



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL APPEAL NO 191 OF 2017

HERITAGE INSURANCE COMPANY LIMITED.....APPELLANT

VERSUS

MAINA MUTURI alias ELIUD MAINA MUTURI.....RESPONDENT

JUDGMENT

1. This is an appeal from the judgment and decree of Senior Resident Magistrate's court at Mombasa delivered by Hon. Senior Resident Magistrate, V. J. Yator on 28th day of July, 2017 vide CMCC.No 544 of 2012, whereby the judgment was entered in favour of the respondent and he was awarded Ksh 645,936 as general damages plus interest and costs of the suit.

2. The Respondent filed a plaint dated 20th September, 2012 on 25th March, 2001 in which he alleged that on 27th July, 2006 his motor vehicle registration No KAS 712 D was lawfully driven along Airport road when it was involved in an accident with motor vehicle registration No EAYA-00113003 driven at the material time by the appellant authorized driver Kenneth Onyango Angir.

3. The respondent averred that he filed a Civil suit No 143 of 2009 before the lower court and obtained judgment against the said Kenneth Onyango Angir in the sum of Kshs 404,300/= plus costs and interest for damages he suffered in the said accident.

4 That being unable to recover the said sum or any part thereof for the said Kenneth Ongao Angir, the Respondent filed a declaratory suit against the insurer of the motor vehicle registration No EAYA- 00113003, the Heritage Insurance company Limited (hereinafter referred to as the Appellant).

5. The lower court entered judgment in favour of the Respondent and the Appellant was hence bound to satisfy the decretal sum in Mombasa SRMCC No 143 of 2009 in the sum of Ksh 645,936/=together with interest on the said sum from 22nd October, 2007 when the judgment was delivered.

6. This decision aggrieved the Appellant that they filed this appeal via a memorandum of appeal dated 29th September, 2017 citing seven (7) grounds as follows;

(a)That the learned Senior Resident Magistrate erred in law and in fact in holding that the defendant is bond to satisfy the decretal amount in Mombasa SRMCC No.(herein after referred to as the primary suit in the sum of Ksh 645,936.00 under the insurance (Motor vehicle third Party Risk Act)

(b) That the learned Senior Resident Magistrate erred in law and infact by failing to appreciate form the pleadings (especially the defence filed on behalf of the appellant in Mombasa SRMCC No 544 of 2012) and the evidence tendered that the primary suit was a claim for liquidated damages and the insurance (motor vehicle Third Party Risk Act, Cap 405) does not apply to liquidated claims and consequently the appellant is not bound to satisfy the decretal amount in the primary suit.

(c) That the learned Senior Resident Magistrate erred in law in failing to hold that h appellant was not statutorily bound to pay to the respondent the decretal sum of Ksh 645,936 in the primary suit.

(d) That the learned Senior Resident Magistrate erred in law in failing to find that the only recourse the plaintiff in the primary suit had to recover the deretal amount was by enforcing (by way of execution) the judgment against the defendant Kenneth Onyango Angir in the primary suit.

(e) That the learned Senior Resident Magistrate erred in law and in fact by holding that a judgment notice under Order 22 rule 6 of the Civil Procedure Rules was duly served upon the defendant totally disregarding evidence tendered that exhibited

that the notice was served not upon the defendant in the primary suit but upon a third party.

(f) That the learned Senior Resident Magistrate erred in law and in fact by failing to appreciate that the defendant/Appellant was not a party to the primary suit.

(g) That the learned Senior Resident Magistrate erred in failing to consider or properly examine the submissions filed by the defendant/Appellant.

7. It is the Appellants prayer that the appeal be allowed and the judgment by the trial magistrate delivered on 28th July, 2017 be set aside or varied and as it appears proper and appropriate order for costs to the appellant.

8. The record of appeal was filed and the appeal admitted for hearing and on 17th September, 2018 directions were issued that the appeal be disposed of by way of written submissions and parties given timelines on when to file and serve the same. The appeal was fixed for highlighting of the said submissions on 22.10.2018.

9. The counsel highlighted their written submissions on 5th February, 2019.

APPELLANT'S SUBMISSIONS.

10. The appellant's counsel cited seven (7) grounds in their memorandum of appeal. In his submissions, the appellant combined grounds 1 and 3, then grounds 2,4, and 6 and lastly grounds 5 and 7 respectively.

11. According to the appellant's counsel, no statutory notice was served upon the appellant as required under section 10 of Cap 405 of the laws of Kenya which requires the same to be served before a suit is filed in 14 days after the suit has been filed. He stated that there was no evidence adduced to prove such service and there was no certificate of postage produced to prove the same.

12. The appellant's counsel also submitted that upon entering of judgment, no notice of the same was served upon the Appellant (Defendant) in the primary suit as provided for under order 22 rule 6 of the Civil Procedure Rules which requires this to be done less than 10 days as no execution, attachment or eviction may issue. He submitted that the trial magistrate erred in failing to consider this issue.

13. Lastly, the appellant's counsel submitted that the trial magistrate failed to consider several mandatory provisions of the law, failed to consider the appellant's submissions and misapprehended the meaning and or misinterpreted order 22 rule 6 by finding that the service upon the appellant was in line with the said provision which is an error in principle.

RESPONDENT'S SUBMISSIONS.

14. The Respondent's counsel opposed the appeal in his submissions in response. He submitted that indeed the appellant was bound to satisfy the said decretal sum under the provisions of section 10 of Cap 405 of the Laws of Kenya, which is the Motor Vehicle Insurance Third Party Risks Act. He stated that evidence was tendered by the Respondent before the trial court that the respondent served the appellant with a letter dated 2nd October, 2006 which notified them of the respondent's claim herein.

15. The Respondent goes on to submit that while the appellant disputes the said service, it will be noted that they did not call any witness before the trial court to rebut the Respondent's evidence to the effect that they were not served. As such, the Respondent's case stands unchallenged.

16. The Respondent's counsel also submits that in the primary suit one Kennedy Onyango was issued by the appellant and he responded in the matter. That the respondent got judgment in the matter but when he tried to execute the judgment, it was in vain. In the circumstances, the appellant had an obligation in law to satisfy the decretal sum where judgment was against his injured.

17. Finally, the respondent's counsel submitted that they will rely on their written submissions entirely and that the authorities cited by the appellant are inapplicable and irrelevant to the instant appeal.

18. The duty of this court as a first appellate court is to re-evaluate, re-analyze and assess the evidence before the trial court while bearing in mind that it neither saw nor heard the witnesses as they testified and therefore make allowance for the same, then make a conclusion whether the findings of the trial court were arrived at in accordance with the evidence and the law or were based on wrong principles. (see the case of **SELLE & ANOTHER VRS ASSOCIATE MOTORS BOAT CO. LTD & OTHERS (1968) 123 AND ABOK JAMES ODERA T/A A.J ODERA & ASSOCIATES VRS JOHN PATRICK MACHIRA T/A MACHIRA & CO. ADVOCATES (2013) e KLR.**

EVIDENCE

19. The plaintiff (respondent) testified as Pw1 and stated that he has filed a case against the Heritage insurance Company (the appellant herein) as a result of an accident that occurred on 27th July, 2006 involving his motor vehicle registration No. KAS 712D make land rover 109 and motor vehicle Mitsubishi Gallant chassis number EAYA-00113003 owned by one KENNEDY ONYANGO AGIL. He stated that after the accident he filed a suit against the said Kennedy Agil who held Insurance certificate No C – 402-7415 policy number MP 06M00007 issued by the appellant company. He produced the decree from Mombasa SRM Civil suit No 172 of 2003 (Exhibit P 1). He went on to state that his advocate proceeded to obtain warrants which they passed onto Auctioneers namely Fantasy Auctioneers but they did

not manage to attach. He produced a certificate from the said auctioneers as Exhibit P2). The Respondent also produced a copy of letter dated 2.10.2006 as Exhibit P3 and other correspondences dated 1.6.2009 as Exhibit P4 to confirm that the appellant was aware of the suit having been filed. He also produced a letter dated 23.11.2011 as exhibit P5 in which the company was informed of the judgment having been entered against Kennedy Agil, their insured. The respondents claim is for Ksh 645,936 plus interest and costs.

20. The defendant's side (the appellant) closed their case without calling any witness or evidence to support their case.

21. I have considered this appeal with regard to the grounds that have been raised by the appellant, the pleadings and evidence that was presented before the trial court, the judgment by the trial court, submissions by both counsels for the parties, the cited authorities and the law. I find that two (2) main issues arise in this appeal.

(a) Whether a notice of entry of judgment ought to have been served upon the appellant;

(b) Was the statutory notice required under the Act given within the time prescribed by the Act;

22. With regard to the first issue of whether a notice of entry of judgment was served upon the appellant, it will be noted that the issue of service of the notice of judgment was never raised by the appellant in its defence dated 15th April, 2013 and neither did the appellant call any witness or evidence to bring out this issue of service of notice of entry of judgment upon the appellant. This issue only came up during cross examination of the respondent and in the appellant's submissions.

23. Section 107 of the Evidence Act, Cap 80 of Laws of Kenya is categorical that:

“(1) The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side”

24. A litigant ought not and must not put suggestions to a witness of the opposite party if he does not desire to call evidence with regard to such suggestions. Parties ought to know that cases are never conducted on the basis of cross examination alone but are conducted on the pleadings and the evidence. Cross examination is a tool for building upon one's case hence where there is a case in the first place cross examination however through cannot make out a case as the purpose of cross examination is to test the veracity of the witnesses on his evidence in chief (See the case of **JAOCHIM NDAIRE MACHARIA VRS MARY WANGARE NDAIRE & ANOTHER , NYERI HCCA NO. 63 OF 2006**).

25. And in the case of **CMC AVIATION LTD VRS CRUIS ARIF LTD (1) (1978) e KLR 103**, Madan J.A. Observed that.

“Pleadings contain averments of the parties concerned until they are proved or disproved, or there is admission of them or any of them by the parties. They are not evidence and no decision could be founded upon them. Prove is the foundation of evidence”.

26. It is also trite law that submissions cannot be treated as evidence or take place of evidence as stated in the Court of Appeal in the case of **DANIEL TOROITICH ARAP MOI & ANOTHER VRS MWANGI STEPHEN MURITHI & ANOTHER (20114) e KLR**, where it held that;

“Submissions cannot take place of evidence. The Respondent failed to prove his claim by evidence what appeared in submissions could not come to his aid.....Submissions are generally parties “marketing language....”

27. Justice Aburili in **MARY NJERI MURIGI VRS PETER MACHARIA & ANOTHER (2016) e KLR** held as follows;

“ In addition, pleadings, answers, in cross examination and or submissions do not amount to evidence or defence. It therefore follows that however well choreographed the submissions are and however serious the cross examination was and however fervent and vehement the statement of defence is, are not evidence”

28. From the pleadings, and evidence that was tendered before the trial court, it is clear that the issue of service of notice of entry of judgment was not pleaded and no evidence was called by the appellant to bring out the same. As a result thereof, the issue will not be considered at this stage.

29. On the second issue of whether the statutory notice required under the Act was served within the period/time prescribed by the Act, it is worth noting that the duty of the Insurers to satisfy judgments against person insured, starts from section 10 (1) and (2) of the Insurance (Motor vehicles Third Party Risks Act) Cap 405 laws of Kenya which provides;

“10(1) If , after a policy of insurance has been affected 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 provision of this section, pay to the person entitled to the benefit for the judgment any sum payable there under 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 enactment relating to interests on judgment”.

30. In the course of testifying the Respondent produced a police abstract (Exhibit P) that indicated that the appellant was the insurer of the motor vehicle chassis number EAYA- 00113003. On the other hand, the defendant did not tender any evidence to the contrary to show that it

had not insured the said vehicle. As a result, the police abstract (Exhibit P) evidence was and remains unshaken and uncontroverted.

In the case of **KASEREKA VRS GATEWAY INSURANCE CO. LTD (2003) 2 E.A.**, it was stated as follows;

“On a balance of probability, the court finds that the Gateway Insurance company Limited appears to be the insurer of motor vehicle registration number KAB 405 K. I say “appears” because the contents of a police abstract is rebuttable and is not conclusive. I refer to the reverse of this documents. However, it suffices to say that having been unchallenged by the defendant, the balance tilts in favour of the plaintiff”.

31. This court will also rely on the decision in the case of **JOSEPH MWANGI GITUNDU VRS GATEWAY INSURANCE Co. LTD (2015)** where it was held as follows;

“..... A contract of insurance is one of indemnity, in so far a claim by third parties are concerned, the insurance has a statutory obligation to pay the judgment of the third parties unless the liability thereof has been avoided in accordance with the law and specifically section 10 of Cap 405”.

32. Since the appellant did not call any witness or evidence to avoid liability in accordance to the provisions of section 10 Cap 405 of the Laws of Kenya, then the appellant should fulfill its statutory obligations, which is to pay the decretal sum.

33. Section 1- (2) (a) of the said Act provides;

“ 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 bringing of the proceedings.....”

This provision simply requires that “notice” be given to the insurer “of the signing of the proceedings” but the Act does not stipulate the format of the notice.

34. According to the appellant, the respondent on cross examination testified that he was unsure, whether the notice was served upon the appellant herein and the document relied on as the notice did not bear the appellant’s stamp as an acknowledgment of receipt. In addition to that, he stated that no certificate of postage was supplied as proof that service was effected through post.

35. The Respondent on the other hand, argued that by a letter dated 2nd October, 2006 the appellant was notified about the respondent’s claim, which fact remained uncontroverted as the appellant never called any witness or evidence to controvert that service of the statutory notice was issued. (see the case of **LINUS NG’ANG’A KIONGO & OTHERS VR TOWN COUNCIL OF KIKUYU (2012) eKLR** and **TIMSALS LMITED VRS HARUN THUO NDUNGU(2010)**)

36. Section 107 (1) of the Evidence Act, states as follows;

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist”.

37. Similarly, in the case of **MARY NJERI MURIGI VRS PETER MACHARIA (supra) Aburili, J** held as follows;

“ In addition, pleadings, answers in cross examination and or submissions do not amount to evidence or defence. It therefore follows that however well choreographed the submissions are and however serious the cross examination was and however fervent and vehement the statement of defence is, are not evidence”

38. It is worth noting that the respondent provided a letter dated 2nd October, 2006 which was copied to the applicant and the same was admitted in evidence as exhibit P3. The issue of the same not having been stamped was never raised at all and the appellant did not call any witnesses or evidence to rebut the averments by the respondent.

39. The appellant also raised an issue that the respondent, in being cross examined, said that he was not aware whether the statutory notice was served. It is the finding of this court that the Respondent (PW1) testimony was very clear that it was his advocate who handled the service of the statutory notice and not him.

40. For the above stated reason, this court is satisfied on a balance of probabilities that a statutory notice was issued to the appellant in accordance with the requirements of the law, a result of which the appellant ought to have complied with its statutory obligations.

41. Accordingly, and for all the reasons outlined, the appeal be and is hereby dismissed with costs to the respondent.

Delivered, dated and signed this 5th day of April, 2019.

LADY JUSTICE D. O. CHEPKWONY

In the presence of:

Mr Okere counsel for the Appellant

Mr Gikandi counsel or the Respondent

C/clerk- Beja