



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 327 OF 2014**

**CANNON ASSURANCE LIMITED..... APPELLANT**

**• V E R S U S –**

**JULIET MORAA NYAMARI (Suing as the Legal**

**Administrator of the ESTATE OF JOHNSON**

**JUMANNE ONGORO deceased..... RESPONDENT**

*(Being an appeal from the ruling and orders for the honourable Mr. D. Ole Keiwua, PM delivered on 25<sup>th</sup> July, 2014 at the CM's court Milimani CMCC of 2013)*

**JUDGEMENT**

1. Juliet Moraa Nyamarim the respondent herein, in her capacity as the administratrix of the estate of Johnson Jumanne Ongoro, deceased, filed a declatory suit before the Chief Magistrate's court, Milimani Commercial Court against Cannon Assurance Ltd, the appellant herein vide the plaint dated 22<sup>nd</sup> August 2013 and amended on 7.3.2014. In the aforesaid plaint the respondent sought for judgment in the following terms:
  - a. *A declaration that the Defendant is statutory bound to satisfy judgment and decree in Milimani CMCC No. 7512 of 2009 dated 11<sup>th</sup> April 2013 and 8<sup>th</sup> July 2013 respectively for kshs.2,414,203.77/= together with costs of kshs.176,816.36/= all totalling to kshs.2,591,020.13/= and interest from 8<sup>th</sup> July 2013 till payment in full in favour of the plaintiff.*
  - b. *Cost of this suit.*
  - c. *Interest on (a) and (b) at court rates.*
  - d. *Any other relief that this honourable court may deem fit and just to grant.*
2. The appellant filed the defence dated 18.9.2013 and amended on 24.3.2014 to deny the respondent's claim. The respondent successfully vide the motion dated 6<sup>th</sup> May 2014 applied to have the amended defence dated 24.3.2014 struck out and for entry of summary judgement. Being aggrieved by the aforesaid decision, the appellant preferred this appeal, the subject matter of this judgment.
3. On appeal, the appellant put forward the following grounds.
  1. *THAT the honourable learned magistrate erred in law and in fact by failing to appreciate the fact that the appellant's amended statement of defence raised triable issues worthy to be determined in an inter partes hearing;*

2. ***THAT the honourable learned magistrate applied wrong principles of in arriving at the decision to strike out the appellant's amended statement of defence and entering judgment as against the appellant;***
3. ***THAT the honourable learned magistrate erred in law and in fact in failing to appreciate the issues raised in the appellant's replying affidavit, particularly that the appellant was not issued with a notice under Chapter 405 of the Laws of Kenya.***
4. ***That the honourable learned magistrate erred in law and in fact in finding that the appellant was statutory bound to satisfy the judgment and decree in Nairobi CMCC No. 7512 of 209 in view of the evidence and pleadings placed before him.***
5. ***THAT learned magistrate misdirected himself in holding that the failure to comply with statutory requirement relating to a notice as provided for under section 10 of Chapter 405 of the Laws of Kenya was a mere technicality.***

4. When the appeal came up for hearing, learned counsels recorded a consent order to have the appeal disposed of by written submissions. Though the appellant put forward a total of five grounds, I am of the view that there is basically one main ground of appeal that is, whether or not the appellant's amended defence raised triable issues. This ground was ably argued before the trial court. The parties have now beseeched this court to re-evaluate the arguments made before the trial court.

5. It is the submission of the respondent that the appellant's amended defence disclosed no reasonable defence hence the learned trial magistrate rightly struck out the same. It is argued that the aforesaid defence did not raise any triable issues that can be adjudicated in a full trial. The appellant on the other hand has urged this court to find that the defence was wrongly struck out yet the same had raised triable issues which should have canvassed at a trial. The appellant beseeched this court to set aside the order striking out the amended defence and proceed to reinstate it so that the suit can be heard. I have carefully considered the rival arguments. I have taken time to re-examine the impugned amended defence dated 24.3.2014. In paragraph 4 of the aforesaid defence the appellant specifically denied being the insurer of motor vehicle registration number KAU 953K. In the primary suit i.e C.M.C.C. 7512 of 2009, it was alleged that the aforesaid motor vehicle belonged to the defendant. In the premises, the appellant was of the view that it had no statutory duty to satisfy the judgement. In paragraph 5 of the same defence, the appellant also denied knowledge of the defendants in primary suit. In other words the appellant denied that the defendants were its insured. Further in paragraph 6 of the amended defence, the appellant stated that the deceased was not a person covered under the subject policy of insurance under Section 5(b) of the Insurance (motor vehicles third Party Risks) Act Chapter 405 Law of Kenya.

6. It should be pointed out here that the above issues were pointed out to the learned principal magistrate. The learned principal magistrate formed the opinion that there was admission on the part of the appellant's legal officer that the appellant was the insurer of motor vehicle registration number KAU 953K.

7. The learned principal magistrate did not at all consider two pertinent issues which were put to his attention.

8. First, is whether the insurance policy over the aforesaid motor vehicle covered the deceased. Secondly, he also failed to consider whether the persons named as the owners of the aforesaid motor vehicle were actually the persons who procured the insurance cover of the ill fated motor vehicle. In my humble view the above issues among other issue were serious triable issues which could not be summarily determined without being tested via a trial. I am convinced that the learned principal magistrate wrongly exercised his discretion to strike out the appellant's defence.

9. In the end the appeal is allowed. The order striking out the appellant's amended defence dated 24.3.2014 issued on 25.7.2014 is set aside and is substituted with an order dismissing the motion dated 6<sup>th</sup> may 2014. Consequently the foresaid amended defence is reinstated and the suit should proceed to hearing on priority basis before any magistrate of competent jurisdiction other than

Hon. Ole Keiwa.

10. In the circumstances of this appeal I am of the view that costs of both the appeal and the motion should await the outcome of the

suit.

Dated, Signed and Delivered in open court this 13<sup>th</sup> day of May, 2016

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant

..... for the Respondent