Metropolitan Cannon General Insurance Company Limited v Kalondu (Civil Appeal E566 of 2023) [2024] KEHC 4660 (KLR) (6 May 2024) (Judgment)

Neutral citation: [2024] KEHC 4660 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL APPEAL E566 OF 2023

WM MUSYOKA, J

MAY 6, 2024

BETWEEN

METROPOLITAN CANNON GENERAL INSURANCE COMPANY LIMITED ..... APPELLANT

AND

IMELDA NTHENYA KALONDU ..... RESPONDENT

(An appeal arising from orders made in a ruling by Hon. SA Opande, Principal Magistrate, PM, delivered on 5th June 2023, in Milimani CMCCC No. E4396 of 2022)

JUDGMENT

1. The suit at the primary court was initiated by the respondent, against the appellant, for a declaratory order that the appellant was liable to settle the decretal sum, awarded in Milimani CMCCC No. E1482 of 2022, to be referred hereafter as the primary suit, together with interests and costs. The respondent had alleged that the court, in the primary suit, had made an award of Kshs. 1,910,586.00, against the owner of motor-vehicle registration mark and number KCJ 922B, insured by the appellant, under policy number 0101/07/29453/19COMP. She asserted that, under the Insurance (Motor Vehicle Third Party Risks) Act, Cap 405, Laws of Kenya, the appellant was bound to settle the entire decretal amount. The appellant filed a defence, in which it admitted covering the motor-vehicle in question, but denied the accident, which gave rise to the claim. It was also averred that the accident was never reported by the insured, and that the relevant statutory notices were not served.

2. Upon the filing of the statement of defence by the appellant, the respondent filed a Motion, dated 22nd September 2022, seeking judgement on admission. A copy of the judgement in the primary suit was attached, as proof that the insured was served, but did not defend the suit, and the matter proceeded ex parte. A demand notice, from the respondent, dated 14th March 2022, was attached, addressed to the insured, and copied to the appellant, quoting policy number 0101/07/29453/19COMP. A copy of a memorandum of appearance and defence filed in Milimani CMCCC No. E1482 of 2022, where the

appellant had been named as a defendant, were attached, wherein the appellant admitted the policy, but argued that it was improperly sued. A copy of a summons, that the appellant filed in the primary suit, dated 11th April 2022, seeking to be removed from the suit as a defendant, was also attached. In the affidavit sworn in support, the appellant acknowledged receipt of summons to enter appearance, and being the underwriter of the insured, named as 1st defendant in that suit, but argued that it ought to not have been made a party to that suit. The record reflects that the appellant did not file a response to the Motion, dated 22nd September 2022, and the same was allowed on 1st February 2023, as unopposed, with the result that judgement was entered in favour of the respondent, on admission.

3. The orders made on 1st February 2023 prompted the filing of a Motion, dated 1st September 2023, by the appellant, seeking the setting aside of the said orders, on grounds that, although the application, dated 22nd September 2022, had been served by email, the papers ended up in the spam box, instead of the inbox, hence the failure to respond to the application. Similarly, it was averred that the hearing notice was served, but ended up in the spam box. It was stated that the Advocate for the respondent contacted the Advocate for the appellant, on the date the matter was coming up, but by the time the Advocate for the appellant sought to attend court, it was already too late, for the matter had been dealt with. The Advocate regretted the failure to attend court. It was argued that the appellant had a good defence, which raised triable issues. That application was resolved by the court, vide a ruling delivered on 5th June 2023. The trial court noted that there had been proper service of the application, which gave rise to the judgement, and of the hearing notice of the hearing when the judgement was entered. It was noted further that no defence had been filed, and that although the affidavit in support alleged that a draft defence, which raised triable issues, was attached, there were no annexures to that affidavit, and no basis could be found to conclude that any such defence existed, upon which the court could evaluate whether the appellant should be allowed to defend. The application was dismissed, on 5th June 2023.

4. The appellant was aggrieved, hence the instant appeal. The grounds in the memorandum of appeal, dated 26th June 2023, revolve around the application for judgement on admission, dated 22nd September 2022, being premature; its written submissions being ignored; erring in finding and holding that the application for setting aside had not reached the threshold for grant of those orders; being condemned unheard; rules of natural justice and fair hearing being flouted; the evidence tendered by the respondent being wanting; and the trial court misdirecting itself on the law.

5. Directions were given on 8th February 2024, for disposal of the appeal by way of written submissions. There has been compliance. Both sides have filed written submissions, which I have read through, and noted the arguments made.

6. To my mind, this is a fairly straightforward matter. The appellant had insured a vehicle, which was subsequently involved in an accident with the respondent. The respondent sued both the insured and the insurer. The insurer was the appellant. The insurer appeared in the matter and filed a defence. The insured neither appeared nor filed defence. Rather than fight the matter to the end, seeing that it involved a vehicle it had insured, the appellant insurer chose to be removed from the suit altogether, as it had not been properly joined. It was removed from the suit, and the suit proceeded to its logical conclusion, without being defended. I find it curious, that an insurer would abandon a suit, where a motor-vehicle it has insured is the subject of the suit, and where the insured owner of the motor-vehicle has neither appeared nor filed defence. Prudence would have required that the appellant would instruct an Advocate to appear for its insured client, to defend the suit, to its own best interests. Alternatively, it could have just overlooked the misjoinder, and remained in the matter, in order to safeguard its interests. The appellant did not do that, and left the matter to fate, yet it had filed pleadings and affidavits in that suit admitting that it had insured the accident vehicle.

7. After judgement in the primary suit was determined, in favour of the respondent victim of the accident, a declaratory suit was filed, against the appellant. The appellant was served, and it appeared and filed a defence, which turned out to have been filed irregularly. Whatever the case, in the defence, the appellant admitted that it had insured the accident vehicle. Curiously, it denied the accident, yet it was party to the primary suit, where it had been named as a defendant, had appeared and filed a defence. It cannot possibly be true that it was unaware of or a stranger to the said accident. If the appellant had been serious about the matter, it would have either defended the primary suit to the end, despite being improperly joined, or it would have instructed an Advocate to secure its interests through the other defendant, the insured, who had not entered appearance nor filed defence.

8. This is a case where the appellant repeatedly admitted the policy. The appellant had been dragged into the primary suit by the respondent, and from then on it was expected that it got to know about the accident involving the insured vehicle, the suit against its insured and the claim by the respondent. From that point on, it could not feign ignorance. It could not claim, in the face of the declaratory suit, that it was caught unawares. In both the primary suit and the declaratory suit, the policy was admitted. There was a judgement that had been obtained in the primary suit, routinely and regularly, and the appellant could not possibly challenge that judgement in the declaratory suit. Any challenge could only be in the primary suit, yet it had opted out of that suit. It could not get back into that suit without eyebrows being raised. In view of the admissions in the pleadings, and the involvement in the primary suit, there would have been no reason for the trial court declining to enter judgement on admission.

9. On the matter of the application for setting aside, it is common ground that the appellant had been served, with both the application, and the hearing notice. Its defence is that the process served found its way into the spam box, rather than the inbox. Well, the respondent had discharged her obligation under the law. It forwarded the process to the email address provided, and the fact that the process ended up in the spam box could not be blamed on her. That was an internal matter, for the appellant to manage affairs relating to its mail properly.

10. It could be that discretion could be exercised, to excuse the appellant for that mishap, on grounds that it was inadvertence, for which it had no control. Of course, a prudent person should regularly scan the spam box, to establish whether vital documents may have strayed in there. However, the question to ask would be whether it would serve any purpose to set aside the judgement on admission. I have indicated above, that the appellant had been party to the primary suit, the precursor of the judgement in the declaratory suit. It admitted the policy in that suit, and, quite unwisely, chose to abandon that suit, when and where its own interests were at stake. Granted that it was not a proper party in there, but, given its stake there, it could have stuck in there to protect its interests, or instruct an Advocate to appear and defend the suit through its insured, who was also a defendant in that suit, but had not appeared nor filed defence. In the declaratory suit, the appellant had also admitted the policy. I doubt that the appellant had any triable cause to present in the declaratory suit, in the circumstances, and it would have served no purpose, for the trial court to exercise discretion in favour of setting aside the orders, and allowing the appellant to respond to the application for entry of judgement on admission. The case for the appellant was lost on account of its actions and omissions in the primary suit. That was when the horse bolted, and the situation could not be salvaged at the declaratory stage.

11. The appellant made heavy weather about being judged unheard, and about fair hearing rules being flouted. I am not persuaded. If anything, it is the appellant was not serious in the way it approached the matter. There was poor strategy towards the matter, right from when it was served with the papers in the primary suit. It had a chance to be heard at the primary suit. But it passed up that chance, when it sought to be removed from the suit, and upon being removed, when it failed to appoint an Advocate to defend the primary suit on behalf of its insured. It cannot complain that it was not given a chance

to be heard, or of fair trial principles being ignored, with respect to the primary suit. Regarding the declaratory suit, it was properly served, and it admitted that quite freely. The mix-up, regarding the process served straying into the spam box, was an internal matter. It was up to the appellant to organise and manage its mail affairs. A chance was given to it, to be heard in that matter, the fact that it did not get to be hard, because the court process served on it got lost within its systems, cannot possibly be blamed on the court or the respondent. It was the appellant's own disorganised system to blame. It cannot be said that fair trial principles were not observed, where a party was served regularly, but that party failed to attend court, for reasons that had nothing to do with the court or the other party.

12. I find no merit whatsoever in the instant appeal. it is for dismissal, and I hereby dismiss the same, with costs..

DELIVERED BY EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, THIS 6TH DAY OF MAY 2024

WM MUSYOKA

JUDGE

Ms. Veronica, Court Assistant, Milimani, Nairobi.

Mr. Arthur Etyang, Court Assistant, Busia.

Advocates

Mr. Bwire, instructed by MNM Advocates LLP, Advocates for the appellant.

Mr. Momanyi, instructed by Kiyondi Nyachae, Advocate for the respondent.