, for claims arising out of an accident that occurred on 10th October 2009 involving the said Defendant’s motor vehicle registration number KAY 458 E . This is the same motor vehicle involved in the accident the Respondent had on the same date, leading to the award made in the primary suit. The trial magistrate therefore erred in finding that there was no connection between Nairobi HCCC No. 311 of 2011 and the Respondent and primary suit in Kilungu PMCC No. 91 of 2010.

However, I note that the Appellant has since filed a Defence in in PMCC No. 69 of 2013 at Kilungu and will not suffer any prejudice in having the Defence continue to be on the court record, as Order 8 of the Civil Procedure Rules allows for amendment of pleadings at any stage of proceedings, including by the Court’s own motion. In the premises I find that the Appellant’s appeal has merit, and set aside the orders by the trial magistrate made in PMCC No. 69 of 2013 at Kilungu on 18th September 2013, and substitute them with the following orders:

1. That the proceedings in PMCC No. 69 of 2013 at Kilungu be and are hereby stayed pending the hearing and determination of Nairobi HCCC No. 311 of 2011;
2. That the Appellant be at liberty to amend and file an Amended Defence in SRMCC No. 69 of 2013 Kilungu within 14 days from the date of the judgment in Nairobi HCCC No. 311 of 2011

and/or within 14 days of the date of this judgment, whichever date is the applicable date.

3. Each Party shall bear their costs of the Appeal

It is so ordered.

DATED AT MACHAKOS THIS 30TH DAY OF MAY 2016.

P. NYAMWEYA

JUDGE