Canon Insurance Company Limited v Muindi (Civil Appeal E157 of 2022)
[2024] KEHC 1422 (KLR) (Civ) (15 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1422 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E157 OF 2022

JN MULWA, J

FEBRUARY 15, 2024

BETWEEN

CANON INSURANCE COMPANY LIMITED ..... APPELLANT

AND

JOSEPH MUINDI ..... RESPONDENT

(Being an Appeal against the judgment of Hon. S. Muchungi SRM delivered in CMCC no. 1857/2028 on 18/2/2018)

JUDGMENT

1. On 12/07/2009 while pulling his hand cart off Spine Road in Nairobi, the Respondent was hit and injured by motor vehicle Registration number KAV 356 Z which was insured by the Appellant. He filed a suit before the Chief Magistrates Court Case NO.6083 OF 2010 against the owner of the motor vehicle and the driver for general damages, future medical expenses, loss of earnings and costs and interest of the suit. The Court entered judgment in the sum of Kshs. 3,579,470.4/= in favour of the Appellant's insured and his driver, which sum the Appellant's insured and driver failed to settle. As a result, the Respondent filed a declaratory suit vide CMCC 1857/2018. The trial court upon hearing delivered its judgment on 18/2/2022 in which the trial magistrate found in favour of the Respondent under section 10 (1) of Cap 405 Laws of Kenya. This judgment is the subject of the Appeal herein.

2. Being aggrieved by the judgment the Appellant filed a Memorandum of Appeal dated16/03/2022 before this Court on the following grounds:

    1. That the Learned Trial Magistrate erred in law and in fact in finding that the Respondent had proved his case against the Appellant on a balance of probabilities when the evidence on record could not support such a finding.

2. That the Learned Trial Magistrate erred in law and in fact in finding that the Appellant had been served with Statutory Notice on the 10th February,2010 despite the fact that the Appellant had not stamped the same as is customary with such documents.

3. That the Learned Trial Magistrate erred in law and in fact in disregarding the extract of the register produced by the Appellant's witness confirming that there was no record of receipt of the Statutory Notice.

The Appellant prays that the trial court's judgment dated 18/02/2022 be set aside and substituted with an order dismissing the Respondent's case with costs.

3. The Respondent's case was urged through the evidence of PW1 Joseph Muindi Mutuku PW1 and PW2 Dickson Wambua Makau, a process server.

PW1 in his testimony adopted his written statement in evidence and produced documents filed in court as exhibits. PW2 in his testimony he stated that he was the one who had signed the affidavit of service produced before the court as 'P. exhibit 9' and that sometime in 2010 he went to the offices of the Appellant and served them with documents which were not stamped although they remained with a copy. The Appellant's officer said that they would contact their lawyers. During cross examination PW2 confirmed that the documents served had not been indicated in the register produced before the Court by the Defendant. However, upon re-examination he testified that it was not his duty to ensure that the entry was made in the register and that normally insurance companies never stamped court documents.

4. Appellant's case was adduced by DW1 Esther Waya an employee of the Appellant. In her testimony Esther testified that upon service of letters on the Appellant it is recorded in a register what type of letter had been written and who the recipient was. She stated that there was no indication of a document that had been served on the Appellant from Ms. Kiluva on 10/02/2020 as could be seen from the extracts dating between 9/2/2010-11/2/2010. Upon cross examination DW1 testified that there was no indication that the register produced before the court belonged to the Appellant. She also stated that the officer who had prepared the register had since left the company and that no efforts had been made to reach her to testify. It was also her testimony that they became aware of the Judgment in Case No.6083 OF 2010 when the declaratory suit was filed and judgment obtained against it.

Analysis and Determination

5. I have considered the Memorandum of Appeal filed before this Court, the written submissions in support and against the Appeal and the evidence adduced before me. One issue falls for determination in my view:

> Whether the Respondent complied with the provisions of S.10 (2) (a) of the *Insurance (Motor Vehicles Third Party Risks) Act* which requires that a statutory notice be issued in respect of any judgment unless before or within thirty days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings.

6. The Appellant in its written submissions submits that had the Trial Magistrate considered the evidence adduced before her, she would have found that service of the Statutory Notice was never done. Further that as was held by the court in Alice Wanjiru Ruhiu vs. Messiac Assembly of Yahweh-Civil Appeal No.521 of 2019 it was upon the Respondent to prove that the said notice was indeed served upon the Appellant.

7. In his submissions the Respondent submitted that it is a trend for Insurance companies to claim non-service of third party notices from claimants while denying liability. He also submits that the trial court

rightfully rejected the register produced by DW1 as she was not the maker of the register and that it did not contain any entry of statutory notices that had been served upon the Appellant. DW1 was also not an employee of the Appellant at the time of service and as such she could not testify as to the practice and controls at the time. Particularly in respect to the Appellant, noting that the trial court observed that the authenticity of the register could not be verified nor was it of any evidential value.

8. This is the first appellate court. Its duty is well cut; to subject the whole evidence to fresh and exhaustive scrutiny taking into account that it did not see nor hear the witnesses and make its own findings and conclusion as stated in Selle & another v Motor Boat Co. Ltd & others 1968 EA123. However, while doing the above, the court is not bound to agree with the trial court's findings of fact or the conclusions.

9. The Court in the case of UAP Insurance Co. Ltd v Patrick Charo Chiro [2021] eKLR held as follows on the import of Section 10 of the Insurance (Motor Vehicle Third Party Risks) Act CAP 405;

> " The import of the above provision of the law is that for liability to accrue under section 10 of the Insurance (Motor Vehicle Third Party Risks) Act CAP 405, there is a 4-fold test to be met. Firstly, that the motor vehicle in question was insured by the appellant; Secondly, that the respondent has a judgment in his favour against the insured; Thirdly, that statutory notice was issued to the insurer either at least 14 days before the filing of the suit wherein judgment has been obtained or within 30 days of filing the suit where judgment has been obtained and finally the respondent was a person covered by the insurance policy. See Roseline Violet Akinyi v Celestine Opiyo Wangwau (2020) eKLR and Stephen Kiarie Chege v Insurance Regulatory Authority & Another (2009) eKLR."

10. It is not in dispute that an accident occurred. This was supported by the police abstract produced by PW1 before the court. There is also no challenge to the fact that the motor vehicle in question was insured by the Appellant at the material times, nor that the Respondent has a judgment in his favour against the Appellant. Further there is no dispute that the Respondent is a person covered under the policy. What the Appellants seem to be challenging is service of the statutory notice upon as is required under section 10 (2) (a) of the *Insurance (Motor Vehicles Third Party Risks) Act*.

11. In proving that a statutory notice had been served upon the Appellant the Respondent called PW2 who produced an affidavit of service sworn on 10/08/2021 by a process server one Mr. Wambua. In it, the process server gave a chronology of 10/2/2010. He deposed that on 10/02/2010 he received a Notice of Intention to Institute Suit addressed to the Appellant and a Demand Letter addressed to Vincent Magero Otieno the 2nd Defendant in the Case, that he proceeded to the Appellant's office at Cannon House along Haile Selassie Avenue to effect service and that upon reaching the said offices he was received by one of the Appellant's officers who received a copy of the Notice but declined to sign or stamp PW2's copy.

12. In response to this, the Appellants called DW1 who produced a register that she testified was used to record any letters that were received on behalf of the Appellant. DW1 testified that the Notice of Intention to Institute Suit was not among the documents received on 10/02/2020 as alleged by PW2.

13. This court has had the opportunity to examine the documents produced before the lower court as evidence and the testimonies given by the witnesses called to testify by the parties. The Court is in agreement with finding of the lower court that the Appellant failed to adequately counter the Respondent's evidence that service had been effected. This is because the Appellant failed to produce verifiable evidence as the main document relied upon was an extract from a register produced by a witness who was not the maker.

14. The law is very clear under section 35(1) (b) of the *Evidence Act* that the maker of a document should be the one to produce a document before the court as a witness before the Court. There are exceptions given in the proviso to the sub-section when the maker need not be called if it is shown to the satisfaction of the Court that either the he is dead, or cannot be found, or is incapable of giving evidence; or his attendance can only be procured with an amount of delay or expense which in the court's view would be unreasonable in the circumstances of the case. None of these exceptions are applicable in this appeal, as no plausible reasons were adduced for the Appellants failure to bring the maker to court to testify.

15. The Appellant in this court's opinion did not prove any of the exceptions as provided under the Act. I find no reason to interfere with the lower court's decision as the Appellant failed to prove before the trial court of the non-service by the Respondent. Additionally, the Appellant has not attempted to explain to the court why in the primary suit it failed to defend the suit that gave rise to the impugned judgment. It would have been the right place wherein the issue of non- service of the statutory notice as it alleges would have been interrogated in depth. Further the Appellant lost the opportunity to cross examine the process server on his affidavit at the time he gave his evidence as PW2.

16. For the above reasons, I find and hold that the Appellant has failed to prove its appeal against the Respondent to the required standard of proof, upon a balance of probabilities. The Appeal lacks merit and is hereby dismissed with costs to the Respondent.

DATED, DELIVERED AND SIGNED IN NAIROBI THIS 15TH DAY OF FEBRUARY 2024.

J. N. MULWA

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR