Kubondo v Cannon Assurance Company Limited (Civil Appeal 33 of 2019) [2024] KECA 1323 (KLR) (27 September 2024) (Judgment)

Neutral citation: [2024] KECA 1323 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 33 OF 2019

S OLE KANTAI, P NYAMWEYA & JM MATIVO, JJA

SEPTEMBER 27, 2024

BETWEEN

ISAIAH MAKUTWA KUBONDO ..... APPELLANT

AND

CANNON ASSURANCE COMPANY LIMITED ..... RESPONDENT

(An appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (P. J. O. Otieno J.) made on 22nd November 2018 in Nairobi Civil Appeal No. 517 of 2015 arising from the original Ruling in Nairobi Chief Magistrate Court (A. Lorot SPM) dated 5th October 2015 in Milimani CMCC No. .4381 of 2014)

JUDGMENT

1. What is before us is a second appeal by Isaiah Makutwa Kubondo, the Appellant herein, who has challenged the judgment delivered on 22nd November 2018 by the High Court of Kenya at Nairobi (P.J. Otieno J.) in Nairobi Civil Appeal Case No. 517 of 2015. The said judgment allowed the Respondent's appeal, set aside the decision by the Chief Magistrates Court at Nairobi in CMCC No. 4381 of 2014 (hereinafter "the trial Court"), and remitted the matter back to the trial Court for the hearing of the suit on merit.

2. Being a second appeal, we are mindful that the duty of this Court as a second appellate Court, is limited to matters of law, unless, as held in Kenya Breweries Limited v Godfrey Odoyo [2010] eKLR "it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse". We also note, as held in Stanley N. Muriithi & another vs Bernard Munene Ithiga [2016] eKLR, that failure on the part of a first appellate court to re-evaluate the evidence tendered before the trial court and as a result, arriving at a wrong conclusion, is a point of law.

3. What then are the points of law, if any, that are raised in this appeal? The Appellant initiated the suit in CMCC No. 4381 of 2014 in the trial Court against Cannon Assurance Co. Ltd, the Respondent herein, wherein he pleaded that the Respondent was the insurer of motor vehicle registration number KBL 069X. Further, that on 15th September 2010, whilst the said policy was in force, the Appellant had an accident along Mombasa Road, Nairobi involving the said vehicle. He thereupon sued the Respondent's insured in Nairobi CMCC 7721 of 2010 (hereinafter "the primary suit"), wherein judgment was entered on 10th April 2013 for the Appellant against the Respondent's insured for Kshs.450,000/- plus costs and interest. The Appellant claimed that Respondent was given statutory notice of the primary suit as required as under the Insurance (Motor Vehicle Third Party Risks) Act under which the insurance policy was issued. The Appellant stated that by a letter dated 12th April 2013, the Respondent was also given notice of the judgment in the primary suit, and he prayed for a declaration that the Respondent was therefore bound to satisfy the said judgment and decree in Nairobi CMCC 7721 of 2010.

4. On 25th August 2014, the Respondent filed a Statement of Defence dated 2nd September 2014 wherein it denied the contents of the Appellant's claim, and in particular the service of the statutory notice as required under the Insurance (Motor Vehicle Third Party Risks) Act, and asserted that it was not mandated in law to indemnify the Appellant or satisfy any judgment arising from any suit and was a stranger to the primary suit.

5. The Appellant thereupon filed an application in the trial Court dated 9th September 2014, seeking that the Respondent's defence be struck out, judgment be entered for the Appellant against the Respondent as prayed for in the plaint, and the costs be provided for. The application was premised on the grounds that the defence was a sham, tailored only to buy time to delay the early finalization of the suit and could not stand serious scrutiny, since the Respondent had no legal defence to the claim under the law and in particular under the Insurance (Motor Vehicle Third Party Risks) Act.

6. The Respondent opposed the application by way of a Replying Affidavit sworn on 16th January 2015 by Martha Mutoro, its Legal Officer, who asserted that the Appellant's application was premature as the Defence raised pertinent issues in reply to the Plaint which the trial Court ought to deliberate on in-depth and could only be done if the matter proceeded inter partes. The Respondent identified the said issues to be whether it was the insurer of motor vehicle registration number KBL 069X, and whether it had effected any cover in favour of the insured sued in the primary suit. It was their averment that an insurer could not be held liable under the Insurance (Motor Vehicle Third Party Risks) Act to satisfy a judgment that was obtained against a person who was a stranger to it, and that this was a distinct issue for determination.

7. In a ruling delivered on 5th October 2015, the trial Magistrate (Hon. A. Lorot H. R. SPM) held that the defence did not raise any triable issue and was economical with information, and that the Appellant had brought forth every material evidence relating to the primary suit and the policy. The Honourable Magistrate therefore allowed the Appellant's application, struck out the statement of defence and entered judgment for the Appellant as prayed in the plaint. Being aggrieved, the Respondent filed the appeal in the High Court, being Civil Appeal No. 517 of 2015.

8. The High Court (P.J.O. Otieno J.) after considering the pleadings and submissions filed by the parties found that there was nothing on the record apart from the police abstract report to show that there was a policy issued by the Respondent to the person against whom judgment was entered in the primary suit, and there was insufficient evidence that the Appellant issued the policy sued upon. Additionally, the certificate of posting of the statutory notice that was exhibited did not show the date of posting to prove compliance with the requirement of section 10 (2) (a) of the Insurance (Motor Vehicle Third

Party Risks) Act as to the time of service. Therefore, that these findings raised two triable issues which entitled the Respondent to an unconditional leave to defend.

9. In addition, that at all times the burden rested upon the Appellant to prove those two facts namely the existence of policy of insurance in favour of the judgment debtor in the primary suit and service of the notice, and there was never any onus upon the Respondent to prove anything. The High Court found that the trial Court was in error when it faulted the Respondent for failure to show whether the policy existed or not, and for being sketchy with information so as to avoid scrutiny. The High Court accordingly allowed the appeal, dismissed the application dated 9th September 2014 with costs, and remitted the matter to the trial Court for hearing of the suit on merit.

10. The Appellant is aggrieved by the decision of the High Court, and has raised nine (9) grounds of Appeal in his Memorandum of Appeal dated 25th January 2019 and lodged on 30th January 2019, namely:

    1. The Learned Judge erred by finding that there was no sufficient evidence to prove the facts of insurance

    2. The Learned Judge erred by finding that there was no evidence of service of a statutory notice

    3. The Learned Judge erred by failing to consider the submission of the Respondent (now Appellant) and or the precedent cited in those submissions

    4. The Learned Judge erred in his holding on the burden of proof

    5. The Learned Judge erred by applying the general law principles on striking out of defences and/ or on summary judgment in cases not dealing with the statutory provisions of Chapter 405 which is a special legislation to protect accident victims

    6. The Learned Judge erred by misapprehending the law and applying the wrong legal principles

    7. The Learned Judge erred by finding that there were triable issues

    8. The Learned Judge erred by disregarding or failing to consider uncontroverted evidence or by reaching unsupported conclusions thereon or by misunderstanding the same

    9. The Learned Judge erred by finding no case was made out for summary judgment

11. The Appellant therefore prays for orders that the appeal be allowed with costs in this court and the High Court; the judgment of the first appellate Court be set aside and be substituted with a judgment dismissing the first appeal with costs; and the decision of the trial Court be reinstated. We heard the Appeal on this Court's virtual platform on 19th March 2024, and learned counsel Mr. N. Kaburu appeared for the Appellant, and placed reliance on his written submissions dated 27th May 2020. There was no appearance for the Respondent, even though its advocates were duly served with a notice of the hearing date. We accordingly relied on written submissions dated 25th August 2020 on record filed on behalf of the Respondent by MNM Advocates LLP.

12. Mr. Kaburu submitted that the Memorandum of Appeal raised points of law, namely whether or not the Respondent's defence raises triable issues, and argued all the grounds of appeal conjunctively. The Respondent's advocates on the other hand urged that grounds of appeal numbers 1, 2, 3 and 8 were based on matters of fact, and the Appellant had not shown any justification why this Court should delve into them in a second appeal. The Respondent urged this Court to strike out the said grounds. In addition, that ground of appeal number 9 was on summary judgment which was not an issue before the High Court, and thus could not be urged in this appeal.

13. We note that the first appeal in the High Court arose from the decision of the trial Court upon application by the Appellant, of striking out of the Respondent's defence. Two findings were made by the first appellate Court in this regard, namely that the defence raised triable issues, and that the trial Court erroneously shifted the burden of proof to the Respondent. These are the two issues of law that arise in this appeal, and the question we need to answer is whether the first appellate Court erred in its findings on the two issues, in the manner we described at the commencement of this judgment.

14. The law on striking out of a defence is settled. This Court has severally reiterated in Postal Corporation of Kenya v IT Inamdar & 2 Others [2004] KECA 139 (KLR), Blue Shield Insurance Company Limited v Joseph Mboya Ogutu [2009] KECA 221 (KLR) and Moi University v Vishva Builders Limited [2010] KECA 397 (KLR) that the power to strike out a pleading which ends in driving a party from the judgment seat should be used very sparingly and only in cases where the pleading is shown to be clearly untenable; and that only one triable issue in a defence was sufficient for a defendant to be granted leave to defend in a full hearing.

15. On whether there were triable issues disclosed, Mr. Kaburu submitted that the defence denied service of a statutory notice, yet there was proof of service of a notice before the filing of the primary suit. Furthermore, that the Insurance (Motor Vehicle Third Party Risks) Act did not prescribe that service be proved to a specific date as was held by the first appellate Judge, and was only required to have been either before the primary suit or within 14 days after the suit. Thus, it was erroneous for the first appellate Judge to require a specific date. He reiterated that the notice which was dated 1st November 2020 was served by a letter dated 12th November 2020, and the primary suit was filed in December 2020. Therefore, even if it was received within 14 days after the suit was filed, that was in compliance with section 10(2)(a) of the Act. In addition, that the Respondent did not expressly deny receipt of the registered letter or allege that it was returned unclaimed as deposed before suit

16. On the whether the Respondent was the insurer, Mr. Kaburu submitted that it had been accepted by other Judges in the High Court that it was not mandatory that an accident victim produce either a policy document or a certificate of insurance to prove the fact of insurance, and that a police abstract and the information therein about the insurance company policy was sufficient proof of insurance for the purposes of the Act, unless the insurer proved otherwise. The Appellant urged this Court to uphold this position, and submitted that the burden thus shifted to the insurer once it was cited as the insurer. Reference was made to various judicial decisions of this Court that have accepted police abstracts as proof of insurance, including Securicor Kenya Ltd v Kyumba Holdings Ltd [2005] eKLR and Joel Muna Opija v E. A. Sea Foods Ltd [2013] eKLR.

17. The Respondent's advocates in response submitted that the notice required under section 10 of the Insurance (Motor Vehicle Third Party Risks) Act ought to not only be issued but also delivered, and there was no other evidence availed that indeed the notice reached the Respondent in the stipulated time. They argued that this was not a casual issue to be summarily dismissed without further scrutiny, and submitted that the argument by the Appellant that there was no denial that the notice was indeed issued was contrary to the affidavit of Martha Mutoro, which clearly stated that there was no service of the said notice, and the burden to demonstrate that the notice was issued and sent rested with the Appellant.

18. The Respondent denied having issued an insurance policy in respect of the Motor vehicle registration No. KBA 682 E to one Solomon Kimani who had been sued initially by the Appellant in the primary suit. Reliance was placed on the case of Mary Adhiambo Onyango v Jubilee Insurance Co. Ltd [2007] eKLR for the position that a police abstract cannot be a basis to prove the existence of a policy of insurance, and in light of the denial by the Respondent, the issue ought to have been ventilated in a

full trial and could not be conclusively determined on the basis of the affidavit evidence placed before the trial Court.

19. It is evident that there is a contest between the Appellant and Respondent as regards whether and when the statutory notice required under the Insurance (Motor Vehicle Third Party Risks) Act was sent to and received by the Respondent, whether the Respondent had issued an insurance policy to the insured person in the primary suit, and the method and burden of proving such insurance. The Statement of Defence dated 2nd September 2014 filed by the Respondent in the trial Court in this respect denied that it was "the insurer of the motor vehicle registration number KBA, 682E and more so having ensured one Solomon Kimani against whom the plaintiff purportedly obtained judgment against", and that service of the statutory notice as required under the provisions of the Insurance (Motor Vehicle Third Party Risks) Act "was strenuously contested'. The Respondent also sought leave to supply witness statements and documents prior to the trial Conference, and provided a list of its witnesses. The contestations could only be determined upon adjudication in a full trial, and the first appellate Court therefore did not err in its finding that the defence raised triable issues, and took into account the relevant considerations into account.

20. On the issue of the burden of proof, we understood Mr. Kaburu's arguments to be that there are different principles that apply to matters falling under the Insurance (Motor Vehicle Third Party Risks) Act which provides for the applicable the statutory defences available to an insurer, and that the Trial Court set out pertinent requirements in this regard, and found that the defence was not accompanied by statements or documents and did not state whether it had issued the cited policy or not or whether such a policy existed in its books. Therefore, the burden of proof was shifted to the Respondent by section 112 of the *Evidence Act* which provides that the burden of proving any fact especially within the knowledge of any party rests on that party.

21. The Respondent's advocates on their part submitted that the Appellant did not demonstrate that there existed any legal instrument or custom that mandates the Courts to treat pleadings under the Insurance (Motor Vehicle Third Party Risks) Act differently from others when it comes to striking out of the pleadings; the question of how an insurer could avoid liability under the Act or statutory defences available was not in consideration in the judgment which was the subject of the appeal; and that in any event, the Respondent could only tender this evidence at the trial.

22. It is our view that the issue of burden of proof is premature in the circumstances of this appeal for two reasons. Firstly, the issue before the trial Court and first appellate Court was the circumstances when a defence can be struck out, on which the applicable principles of law are settled, as set out hereinabove. Once this issue was resolved, any other outstanding issues were matters of merit for determination during trial or judgment, including the application of any statutory defences or the sufficiency or otherwise of any evidence adduced by the parties.

23. We need to emphasise in this regard that averments made by parties in pleadings do not constitute evidence, as explained by Madan, JA (as he then was) in CMC Aviation Ltd v Crusair Ltd (No.1) [1987] KLR 103:

> "The pleadings contain the averments of the three 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 on them. Proof is the foundation of evidence.
>
> As stated in the definition of "evidence" in section 3 of the *Evidence Act*, evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation, is proved or disproved. Averments are matters the truth of which is submitted for investigation. Until their truth has been established or otherwise they remain unproven...

> The pleadings in a suit are not normally evidence. They may become evidence if they are expressly or impliedly admitted as then the admission itself is evidence. Evidence is usually given on oath. Averments are not made on oath. Averments depend upon evidence for proof of their contents."

24. Secondly, we reiterate and adopt the following holding of this Court in Charterhouse Bank Limited (Under Statutory Management) v Frank N. Kamau, [2016] KECA 153 (KLR) as regards the burden and standard of proof in cases where it is alleged that there is absence of evidence:-

> " In Karugi & Another v Kabiya & 3 Others [1987] KLR 347, this Court held that the burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof.
>
> We would therefore venture to suggest that before the trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities by reason of the defendant's failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant. Where the defendant has subjected the plaintiff or his witnesses to cross-examination and the evidence adduced by the plaintiff is thereby thoroughly discredited, judgment cannot be entered for the plaintiff merely because the defendant has not testified. The plaintiff must adduce evidence, which in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities, it proves the claim. Without such evidence, the plaintiff is not entitled to judgement merely because the defendant has not testified. The proposition that failure by the defendant to call evidence lessens the burden on the plaintiff to make out his case on a balance of probabilities as propounded in Karugi & Another v. Kabiya & 3 Others (supra) is totally different from the proposition advanced by the appellant in this appeal, namely that the failure by the defendant to call evidence invariably entitles the plaintiff to judgement, irrespective of the quality and credibility of the evidence that the plaintiff has presented. In our view the latter proposition has no sound legal basis."

25. We accordingly find no merit in the appeal, which is hereby dismissed with no order as to costs, since the Respondent was not in attendance during the hearing.

26. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF SEPTEMBER, 2024.

S. ole KANTAI

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JUDGE OF APPEAL

P. NYAMWEYA

.....

JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR.