



REPUBLIC OF KENYA



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Cannon Assurance Company Limited v Wanjiku (Suing through her Mother and Next Friend, Martha Nyambura Wanjiku) (Civil Appeal E097 of 2022) [2025] KEHC 277 (KLR) (22 January 2025) (Judgment)

Neutral citation: [2025] KEHC 277 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL E097 OF 2022
JM NANG'EA, J
JANUARY 22, 2025**

BETWEEN

CANNON ASSURANCE COMPANY LIMITED APPELLANT

AND

VICTOR WANJIKU RESPONDENT

**SUING THROUGH HER MOTHER AND NEXT FRIEND, MARTHA
NYAMBURA WANJIKU**

(Being an appeal from the judgement and decree of the Chief Magistrate's court at Nakuru in Civil Suit No. 27 of 2020 delivered by Hon. N. Makau (Ms) - SRM on 29/6/2022)

JUDGMENT

Grounds of Appeal and reliefs sought

1. This appeal follows the trial court's decision to enter judgement in favour of the respondent in the sum of Ksh. 754,681 in the above stated suit plus the costs of the suit instituted vide plaint dated 9/1/2017. The respondent wanted the appellant to satisfy the decretal sum she had obtained against the latter's insured client in a separate claim. By a Memorandum of Appeal filed on 29/7/2022, the appellant faults the trial court's judgment on grounds that may be summarized into three as hereunder:
 - a. That the learned trial magistrate erred in law and fact by failing to consider the appellant's evidence and submissions proffered in the lower court as well as appreciate applicable law , thereby erroneously holding that it was obliged to indemnify the respondent.
 - b. That the learned trial magistrate erred in law and fact by finding that the appellant had been served with notice of institution of the suit and pleadings in the lower court.and



- c. That the learned trial magistrate erred in law and fact by failing to find that there was no evidence of issuance of a valid Certificate of Insurance or Insurance Policy document to the appellant's insured client.
2. The appellant therefore prays that the appeal be allowed and the said judgement and decree of the trial court set aside, and substituted with an order dismissing the respondent's suit with costs. The court is also urged to award the appellant the costs of the suit in the lower court.

Analysis and determination

3. Learned Counsel for the parties filed submissions which I have perused together with the trial court's record. In the impugned judgment, the trial magistrate entered judgement for the respondent in the sum of Ksh. 754,681 in the said Nakuru Chief Magistrate's Court's Civil Suit No. 27 of 2020 ("the declaratory suit") plus the costs of the suit. The respondent had sought a declaration that the appellant was liable to satisfy judgement in Nakuru CMCC NO. 19 of 2017 (hereinafter referred to as "the primary suit"); the costs of the suit and interest.
4. In the primary suit the respondent sued the appellant's insured client (Moses Gathogo) and two others in tort for causing bodily injuries to him on 17/10/2016 owing to careless and/or negligent driving of the appellant's insured client's motor vehicle registration number KAN 038 S, as a consequence of which it lost control thereby causing the injuries. Motor vehicle registration number KAN 038 S was at the material time allegedly insured by the appellant against third party risks under the Insurance (Motor Vehicles Third Party Risks) Act. The respondent obtained a final decree in the sum of Ksh.898,676 in the primary suit which the insured client of the appellant failed to satisfy. The respondent brought the declaratory suit against the appellant as the accident vehicle's insurer to enforce her decree and enjoy the fruits of her litigation.
5. The appellant filed defence dated 3/3/2020. It traverses the allegation of occurrence of the accident giving rise to the claim in the primary suit and generally denies liability to compensate the respondent. The appellant further contended that it never insured the said Moses Gathogo, a defendant in the primary suit; it was not given notice of institution of the primary suit and neither was it informed of judgement in the suit.
6. The respondent reiterated the averments in the declaratory suit in her oral evidence before the trial court. In support of her claim she inter alia tendered copies of a letter dated 3/12/2016 she says amounts to notice of intention to institute suit; a copy of an abstract report in respect of motor vehicle registration number KAN 038 S and notice of entry of judgement in the primary suit. An affidavit of service of the suit documents purportedly upon the appellant's Legal Officer bearing the court stamp of 24/5/2021 is also exhibited. The notice of filing of the primary suit is said to have been addressed to the above named Moses Gathogo and copied to the appellant. The letter dated 3/12/2016 does not indicate the postal address of the appellant, as confirmed by the respondent.
7. The appellant called its Legal Officer (Esther Waiya). She denied the appellant's receipt of notice of institution of the primary suit. The court was told that such notice was only filed in the declaratory suit that gave rise to this appeal.
8. In its judgement , the trial court observed inter alia that the appellant was served with notice of institution of the primary suit vide a letter dated 13/12/ 2016 sent to the appellant's insured client the court found to constitute proper notice of filing of suit. The court also found that the accident vehicle was at the material time insured by the appellant against third party claims such as brought by the respondent. Although the respondent did not tender a certificate of insurance, the learned



trial magistrate was persuaded that the police abstract report of accident issued by the police and exhibited in court showing the appellant as the insurer of the vehicle is sufficient to prove existence of the insurance cover. The trial court was further fortified in its conclusion by the said appellant's insured client's evidence affirming that the insurance cover was provided by the appellant. Judgement was then entered against the appellant's insured client in the primary suit which the appellant is said to be legally enjoined to satisfy pursuant to the provisions of section 10 (1) of the Insurance (Motor Vehicles Third Party Risks) Act.

9. It is trite law that the appellate court has the duty of re-assessing the evidence adduced before the lower court and reaching its own conclusions on matters of fact and law. The court will only interfere with the trial court's findings if relevant factors were not taken into account or irrelevant factors were considered or the trial court otherwise misdirected itself. (see case law in *Selle vs. Associated Boat Company* [1968] EA 123 and *Ocean Freight Shipping Co. Ltd vs. Oakdale Commodities Ltd* (1997) eKLR. As exhorted in these decisions, an appellate court should also bear in mind the fact that it neither heard nor saw the witnesses testifying in order to gauge their demeanour. The Court of Appeal for East Africa in *Peters -vs- Sunday Post Limited* [1958] EA 424 underscored the same principles delivering itself thus:-

- i. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
- ii. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and
- iii. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.”

10. The appellant's advocates in their submissions maintain that there is no evidence proving their client's liability in the declaratory suit. It is contended that the respondent did not discharge her burden of proof of service of the statutory notice of intention to bring the primary suit and/or existence of third party insurance cover in respect of the accident vehicle as required under the Motor Vehicles Insurance (Third Party Risks) Act. It is submitted correctly that, pursuant to section 2 (a) of the Act, no liability can attach to an insurer unless the requisite notice has been given. Citing the judicial determination in *Bem Kariuki Shadrack Amakobe Tacher V. United Insurance Co. Ltd* (2005) eKLR, Counsel state that it should be shown that in fact the notice was received by the insurer.

11. The appellant's advocates further submit that the respondent was also obliged to prove that their client insured the vehicle and that a police abstract tending to prove the fact does not suffice (see case law in *Kasereka V. Gateway Insurance Co. Ltd* (2013) eKLR; *Richard Makau Ngumbi & Another V. Cannon Assurance Co. Ltd* (2011) eKLR and *Dr James Ng'ang'a Mungai V. United Insurance Co. Ltd* (1860) 2000 KLR relied upon by the appellant.)

12. According to the appellant , the respondent is bound by her pleadings as to service of the statutory notice and existence of the insurance contract between it and the owner of the accident vehicle (also see the decision in *Independent Electoral & Boundaries Commission & Another V. Stephen Mutinda Mule & 3 Others* (2014)eKLR referred to by Counsel.

13. The respondent replies that the statutory notice was duly served through registered post . That the appellant filed a Memorandum of Appearance in the declaratory suit is further evidence that it received the notice, according to the respondent. The court is also told that the respondent's letter dated



- 3/12/2016 to the appellant and/or its insured was sufficient notice of intention to file the primary suit for the reason that necessary particulars of the accident were given.
14. The respondent's Counsel continue to submit that a police abstract suffices to prove the fact of insurance of a vehicle as details therein are derived from Certificate of Insurance affixed to the vehicle. To buttress this argument, reliance is placed on judicial determinations in *Kenya Alliance Insurance Co. Ltd V. Thomas Ochieng Apopa (Civil Appeal No. 6 of 2020)* and *APA Insurance Co. Ltd V. George Musele* (2014) eKLR.
 15. The issues for determination in this appeal are whether the appellant was served with the statutory notice of intention to file suit and/or whether the appellant insured the vehicle . It is common ground that the appellant was not directly given notice of intention to file suit, the respondent having made the intimation through the appellant's insured client who was the owner of the accident vehicle. The respondent's letter in this regard purports to have been copied to the appellant but the latter's address is not shown on the letter.
 16. I agree with the respondent that the demand letter addressed to the appellant's alleged insured client contains sufficient details amounting to notice of institution of the primary suit. I further concur with her that in the absence of evidence rebutting the contents of the police abstract indicating the appellant as the insurer of the vehicle in issue, the court has to accept the fact since it is only an insurer or the insured that could produce a certificate of insurance or relevant policy document. I find common ground with the decision in *APA Insurance Co. Ltd V. George Musele supra* in this regard.
 17. It is, however, the responsibility of the respondent to show on a balance of probability that notice of intention to file suit over the accident in question was sent to the appellant. The evidence shows that the notice was addressed to the alleged insured . Although it is portrayed that a copy of the notice/ demand letter was dispatched to the appellant, the latter's address through which the notice was sent is not stated. Moreover, the respondent seemed to say that the letter was sent by registered post yet a certificate of postage of the notice was not also produced in evidence to persuade the court. That the said insured client of the appellant affirmed that the appellant was aware of the matter does not excuse the respondent's legal obligation to issue notice of intention to file a claim under an insurance policy.
 18. In the premises , the respondent failed to discharge her burden of proof to the required legal standard as argued in the grounds of appeal. The appeal therefore succeeds.
 19. Consequently, the trial court's judgement is set aside and substituted with an order dismissing the declaratory suit before the lower court with costs. The appellant is also granted costs incurred in the lower court.
 20. Judgement accordingly.

JUDGEMENT DELIVERED VIRTUALLY THIS 22ND DAY OF JANUARY 2025 IN THE PRESENCE OF:

J. M. NANG'EA,

JUDGE.

The Appellant's Advocate, Mr Alusa for Ms Cheloti.

The Respondent's Advocate, Mr Odhiambo.

The Court Assistant, Jennifer

