



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NUMBER 419 OF 2014

RICHARD MAKAU NGUMBI.....1ST APPELLANT

ONESMUS KIMANZI KYAVA.....2ND APPELLANT

(BOTH SUING AS LEGAL REPRESENTATIVES OF THE ESTATE AND DEPENDANTS OF THE LATE MISILI MULANDI.

VERSUS

CANNON ASSURANCE COMPANY LIMITED.....RESPONDENT

(Being an Appeal Arising from the Decision, Order and Ruling Made on the 18th Day of August, 2014 By Hon. M Chesang (Mrs) Ag. SRM in CMCC No. 1157 of 2014)

J U D G M E N T

In a plaint filed in the lower court on the 10th day of March, 2014 at the Chief Magistrate's Court Nairobi (Milimani Commercial Courts) the appellants herein sued the Respondent, the cause of action being founded on a judgment that had been obtained in Civil suit No. 5130 of 2010. In the said case, judgment was delivered on the 22nd day of October, 2012 wherein the Appellants herein were awarded general and special damages amounting to Ksh.799,163 plus costs and interest making a total decretal sum of Ksh.877,417/-

The said cause of action arose out of a road traffic accident that occurred on the 29th day of November, 2009 involving motor vehicle registration number KBA 682E along Kiambu Road in Nairobi area causing fatal injuries that led to the instant death of the late Musili Mulandi. The Appellants herein who sued in that matter as legal representatives of the Estate of the said Musili Mulandi filed the matter and obtained judgment as noted earlier on in this judgment.

Following the said judgment the Appellants filed Civil suit No. 1157 of 2014 being a declaratory suit against the insurers of motor vehicle KBA 682E, M/s Cannon Assurance Company Limited seeking declaratory orders to the effect that the Respondent is liable to pay the sum of Ksh.877,417/- costs of the suit plus interest at court rates.

It is pleaded that at all material times relevant to the suit, the Respondent had effected a valid policy of insurance being Policy Number Comp 01/07/01524507 with one Jamal Maina Mohamed who was the owner of the aforesaid motor vehicle in respect of motor vehicle registration number KBA 682E.

It is further pleaded that pursuant to the said policy and upon payment of premiums by the owner and the driver, the Respondent undertook to indemnify the insured against all the claims of third parties arising

out of accidents involving such third parties and motor vehicle registration number KBA 682E.

It is further contended that pursuant to the provisions of Section 10(2) (a) of the insurance (Motor Vehicle Third Party Risks) Act Cap 405, the Respondent was duly served with a statutory notice prior to the filing of civil suit number 5130 of 2010 and therefore had notice and were fully aware of the existence of the said civil suit.

The Respondent filed a defence to the suit in which it denied that it was the insurer of motor vehicle registration number KBA 682E at the material time of the accident. The Respondent further avers that it is a stranger to the said Jamal Maina Mohamed (the alleged insured) and states that neither did the said person procure insurance cover from it in respect of motor vehicle KBA 682E nor were any premiums paid to it for Policy Number Comp/01/07/01524507.

The Respondent further denied that an accident occurred involving the said motor vehicle on the 29th day of November, 2008 and the deceased and that there was judgment for the Appellant In respect of the said accident. A reply to defence was filed on 29th April 2014 which basically joins issues with the Respondent in its defence and reiterates the contents of the plaint.

On 28th May, 2014, the Appellants filed a Notice of Motion dated 27th May, 2014 seeking orders that the statement of defence dated and filed on the 17th April 2014 be struck out and judgment be entered as prayed in the plaint. They also sought for the costs of the application and the suit. The main grounds on which the application is premised are that the Respondent is obliged to settle the decretal sum awarded in CMCC Number 5143 of 2010 under the provisions of Section 10(2) (a) of the Insurance (Motor Vehicles Third Party Risks Act) Cap 405, the Respondent has no valid defence against the Appellants claim, the Respondent is justly liable to compensate the Estate of the late Musili Mulandi, that the statement of defence is an abuse of court process, the statement of defence may prejudice, embarrass or delay the fair trial of the suit and that the ends of justice shall be served upon granting of the application. The application is supported by the affidavit of Richard Makau Ngumbi sworn on the 27th May, 2014, the contents of which I will not reproduce herein but I will consider the same while analyzing the merits of the appeal.

The application is opposed vide a replying affidavit by Martha Mutoro sworn on the 13th June, 2014 which I will also not consider at this moment for the same reason given above.

The application was heard by the learned magistrate and in a short ruling delivered on 18th August, 2014, she dismissed it with an order that the costs to follow the cause. It is this ruling that prompted the Appellants to file the appeal herein. The Memorandum of Appeal has listed four grounds of appeal as hereunder: -

1. That the Honourable magistrate erred in law and in fact by dismissing the Notice of Motion Application dated 27th day of May, 2014.
2. That the honourable magistrate erred in law and fact by misconceiving the court process of summary judgment and/or striking out proceedings summarily in a declaratory suit.
3. That the honourable magistrate erred in law and in fact by finding that the Respondent has a valid defence that raises triable issues.
4. That the Honourable magistrate erred in law and in fact by failing to find the Respondent liable to compensate the Estate and Dependents of the late Musili Mulandi.

They have sought orders that the appeal be allowed and the ruling of the lower court be set aside and the Appellants be awarded the decretal sum in the primary case No. 5143/2010 with interest at court rates, they have also sought costs of the appeal and of the suit.

Parties agreed to dispose off the appeal by way of written submissions. Looking at the Memorandum of Appeal and submissions by the learned counsels, in my view, the following are the issues for determination.

- a. Whether the defence in Civil Suit Number 1157/2013 raised any triable issues.
- b. Whether the Respondent was served with a statutory notice.
- c. Who should bear the costs of the appeal and that of the lower court?

It is only after considering the above issues that one can be in a position to conclude whether the learned magistrate was right in dismissing the application and whether she misconceived the court process of summary judgment and striking out of proceedings summarily as she did.

I am alive to the fact that in considering the appeal I am under a duty to re-evaluate the evidence. This is an appeal against a ruling as opposed to an appeal against a judgment.

On the first issue, this court has perused the defence as filed. The Respondent denies the following assertions.

1. That it was the insurer of motor vehicle registration number KBA 682E at the material time when the accident occurred.
2. It denies knowledge of Jamal Maina Mohamed and that he ever procured insurance cover for motor vehicle KBA 682E from the Respondent.
3. That it did issue a policy of insurance number Comp/01/07/01524507 to nor accepted premiums from the said Jamal Maina Mohamed or any other person in respect of motor vehicle KBA 682E.
4. It also denies that there was an accident involving motor vehicle KBA 682E and the deceased on the material date and that judgment had been obtained by the Appellants in respect of the said accident. (This is the purport of paragraph 7 of the defence).
5. That a statutory notice was served as required by the law and in particular Cap 405.
6. And in the alternative and without prejudice whether the Respondent is under any contractual or statutory duty to satisfy the judgment as the deceased was not a person covered under the subject policy under the provision of Insurance (Motor Vehicle Third Party Risks Act) Cap 405.

The issues raised in this defence can be collapsed into two which are

- i. Whether there was a valid policy of insurance in respect of motor Vehicle KBA 682E and who was the insured.
- ii. Was a statutory notice served upon the Respondent?

As to whether there was an accident on the material date or not, I suppose, that was an issue that was determined in the initial suit pursuant to which the declaratory suit the subject of this appeal was filed. The Respondents did not file any appeal to challenge the judgment in the initial suit and therefore, the issue of whether there was an accident or not is not for this forum and ought not to have been raised in the defence to the declaratory suit.

As to whether there was a policy of insurance in respect of motor vehicle KBA 682E my humble view is that, this is a serious issue that can only be determined at the main trial. I have perused the affidavits filed by both parties in support of the application dated 27th day of May, 2014 and there is no evidence by way of a Certificate of Insurance or a policy document to support the assertion by the Appellants that the Respondent was the insurer of motor vehicle KBA 682E at the material time when the accident occurred. It is only a copy of the police abstract that was annexed which to me is not conclusive.

Note here that the liability of the Respondent arises only and only if it was the insurer of the offending motor vehicle and if no nexus is proved between the insurer and the insured then a cause of action by way of a declaratory suit such as the one that is before the trial court could hardly succeed. I use the word "hardly" in this appeal because the duty of this court is limited to hearing the appeal and not the main cause in the declaratory suit and this court should be careful not to step into the shoes of the trial court.

The duty of the insurers to satisfy judgments against persons insured stems from Section 10(1) and (2) of the Insurance (Motor Vehicles Third Party Risks Act) Cap 405 which provides: -

“10(1) If, after a policy of insurance has been effected judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of Section 5 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy, the insurer shall subject to the provisions of this section, pay to the person entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.”

From a quick look at the above section the following things are clear which are that for the Respondent to be liable;

- a. There must be a policy of insurance in force.
- b. There has to be judgment in respect of any such liability as is required to be covered by the policy.
- c. Then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy.....

Following the well known principle that the party that alleges must prove, it is the Appellants duty to prove that the Appellant has a legal liability to satisfy the Respondent's claim as they allege and the Respondent has denied the liability. To me, this can only be done at the trial.

I now turn to the issue of whether a statutory notice was served upon the Respondent or not. The Appellants contend that they served the same upon the Respondent a fact which the Respondent denies. The law places a duty on the Respondent to serve a statutory notice before or fourteen days after filing a declaratory suit. Section 10 (2) (a) of Cap 405 provides: -

“2. No sum shall be payable by an insurer under the foregoing provisions of this Section

- a. ***In respect of any judgment, unless before or within fourteen days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings; or....”***

The only sure way for the insurer to have notice of the suit is for it to be served with a statutory notice. In this case, the Respondent alleges that it was not served with the notice. I have looked at the statutory notice dated 13th May, 2009. On the face of it, there is no evidence of service upon the Respondent. In paragraph 5 of the supporting affidavit, it is deposed that a statutory notice dated 20th April, 2009 was served under Cover of a letter dated 28th April, 2009. That letter though referred to, was not annexed to the said affidavit and from where I sit, it's not clear whether the statutory notice was indeed served or not and to my mind, that is an issue for determination by the trial court at the hearing.

In conclusion, I think I have said enough to show that the learned magistrate was right in dismissing the application dated 27th May, 2014 and that she did not misconceive the court process of summary judgment and/or striking out proceedings summarily as alleged.

In the premises, the Appellants appeal is hereby dismissed with costs to the Respondent. The matter is hereby referred back to the Chief Magistrate's Court for hearing and final determination.

Dated, signed and delivered at Nairobi this 9th day of June, 2016.

L NJUGUNA

JUDGE

In the presence of

..... ***For the Appellants.***

..... ***For the Respondent.***