Nyamari v Cannon Assurance Limited (Civil Appeal 630 of 2019)
[2024] KEHC 9857 (KLR) (5 August 2024) (Judgment)

Neutral citation: [2024] KEHC 9857 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL APPEAL 630 OF 2019

AC BETT, J

AUGUST 5, 2024

BETWEEN

JULIET MORAA NYAMARI ..... APPELLANT

AND

CANNON ASSURANCE LIMITED ..... RESPONDENT

((Being an appeal from the Judgement and Decree of The Chief Magistrate at Nairobi delivered on 11th October 2019 by Hon. Gicheha L. Mrs. in Nairobi CMCC No. 5177 of 2013))

JUDGMENT

1. The Appellant filed suit by way of a plaint dated 22nd August 2013 against the Respondent in her capacity of the legal administratrix of Johnson Jumanne Ongoro (deceased). Her case was that on or about 27th October 2007, the deceased was travelling as a fare paying passenger aboard motor vehicle registration number KAU 953K which motor vehicle was duly insured by the Respondent when the said motor vehicle was involved in an accident whereby the deceased sustained fatal injuries. The Appellant later amended her plaint to describe the deceased as just a "passenger".

2. The Appellant averred that she had filed suit against the registered owner, and driver of the subject motor vehicle namely Milimani CMCC No. 7512 of 2009 whereby judgement was delivered in her favor for the sum of kshs.2,414,203.77/=.

3. The Appellant therefore prayed for a declaration that the Respondent was statutorily bound to satisfy the judgement and decree of the court together with costs amounting to kshs.176,816.36/= with interest from 8th July 2013 until payment in full.

4. In a statement of defence filed in court on 23rd December 2013, the Respondent denied the Appellant's claim. It denied that it was the insurer of motor vehicle registration number KAU 953K and that the

Appellant met any conditions stipulated under the Insurance (Motor Vehicle Third Party Risks)Act Cap 405, Laws of Kenya. It averred that it was a stranger to the Appellant's claim.

5. In the alternative, the Respondent averred that if the accident occurred as stated by the Appellant, then the Respondent was not under any statutory obligation to satisfy any decree in possession of the Appellant as the deceased was not a person covered under the policy of insurance nor was he entitled to compensation within the ambit and meaning of Section 5(b) of The Insurance (Motor vehicle Third Party Risks Act) Cap 405, Laws of Kenya.

6. The Respondent's further averment in its Amended Defence was that the deceased was not carried for hire or reward or in pursuance of a contract of employment in terms of Section 5(b) (ii) of Cap 405 and therefore the Respondent could not be held liable for any claim in respect of the deceased.

7. After an unsuccessful bid by the Appellant to have the Respondent's Defence struck out and Judgment entered in her favor, the matter proceeded to hearing.

8. Upon hearing both parties, and upon considering their written submissions, the trial magistrate delivered a judgement in which she dismissed the Appellant's suit, precipitating this appeal.

9. The Appellant being dissatisfied with the decision of the trial court promptly filed the instant appeal. In her Memorandum of Appeal, the Appellant sets out the following grounds of appeal: -

    a. The Learned Magistrate erred in law and in fact in failing to appreciate the triable issues raised in the Appellant's Plaint and in allowing the Respondent 's claim.

    b. The Learned Magistrate erred in law and in fact in wrongly deciding that no statutory notice was served disregarding the evidence and submissions for the plaintiff/Appellant in that regard.

    c. The learned magistrate erred in law and in fact in failing to sufficiently frame and address the issues of service upon the Respondent in light of the totality of the evidence adduced and submissions made.

    d. The learned magistrate erred in law and in fact by wrongly evaluating the evidence on record and therefore arrived at a wrong conclusion that a comprehensive cover does not cover 3rd party.

    e. The learned magistrate made a decision that was clearly wrong and misdirected herself and failed to take into consideration matters she should have taken into consideration and thereby arrived at a wrong conclusion.

    f. There was no good or proper basis for the orders made in the said ruling.

10. Directions were subsequently taken that the Appeal be heard by way of written submissions, which directions both parties complied with.

11. In her submissions, the Appellant identified only one issue for determination that is, whether the Plaintiff/Appellant has established sufficient cause to set aside the judgement delivered on the 11th October 2019.

12. The Appellant submits that the trial magistrate failed to take her pleadings and evidence into account and therefore erred in its decision. She submits that there is no dispute that the Respondent participated in the proceedings in the Milimani CMCCNO.7512 OF 2009 which is the primary suit.

13. The Appellant submits that the trial court did not take the facts and evidence demonstrated to the lower court into account, notably that the Respondent cannot claim that no notice was served upon it when it instructed two law firms to act for it in the primary suit.

14. The Appellant's further submissions are that the Trial Magistrate failed to give reasons as to why she arrived at her decision and only relied on technical arguments to dismiss the Appellant's suit.

15. It is the Appellant's contention that the trial court exercised its discretion improperly by failing to appreciate the evidence and relevant matters before it. Relying on the case of Mbogo Vs Shah [1968] EA, the Appellant urges this honorable court to re-evaluate the evidence and facts and interfere with the lower court's finding.

16. On its part, the Respondent maintains that this appeal ought to be dismissed. It submits in three issues for determination. First, it submits that the Appellant failed to prove, on a balance of probabilities that the Defendant in the primary suit was its insured.

17. It also submits that it was incumbent upon the Appellant to establish a link between the deceased and the Respondent which had expressly denied that it had issued the insurance cover to the defendants named in the primary suit.

18. The Respondent posits that Section 10 of Cap 405, Laws of Kenya cannot benefit a person unless he obtains a judgment against an insured person of the insurer.

19. The Respondent contends that by failing to tender a police abstract to demonstrate a link between the quoted policy and the Respondent, the Appellant failed to discharge her burden of proof.

20. It further argues that the law does not impose any duty to the insurer where judgment obtained is against strangers. It relies on the decision in Kenindia Assurance Company Limited Vs Otiende (1991) Klr 39.

21. Moreover, the Respondent submits that the deceased was not a passenger within the meaning of Section 5b(ii), Cap 405, Laws of Kenya which states: -

> " In order to comply with the requirements of section 4 the policy of insurance must be a policy which: -
>
> (b) insures such person, persons or classes of persons as may be specified in the policy of any liability which may be incurred by him or them in respect of death of or bodily injury to any person caused by or arising out of the use of the vehicle on the road:
>
> Provided that a policy in terms of this section shall not be required to cover: -
>
> (ii) except in the case of a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, liability in respect of death or of bodily injury persons being carried in or upon or entering or getting onto or alighting from the vehicle at the time of occurrence of the event out of which the claims arose.

22. The Respondent's submissions are that the inference from Section 5b(ii) of Cap 405 bars the Appellant from seeking indemnity from the insurer because the deceased was a mere passenger.

23. The Respondent cited the case of Gateway Insurance Co. Limited vs Martin Sambu [2006] eKLR where the court discussed at length the issue of third-party insurance and the court found that the insurer was not liable for any action by any passenger under the policy where the insured had answered

in the affirmative the question "will the car be used exclusively for social, domestic and pleasure purposes."

24. The Respondent also relied on the case of Solomon Okeyo Okwama and Another vs Kenya Alliance Insurance Co. Ltd [2009] eKLR.

25. On the last issue, the Respondent denied receiving statutory notice under section 10, Cap 405. It is their contention that the trial magistrate was right in holding that there was no evidence of service of the statutory 30 days' notice and therefore it is under no obligation to satisfy the judgment.

26. The Respondent further submitted that the fact that the insurance policy was comprehensive is immaterial as our legal regime and jurisprudence has not imposed any duty to an insurer to satisfy judgment except in accordance with the provisions of Cap 405, Laws of Kenya.

27. I have gone through the parties' evidence before the trial court. The Record of Appeal appears incomplete as the pages wherein the parties' witnesses' evidence was recorded are missing.

28. Nonetheless, I have carefully gone through the original file and found the missing parts of the record. The Appellant testified in support of her case. She relied on her written statement and produced documents in support of her case.

29. My foray into the original file finally yielded the plaintiff's statement and list of documents. These documents were as follows: -

    a. Decree in Nairobi CMCC No. 7512 of 2009.

    b. Demand letter dated 16/7/2013 from Ongutu and Co., to the Respondent.

    c. Letter from the Respondent dated 15/7/2011 addressed to S.M. Chege and Co., Advocates instructing them to prepare an application to cease acting for the 2nd and 3rd defendants in Nairobi CMCC No. 7512 of 2009 due to the insured's failure to provide witnesses.

30. The documents relied upon by the Appellant in the trial court were not objected to by the Respondent and so remained unchallenged. However, the Appellant, in a departure from her pleadings in the Amended Plaint dated 7th March 2014 stated that the deceased was a fare paying passer.

31. The Appellant did not however produce a copy of the judgment of the primary suit, nor the police abstract or any notice of institution of the suit to the insurer.

32. On its part, the Respondent called one Caroline Nthiga, its legal assistant who adopted her witness statement. According to this witness no notice was served upon the Respondent prior to filing of the primary suit.

33. She also denied that the deceased was a fare paying passenger which denial was in consonance with the Appellant's Amended Plaint where she struck off the words "fare paying" and only left the word "passenger" in her claim.

34. The witness further stated that the Respondent came to know that the motor vehicle was insured by the Respondent although the name of the insurer is different and that is because the policy was a comprehensive cover, it was a private comprehensive cover, and a third party could not pursue the insurer as there was no contract to cover third parties.

35. From the above evidence, I must state that it is trite law that parties are bound by their pleadings. Hence, at the point when the Appellant decided to strike out the word "fare paying" from her

pleadings, she could then not change her evidence and insist that the deceased was a fare paying passenger unless she re-amended her plaint, which she did not.

36. Be that as it may, in determining this appeal, the court also has to establish whether a statutory notice was served upon the Respondent.

37. In this regard, the provisions of Section 10 of the Insurance (Motor Vehicle Third Party Risks) Act, Cap 405, Laws of Kenya, states as follows:

> Duty of insurer to satisfy judgments against persons insured
>
> (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 persons 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.
>
> (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
>
> (b) in respect of any judgment, so long as execution thereon is stayed pending an appeal; or
>
> (c) in connexion with any liability if, before the happening of the event which was the cause of the death or bodily injury giving rise to the liability, the policy was cancelled by mutual consent or by virtue of any provision contained therein, and either—
>
> (i) before the happening of the event the certificate was surrendered to the insurer, or the person to whom the certificate was issued made a statutory declaration stating that the certificate had been lost or destroyed; or
>
> (ii) after the happening of the event, but before the expiration of a period of fourteen days from the taking effect of the cancellation of the policy, the certificate was surrendered to the insurer, or the person to whom the certificate was issued made such a statutory declaration as aforesaid; or
>
> (iii) either before or after the happening of the event, but within a period of twenty-eight days from the

taking effect of the cancellation of the policy, the insurer has notified the Registrar of Motor Vehicles and the Commissioner of Police in writing of the failure to surrender the certificate.

(3) It shall be the duty of a person who makes a statutory declaration, as provided in subparagraphs (i) and (ii) of paragraph (c) of subsection (2), to cause such statutory declaration to be delivered to the insurer.

(4) No sum shall be payable by an insurer under the foregoing provisions of this section if in an action commenced before, or within three months after, the commencement of the proceedings in which the judgment was given, he has obtained a declaration that, apart from any provision contained in the policy he is entitled to avoid it on the ground that it was obtained by the non-disclosure of a material fact, or by a representation of fact which was false in some material particular, or, if he has avoided the policy on that ground, that he was entitled so to do apart from any provision contained in it: Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not thereby become entitled to the benefit of this subsection as respects any judgment obtained in proceedings commenced before the commencement of that action, unless before or within fourteen days after the commencement of that action he has given notice thereof to the person who is the plaintiff in the said proceedings specifying the non-disclosure or false representation on which he proposes to rely, and any person to whom notice of such action is so given shall be entitled, if he thinks fit, to be made a party thereto.

(5) Deleted by *Act No. 8 of 2009*, s. 41.

(6) In this section, "material" means of such a nature as to influence the judgment of a prudent insurer in determining whether he will take the risk, and, if so, at what premium and on what conditions; and "liability covered by the terms of the policy" means a liability which is covered by the policy or which would be so covered but for the fact that the insurer is entitled to avoid or cancel, or has avoided or cancelled, the policy. CAP. 405 [Rev. 2012] Insurance (Motor Vehicles Third Party Risks) [Issue 1] 10

(7) In this Act, references to a certificate of insurance in any provision relating to the surrender or the loss or destruction of a certificate of insurance shall, in relation to policies under which more than one certificate is issued, be construed as references to all the certificates, and shall, where any copy has been issued of any certificate, be construed as including a reference to that copy (emphasis added).

38. Having considered the evidence tendered by the parties and their rival submissions, I find that there was a valid judgement and decree against the Respondent's insured in primary suit and that the Appellant proved that the Respondent was aware of the suit and participated in it.

39. I also find that the Respondent was duly served with a demand notice after delivery of judgment in the primary suit. The demand letter was dated 16th July 2013 and stamped as received by the Respondent on 17th July 2023 whereas judgement was delivered on 8th July 2023.

40. In UAP Insurance Co. Ltd vs Peter Charo Chiro [2021] EKLR, the court set out the four-fold test to determine when liability can accrue against an insurer. First; whether the vehicle was insured by the Respondent; two, whether the Appellant has judgement in his favor; three, whether notice was issued to the insurer; and four, whether the deceased was a person covered by the insurance policy.

41. According to the court in the UAP Insurance Co. Ltd case (supra), the Appellant would need to prove that the statutory notice was served to the insurer either 14 days before filing of suit wherein judgment has been obtained or within 30 days of filing of suit wherein judgement has been obtained.

42. As to whether the deceased was a person covered by the insurance policy, I note that the Respondent did not produce the policy document for the court to scrutinize and establish whether the terms of the cover did not extend to the deceased.

43. The policy document was material evidence at the trial of the declaratory suit because the Appellant had already secured a valid judgment and decree against the Respondent's insured and in favour of the deceased in the primary suit which was defended by the Respondent's advocates.

44. The trial court was therefore right in its decision that the deceased was covered by the insurance policy as this issue had been settled in the primary suit and was not open for re- litigation.

45. At the hearing of the declaratory suit however, the Appellant did not produce evidence of service of a statutory notice, or even a demand letter to the Respondent 14 days prior to filing suit or within 30 days of filing of suit.

46. It was incumbent upon the Appellant to produce the copy of notice and evidence of service thereof. In page 3 of The Record of Appeal, the Appellant has attached a copy of a statutory notice dated 9th September 2009 which was not part of the documents produced at the trial court.

47. Clearly, the Appellant was trying to retrace her steps and close the gap created by the failure to submit the copy of the statutory notice at the hearing of the declaratory suit. At this juncture, the said notice cannot be subjected to cross-examination in order to ascertain if it was served upon the Respondent or not.

48. Although this court is of the view that it must endeavor to do justice to all without undue regard to technicalities in order to give effect to the purpose of Article 159 (2) of *The Constitution*, the court is guided by statute, in this case, Cap 405, Laws of Kenya which requires that for the Respondent to be held liable in this instance, the Appellant needed to prove that it had served the statutory notice within the requisite period.

49. It did not prove to the satisfaction of the trial court that it did so. It looks like there may have been a statutory notice, which has unfortunately now been sneaked in the court record at a stage when the court has no option but to overlook it since it was never produced even during the interlocutory proceedings which I have gone through.

50. Notably, the Statutory Notice is neither part of the documents produced by the Appellant in opposition to the Respondent's application to set aside ex-parte judgement, nor is it comprised among the documents she submitted in support of her application to strike out the Respondents' Defence and enter summary judgment against it.

51. Evidently, the Appellant did not produce any statutory notice in any of the proceedings giving rise to this Appeal although she did attach a police-abstract to her application.

52. In the absence of proof of service of statutory notice, I find that the Trial Magistrate's hands were tied as there was no evidence before her that a Statutory Notice had been served upon the Respondent to warrant a finding of liability against the Respondent.

53. In this regard, P.J.O Otieno J, put it succinctly thus:

> " ..It's true and only meaning is that a victim of a road traffic accident who wishes to enforce a resultant decree against the insurer must serve on such insurer a notice of the primary suit not later than 14 days after the suit is filed. Where the notice is not served, the insurer is by statute absolved from any liability. It matter not that the insurer come to learn about the suit by its own. The law mandates that it shall be served with a notice. That to this court is a legal requirement upon the plaintiff/claimant and therefore an obligation. That obligation upon the plaintiff/claimant has the flip side of an vested right upon the insurer and a vested right, particularly that vested by a statute cannot be wished away or just ignored not even on the basis of article 159 which has been held not to upset all known legal requirements in litigating disputes" (emphasis added).

54. For the above reasons, I find that the trial magistrate did not err in her findings.

55. The appeal is hereby dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAKAMEGA THIS 5TH DAY OF AUGUST 2024.

A. C. BETT

JUDGE