REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CIVIL APPEAL NO. 14 OF 2019

JAMES MAKAU MATIVO.....…APPELLANT

-VERSUS-

CO-OPERATIVE INSURANCE CO. LTD.....RESPONDENT

(Being an Appeal from the Judgment of Hon. J.D Karani (RM) in the Senior Principal Magistrate's Court at Makindu, Civil Case No.507 of 2016, delivered on 13th February 2019)

JUDGMENT

1. The Appellant filed a declaratory suit in the lower court seeking to recover, from the Respondent, an amount of Kshs.265,045/= that was awarded in Makindu PMCC No. 355 of 2012. He also prayed for costs of the suit and interest.

2. The Respondents filed a statement of defence and denied all the contents of the plaint except the descriptive portions. The matter proceeded for hearing and a judgment was delivered dismissing the claim with costs.

3. Aggrieved by the decision, the Appellant filed this appeal through the firm of Mutunga & Muindi advocates listing the following grounds:

> a) ***That*** *the honorable Magistrate erred in law and fact in holding that the Plaintiff did not prove her case on a balance of probability as by law required and which against the weight of the evidence adduced in court.*
>
> b) ***That,*** *the honorable Magistrate erred in law and fact in holding that notice before suit had not been served yet there was uncontroverted evidence by the Plaintiff as to how it was served at the company headquarters, who received it and that person was not called by the defence to controvert the evidence of the Plaintiff.*
>
> c) ***That,*** *the honorable Magistrate erred in law and fact in analyzing the evidence before her and fell into error as to what law applies to service of a notice before suit hence arrived at a wrong decision.*
>
> *d)* ***That,*** *the honorable Magistrate developed a theory not supported by the facts of the case and arrived at a wrong decision.*

4. Directions were given that the appeal be canvassed by way of written submissions. Accordingly, the parties complied and filed their respective submissions.

5. Mr. Mwanzia Muindi for the Appellant submits that the crux of the appeal is whether the statutory notice was served upon the Respondent. He answers the question in the affirmative and submits that the same was received by the claims manager under protest.

6. He further submits that the service was effected by Pw2 whose statement was produced in evidence and the fact of Serah, the claims manager, being an employee of the Respondent was confirmed by Dw1. He contends that in the submissions before the trial court, the Respondent's counsel admitted that the statutory notice was received under protest but was not stamped. He relies on **Nairobi HCCC 644 of 2005; Akiba Micro Financing Ltd –vs- Ezekiel Chebii & 14 Others (2012) eKLR** where the Court held that;

> *"In my view, a statement on oath should as a matter of fact be expressly denied on oath. If not challenged, it remains a fact and the truth for that matter."*

7. Counsel contends that service upon a principal officer of the Respondent was done and as such, the notification required by law was achieved. He contends that the notice was 'before suit' as opposed to 'after suit' hence there was no requirement for a licensed court process server.

8. Further, he submits that the trial Magistrate developed a theory that an office could not stamp a notice of judgment and refuse to stamp a statutory notice. He contends that the same was speculative, wrong and without supporting evidence. It's his submission that one of the reasons for dismissal of the suit was that he did not summon the claims manager for questioning. He contends that there is no law in the Kenyan civil system that allows a Plaintiff to compel a defendant to avail a particular witness for questioning. It is also his contention that the Respondent's failure to call Serah as a witness raises the presumption that her evidence would be incriminating.

9. He submits that the Respondent could not raise the issue of stamping during the hearing since the same was not pleaded. He relies on **Mombasa HCCA 191 of 2017; Heritage Insurance Co. Ltd –vs – Maina Muturi (2019) eKLR** where the Court held that;

> *"It is worth noting that the Respondent provided a letter dated 2.10.2006 which was copied to the applicant and the same was admitted as exhibit P3 before the trial court without any objection by the defendant. The issue of the letter not having been stamped was never raised in the pleadings at all and the Appellant did not call any evidence to rebut the averments by the Plaintiff/Respondent. Accordingly and for the above reasons, the appeal is hereby dismissed."*

10. The Respondent through M/s O.N Makau & Mulei advocates identifies the following as the issues for determination;

a) Whether there was proper service of the statutory notice upon the Respondent.

b) Whether the decision arrived at by the trial court was just and fair as per the evidence placed before it.

11. On the first issue, the Respondent submits that Pw2 was not a licensed process server and did not file an affidavit of service. It submits that a statutory notice can only be left at the corporation's registered office and contends that Pw2 did not demonstrate how he was unable to find its principal officers. It relies on **Machakos HCCA No. 203 of 2009 APA Insurance Co. Ltd –vs- Patrick Musee Masila (2016) eKLR** where the Court held that;

> *"It is argued that notice of the primary suit was not brought to the Appellant's knowledge. The Respondent produced in evidence a statutory notice that was to be served upon the claims manager, Apollo Insurance Co. Ltd dated11th May 2005. An in depth of the original document shows that it bears some writing at the back which reads ' SERVED ON 13TH MAY, 2005 UPON APOLLO INSURANCE CO. LTD AT THEIR HUGHES HOUSE, 6TH FLOOR OFFICES. ACCEPTED SERVICE' ordinarily, an endorsement of an acknowledgement by the recipient of the document would be proof of service. The document is not signed by the recipient. It ought to have been signed by the claims manager of Apollo Insurance Co. Ltd. Being a representative of the company, a stamp impression on the document would have sufficed as a signature of the recipient. That was lacking…for reason given, the appeal has merit and is allowed. The judgment of the lower Court is set aside with costs to the Respondent. It is so ordered."*

12. Counsel has also cited **Kisii HCCA 50 of 2015: Occidental Insurance Co. Ltd –vs- Joel Masita Ogentoto (2019) eKLR** where the Court stated that;

> *"I find that the Appellant was not put on notice of the suit and it is therefore entitled to the defence of section 10(2) of the Act. I therefore find the appeal to have merit and set aside the trial court's decision…"*

13. On the second issue, counsel submits that the Appellant did not discharge his burden of proving that the statutory notice was served and urges this court not to interfere with the finding of the trial court. He cites the case of **Peter –vs- Sunday Post Ltd (1958) EA 424** where the Court held that;

> *"It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the Judge who tried the case, and who has had the advantage of seeing or hearing the witnesses. An appellate court indeed has jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion."*

Analysis and determination

14. It is now settled that the duty of a first appellate Court is to analyze and re-evaluate the evidence on record in order to reach it's own conclusions bearing in mind that it did not have the benefit of seeing or hearing the witnesses. See **Oluoch Eric Gogo –vs- Universal Corporation Ltd (2015) eKLR; section 78(2) Civil Procedure Act.**

15. Having considered the grounds of appeal, the rival submissions and entire record, it is my considered view that the only issue for determination is whether the statutory notice was served as provided by the relevant law.

16. **Section 10 (1)** of the Insurance (Motor Vehicles Third Party Risks) Act *(the Act)* provides;

> *"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 person entitled to the benefit of the judgment any sum payable there under 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."*

17. Further, **section 10 (2)** (a) provides that;

> *" No sum shall be payable by the insurer under the foregoing provisions of this section in respect of any judgment, unless before or within 14 days after commencement of proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings…"*

18. The long and short of the above provisions is that a claimant has an obligation to notify the insurance company about an intended suit against its insured and if the suit has already been filed, the notice should be given within 14 days after commencement of the proceedings. Failure to give such notice entitles an insurance company to avoid making any payment pursuant to a judgment in the said proceedings.

19. **Pw1** in the lower court is the Appellant and he testified that prior to instituting the suit, he wrote a demand letter (P.Ex-4) and received a response for the same (P.Ex-5). **Pw2**, (*Onesmus Mwangi*), testified that on 22/06/2012, he went to Co-operative Insurance at CIC Plaza in Upperhill-Nairobi and served the Claims manager with the demand letter. He produced his witness statement as P.Ex-6.

20. On cross examination, Pw2 said that he got directions to the claims manager's office from the reception. He described the claims manager as a lady of medium built with fair complexion. That the lady named Sarah refused to sign his copy and he never attempted to serve them again. He agreed that he was not a licensed process server and did not file a return of service.

21. **Dw1** was Erastus Mbaka, the legal officer at CIC General Insurance. He testified that the demand letter was never received by the insurance company and that all their letters are received by affixing a stamp. Further, he said that all those serving have an obligation to ensure that the official stamp is affixed on the document.

22. On cross examination and re-examination, he said that Sarah was known to him and had been instructed to receive all documents with an official stamp.

23. The demand letter is dated 22/06/2012 and bears the following words at the bottom;

> *"Received under protest. Accident yet to be reported. Signed. 22/06/2012 at 3.30pm."*

24. P.Ex-5 is a letter dated 16/06/2013 from CIC General Insurance Ltd which I have reproduced as follows;

> *Re: Makindu PMCC No. 355 of 2012*
>
> *Makau Mativo –vs- Kamora Njiru & Jiloh Javan*
>
> *We refer to the above matter and your letter dated **22/05/2014**.*
>
> *We regret out inability to deal with the matter as the accident has not been reported to us and we have therefore invoked our policy conditions. Kindly therefore serve the defendants with the court papers for their further dealing.Please note that this response has been done purely on a without prejudice basis.*
>
> *Yours faithfully*
>
> *Signed*
>
> *Lydia Mwangi*
>
> *Assistant Claims Manager-Legal"*

25. I have emboldened the date in the above correspondence because I believe it is a typographical error. My reason for the belief is that the letter has the same narrative as the reason given for receiving the demand letter under protest. Both of them indicate that the accident was never reported hence the Respondent's inability to deal. Accordingly, I do agree with the Appellant that indeed, the Respondent was put on notice of the intended suit way before it was filed on 26/11/2013. It does not matter that they failed to report the accident because Section 10(1) of the Act is very clear that an Insurance company should pay '*notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy..'*

26. The Respondent's insistence on affixing a stamp to prove service is its own house keeping issue which is good but cannot be the yardstick for determining whether a document has been served or not. Such rigidity would greatly enable insurance companies and other parties to avoid liability in the guise of a missing stamp yet they are in control of the said stamp. As correctly submitted by the Appellant, the important thing is that a claimant is able to establish, on a balance of probability, that the insurance company was put on notice before the suit was filed or within 14 days after filing.

27. It is also noteworthy that Pw2 described the claims manager and gave her name as Sarah. Dw1 confirmed that Sarah was an employee of the Respondent. In my view, the evidence of Pw2 plus the documentary evidence proved that the Respondent was notified of the intended suit.

28. Further, the issue of Pw2 not being a licensed process server and failing to file an affidavit of service is neither here nor there as the

requirement in section 10(2) of the Act is that the insurance company be put on notice. Order 5 of the Civil Procedure Act, which the Respondent has relied on to buttress his argument, deals with issuance and service of summons yet this case is about a statutory notice.

29. In dismissing the claim, the trial Magistrate expressed herself as follows;

> *"The question in this courts mind therefore is? If indeed the said claims manager who is aware of procedure and law refused to stamp the said document, why did she appendix her signature knowing well she could be liable to be called to court to defend her stand?...therefore on a balance of probabilities, can the same office be able to receive one document and refuse to receive another and still go to the extent of placing his/her signature? Secondly, I do note from dw1 evidence that the alleged officer still worked at the said office at the time he was testifying. The question therefore that this court wonders is if indeed she is still an employee what stopped the Plaintiff from summoning her to attend court for questioning?"*

30. As indicated earlier, the insurance company is in control of the stamp and can choose what to do with it hence the presence or absence of a stamp cannot be the yardstick of measuring service. Accordingly, I agree with the Appellant that the sentiments of the trial Magistrate were speculative and based on no evidence. I also agree with the Appellant that the trial Magistrate raised the standard of proof by expecting him to summon the claims manager for questioning yet the evidence on record irresistibly showed that the Respondent was put on notice as by law required. It was the Respondent's duty to summon Sarah its employee to come and rebut the Appellant's evidence. That was not the Appellant's responsibility.

31. The result is that the appeal has merit and I allow it with costs. I set aside the judgment by the trial court dated 13th February 2019 in Makindu PMCC 507 of 2016.

(a) I substitute it with a judgment for Kshs.265,045/= in favour of the Appellant plus costs and interest at court rates from 22nd July 2016 until payment in full.

(b) Costs of the appeal to the Appellant.

Delivered, signed & dated this 10th day of November 2020, in open court at Makueni.

……

H. I. Ong'udi

Judge