



**Kenya Orient Insurance Company Ltd v Rentco East Africa Co. Ltd;
Ndiema & 14 others (Interested Party) (Civil Appeal E538 of 2022)
[2024] KEHC 16781 (KLR) (Commercial and Tax) (31 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 16781 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL APPEAL E538 OF 2022**

NIO ADAGI, J

JULY 31, 2024

BETWEEN

KENYA ORIENT INSURANCE COMPANY LTD APPELLANT

AND

RENTCO EAST AFRICA CO. LTD RESPONDENT

AND

BUKATI ROLLIA NDIEMA & 14 OTHERS INTERESTED PARTY

*(Being an Appeal from the ruling of Hon. A. N. Makau (CM) in
Milimani Nairobi CPMCC. No. E9992 of 2021 delivered on 24/6/2022)*

RULING

1. The Respondent (Plaintiff/Applicant in subordinate court case) moved the court by way of a Notice of Motion application dated 14/12/2021 brought pursuant to the provisions of the law under Order 2 rule 15 (1) (b) (c) (d) and Order 51 Rule 1 of the Civil Procedure Rules, Section 3A of the [Civil Procedure Act](#), Section 10(e) of the Insurance (Motor Vehicle Third Party Risks) Act and all the enabling provisions of the Law. In the said application, the Respondent sought the following orders:
 1. That the Appellant's (Defendant/Respondent in subordinate court case) defence filed dated 14/9/2021 be struck out for being frivolous, vexatious and only meant to delay the finalization of the suit and also abuses court process.
 2. That judgment be entered in favour of the Respondent (Plaintiff/ Applicant) against the Appellant (Defendant/Respondent) as prayed in the plaint.



3. The cost of the application and entire suit be provided for.
2. The application was premised on grounds on the face of it and supported by the annexed affidavit of the Respondent. The Respondent averred that the Appellant had no valid defence and the same was not reasonable and genuine; it was frivolous and consists of mere denials and was purely a sham and had no merit and therefore an abuse of the court process. It was further averred that the Appellant had issued a comprehensive commercial motor vehicle insurance policy dated 15/1/2018 in respect of motor vehicle registration number GKB 978R whose policy number was as shown in annexure MM1. The said GK vehicle was involved in an accident on 20/1/2019 resulting in injuries of the passengers therein, the Appellant took up the matters and instructed an advocate to defend it in numerous suits filed in Moyale Courts by the Interested Parties in cases herein listed. They have obtained judgment amounting to Khs.5,92,344.35/= which the Respondent was now expected to settle and as such it is likely to suffer financial loss.
4. In response, the Appellant averred that there was no cause of action by the Respondent against it and that the defence raised triable issues and the application was devoid of merit and also averred that the Interested Parties were employees of the Government under a contract and such liabilities are not covered by the insurance company. It made reliance on Section 5 (b) (i) of the Motor Vehicle Third Party Risks Act and argued they should be compensated under the Workman's Compensation Act.
5. The Parties' advocates filed written submissions in arguing the application which the learned magistrate considered and, in the end, he allowed the application in terms of prayers 1 & 2 as set out hereinabove.
6. Being dissatisfied by the said ruling, the Appellant filed the appeal herein via a Memorandum of appeal dated 18/7/2022 raising 15 grounds of appeal. However, the Appellant has in its written submissions on the appeal dated 24/4/2024 the Appellant opted to consolidate the grounds into topics which include: 1) the trial court taking into account irrelevant factors; and 2) leaving out of relevant factors. The Appellant seeks to have the ruling of the learned magistrate set aside and the appeal be allowed.
7. The Interested Parties too have filed written submissions dated 23/4/2024 identifying three issues for determination on the appeal including: A) whether the Appellant's defence at the trial court raised any triable issues and whether the learned magistrate erred in allowing the application for summary judgment; B) whether there was an existing contract of insurance; and C) whether the Appellant's appeal has merit and whether the Appellant should compensate the interested parties.
8. The Respondent has not filed written submissions on the appeal.
9. I have carefully perused the Record of Appeal, considered and weighed the evidence and submissions presented on the appeal. It is my considered opinion that the main issue for determination in this appeal is whether the trial court erred in law and in fact in allowing the Respondent's application for summary judgment.
10. Summary Judgment is provided for under Order 36 of the Civil Procedure Rules and it stipulates as follows:

In all suits where a plaintiff seeks judgment for—

- a. a liquidated demand with or without interest; or
- b. the recovery of land, with or without a claim for rent or mesne profits, by a landlord from a tenant whose term has expired or been determined by notice to quit or been forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser, where



the defendant has appeared but not filed a defence the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits.

11. The above provision is applicable where a debt is admitted thereby entitling the claimant to obtain judgment expeditiously so as to save on the costs and time that could have been spent in pursuing a full hearing. This is the position that was taken in *ICDC vs Daber Enterprises Ltd* where the court held that:

“The purpose of the proceedings in an application for summary judgment is to enable the plaintiff to obtain a quick judgment where there is plainly no defence to the claims. To justify summary judgment, the matter must be plainly and obvious and where it is not plain and obvious, a party to a civil litigation is not to be deprived of his right to have his case tried by a proper trial where, if necessary, there has been discovery and oral evidence subject to cross examination.”
12. The Appellant in its defence raised in the lower court denied being the insurer of the Respondent, denied service of a statutory notice and denied that it is bound by section 10 of The Insurance (Motor vehicle third party risks) Act to settle the decretal amount.
13. At paragraph 3 of the defence the Appellant contented that the Respondent had failed to comply with the express provisions of Order 1 Rule 4 and Order 9 Rule 9 (c) as pertains parties to a suit. At paragraph 4 of the defence the Appellant averred that the subject motor vehicle was insured by Cannon Assurance Company Ltd which was indicated in the police abstract that Interested Parties relied upon in the initial suit. Further at paragraph 5 and 6 of the defence, the Appellant averred that the interested parties were employees of the Government under a contract of employment where motor vehicle insurance would not cover such liabilities. There was also an issue with one of the Interested Parties sued as passenger whereas he was the driver of the said GKB 978R as such it created a conflict unknown in law and which issue had to be ventilated in a hearing. Also, in the Replying affidavit to the application, the Appellant referred to issue raised in the defence
14. The Respondent in its Supporting affidavit to the application for summary judgment annexed a copy of the policy of insurance marked as “MM1” for the year 2018 -2019 between Kenya Orient Insurance Company Ltd and Rentco East Africa Limited which sets out limits of liability and standards of excesses applicable
15. The Respondent at paragraph 4 of the Supplementary affidavit averred that the issues raised by the Appellant in the Replying affidavit are issues beyond the scope of the trial court and that they ought to have been litigated and or raised before the court that issued the judgment.
16. I have considered the application, the supporting and supplementary affidavit, the Replying Affidavit as well as the defence filed by the Appellant. There are issues that have captured my attention for instance:
 - a. the police abstract from Sololo police station that the Interested Parties produced in the primary suit show the insurer of motor vehicle GK978R as Cannon Assurance Ltd;
 - b. the motor vehicle Insurance Policy that was marked as “MM1” is neither executed by the parties to it nor does it list or attach a schedule specifying the exact registration numbers of the insured motor vehicles including the subject motor vehicle herein. Could it have been insured by Cannon assurance Ltd as purported in the police abstract?



- c. the Appellant was not a party to the primary suit and therefore the issues it raised in the defence and replying affidavit could not have been expected to have been litigated and or raised in the primary suit where the judgment was delivered.
 - d. one of the Interested Parties is alleged to have sued as passenger whereas he was the driver of the said GKB 978R who was in fact blamed for careless driving and causing the accident as such it creates a conflict in law for him to be compensated as a third party.
 - e. There is an allegation that the interested parties were employees of the Government under a contract of employment where motor vehicle insurance would not cover such liabilities.
17. From the above identified issues, it is this court's opinion that the defence by the Appellant raised substantial triable issues that ought to have been subjected to a hearing.

Madan J A (as he then was) said in the course of his judgment in the case of *Javantil Shah v Hussein Nanji Padamshi & Others* (Civil Appeal No 5 of 1982) (unreported):

“Except in the clearest of cases, which this one was not it is inadvisable for the Court to prefer one affidavit to another in order to enter summary judgment. Summary judgment is a drastic remedy to grant, for inherent in it is a denial to the respondent of his right to defend the claim made against him. A trial must be ordered if a triable issue is found to exist, even if the Court strongly feels that the defendant is unlikely to succeed at the trial. The Court must not attempt to anticipate that the defendant will not succeed at the trial.”

18. In the case of *Saudi Arabian Airlines Corporation v. Sean Express Services Limited*, Civil Case No. 79 of 2013 [2014] eKLR, the court expressed itself as follows:

“I need not re-invent the wheel on the subject of striking out a defence. A great number of judicial decisions have now settled the legal principles which should guide the Court in determining whether to strike out a pleading. Except, I can state comfortably that these principles now draw, not only from judicial precedent, but from the principles of justice enshrined in *the Constitution* especially in Article 47, 50 and 159. The first guiding principle is that, every Court of law should pay homage to its core duty of serving substantive justice in any judicial proceeding before it, which explains the reasoning by Madan JA in the famous *DT DOBIE* case that the Court should aim at sustaining rather than terminating a suit. That position applies *mutatis mutandis* to a statement of defence and counter-claim. Secondly, and directly related to the foregoing constitutional principle and policy, courts should recognize the act of striking out a pleading (plaint or defence) completely divests a party of a hearing, thus, driving such party away from the judgment seat; which is a draconian act comparable only to the proverbial drawing of the “Sword of the Damocles”. Therefore, the power to strike out a suit or defence should be used sparingly and only on the clearest of cases where the impugned pleading is ‘demurer or something worse than a demurer’ beyond redemption and not curable by even an amendment. Thirdly, in case of a defence, the court must be convinced upon looking at the defence, that it is a sham; it raises no bona fide triable issue worth a trial by the court. And a triable issue need not be one which will succeed but one that passes the Sheridan J Test in *Patel v E.A. Cargo Handling Services Ltd.* [1974] E.A. 75 at P. 76 (Duffus P.) that “...a triable issue ...is an issue which raises a prima facie defence and which should go to trial for adjudication”.

19. The learned magistrate was therefore misguided while delivering the ruling by finding that the statement of defence did not raise any triable issues.



20. In the result, I would allow the appeal in the following terms:

- a. The order and decree of Hon. A. N. Makau (CM) in Milimani Nairobi CPMCC. No. E9992 of 2021 delivered on 24/6/2022 is set aside and substitute therefore with an order dismissing the Respondent's application for summary judgment dated 14/12/2021.
- b. The Appellant is granted unconditional leave to defend the suit in Milimani Nairobi CPMCC. No. E9992 of 2021.
- c. The suit shall be heard by another magistrate with jurisdiction other than Hon. A. N. Makau (CM).
- d. Costs of the appeal are awarded to the Appellant.

21. It is so ordered.

DATED, SIGNED & DELIVERED VIRTUALLY AT MACHAKOS THIS 31ST DAY OF JULY 2024.

NOEL I. ADAGI

JUDGE

