



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 31 OF 2015

CANNON ASSURANCE COMPANY LIMITED.....APPELLANT

VERSUS

PETER MULEI SAMMYRESPONDENT

(Being an appeal from the Ruling and Orders of the Hon. Ms. Bosibori Nyangena, Principal Magistrate, delivered on 19th February, 2015 at the Chief Magistrate's Court in Machakos CMCC. No. 729 of 2014)

JUDGMENT OF THE COURT

1. The appellant by way of the Memorandum of Appeal dated 6th March, 2015, sought to appeal on matters of law and facts against the Ruling and Order of **Honourable Bosibori Nyangena** delivered on **19th February, 2015** in Machakos CMCC No. 729 of 2014. The appellant filed its Record of Appeal on 4th May, 2016 and the appeal was admitted on 19th July, 2016. Parties thereafter agreed to dispose-off the appeal through written submissions.

2. The brief history of the appeal is as follows. The respondent sued the appellant in Machakos CMCC No. 729 of 2014, a declaratory suit seeking that the respondent be held liable to pay judgment of Kshs. 1,068,644= in the primary suit being Machakos CMCC No. 327 of 2013, in which he sought to be paid damages following the alleged injuries sustained through a Road Traffic Accident. The appellant filed its defence dated 30th September, 2014 in Machakos CMCC No. 729 of 2014 denying having insured the defendant in the primary suit; having issued the insurance policy in question and receiving any Statutory Notice in accordance with **Section 10(2) of Insurance (Motor Vehicles Third Party Risks) Act Cap 405** of the **Laws of Kenya**. The respondent thereafter filed a Notice of Motion dated 3rd November, 2014 seeking that the Respondent's defence dated 30th September, 2014 be struck out and the judgment entered against the Respondent as prayed in the plaint. The appellant replied to the said application which was disposed off vide oral submissions and a ruling in which **Hon. Ms. Bosibori Nyangena** on 19th February, 2015 allowed the respondent's application dated 3rd November, 2014. The appellant was dissatisfied with that ruling hence this appeal.

3. The appellant has raised the following grounds of appeal;

a. 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 parties* hearing;

b. That the honourable learned magistrate applied wrong principles in arriving at the decision to strike out the appellant's Amended Statement of Defence and entering judgment as against the appellant;

c. 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 respondent was not a fare paying passenger as is a requirement under **Section 5(ii) of Cap 405**, that the existence of a valid policy was not proved by the Plaintiff and that the appellant was not issued with a notice under **Chapter 405 of the Laws of Kenya**.

d. 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. 729 of 2014 in view of the evidence and pleadings placed before him.

e. 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. The appellant prays that

i. The appeal be allowed.

ii. The court finds that the appellant's statement of defence raised triable issues worthy of determination in an *inter partes* hearing.

iii. That the costs of this appeal be borne by the respondent.

iv. Further relief.

5. The appeal is opposed. With the leave of court parties filed submissions to the appeal.

6. The appellant submitted that its defence had disclosed triable issues which the honourable magistrate should have considered worthy of determination in a full trial. The appellant's Statement of Defence is found at page 14 and 15 of the Record of Appeal. It is the appellant's submission that its defence has disclosed triable issues which the honourable magistrate should have allowed to proceed to trial. Firstly, the appellant denies insuring the person the plaintiff purports to have judgment against, that is the said **Abel Mutinda Michael** or **Ruth Kaswii Ndiku** in paragraph 7 of its defence. The appellant further categorically denies insuring motor vehicle registration number KAK 977J and issuing the policy number 03/07/38393/10/TPO to any of the alleged persons in paragraph 7 and 8 of its defence.

7. The appellant submits the following triable issues were distinct in the defence dated 30th September, 2014 as viewed together with the other pleadings filed by the respondent;

a. Whether **Abel Mutinda Michael** or **Ruth Kaswii Ndiku** who had been sued in the primary suit were indeed the appellant's insured persons in respect of motor vehicle registration number KAK 977J;

b. Whether the respondent served Statutory Notice upon the Appellant in accordance with **Section 10(2) of the Insurance (Motor Vehicles Third Party Risks) Act**; and

c. Whether the respondent was a third party falling in the category covered by a policy of insurance under the provisions of **Cap 405 of the Laws of Kenya**.

8. The appellant submits that the respondent did not adduce any plausible evidence, to warrant summary dismissal of the appellant's defence.

9. On his part, the respondent submitted that the defendant's Statement of Defence dated 30th September, 2014 did not raise any triable issues, and that the respondent was a lawful passenger in motor vehicle registration number KAK 977J; and that the appellant was served with a Statutory Notice as required by law.

10. I have carefully considered the appeal and submissions. The law on striking out of pleadings is that no court shall strike out pleadings unless the need to do that is clearly borne out by evidence. The respondent has raised issues for determination in this matter to be:

- a) Whether the appellant's was a lawful passenger in motor vehicle registration number KAK 977J.
- b) Whether the appellant's defence raised triable issues.
- c) Whether the appellants were served with a Statutory Notice as required by law.

I also adopt the above issues as the ones to be determined herein.

11. The Honourable learned magistrate struck out the appellant's defence, and entered judgment for the respondent. However, the appellant's main defence, both in the defence, and in the replying affidavit to the Notice of Motion dated 3rd November, 2014, and in these submissions is that the respondent was not a passenger who would benefit from the duty imposed upon an insurer under **Section 10 of Cap 405**, and in view of the provisions of **Section 5 (b) (ii)** thereof.

12. Further, the appellant denied that it was served with a Statutory Notice as required under the law. These are issues on which this court cannot purport to make a finding, because if this appeal succeeds, such findings would prejudice the hearing of the suit in the lower court. The duty of this court is to ascertain whether or not on the face of the record, these issues required a determination in a full trial rather than in an application.

13. I have no doubt in my mind that where such issues are raised in the defence, the defendant must be given a chance to ventilate them. A declaratory suit arising from an earlier suit in which damages had been awarded, is still a suit. In the declaratory suit, the Insurance Company is the defendant. If it denies knowledge of the alleged insurance policy, or knowledge that it was served with a notice as required by law, the court must give the defendant a chance of a full hearing to ventilate its defence. Indeed in the declaratory suit, the main issues for determination would be the validity of the alleged insurance policy, and whether notice had been served. The issue as to whether the respondent was a passenger would have been settled in the suit preceding the declaratory suit, but even then under **Section 5(b) (ii) of Cap 405**, the defendant in a such declaratory suit would still be entitled to enquire into the category or class of the alleged passenger. It is the finding of this court that the appellant's defence dated 30th September, 2014 raised triable issues, and that the Honourable magistrate erred in striking it out preliminarily.

14. For the foregoing reasons the appeal succeeds and is allowed as prayed.

THAT is the judgment of the court.

DATED AND DELIVERED AT MACHAKOS THIS 30TH DAY OF NOVEMBER, 2016

E. OGOLA

JUDGE

In the presence of:

M/S Nyanjiru holding brief for Kioko for appellant

Mr. Mutua A.K holding brief for Mulu for respondent

Court Assistant – Mr. Munyao