Gateway Insurance Company Limited v Maritim (Civil Appeal 164 of 2019) [2024] KEHC 13263 (KLR) (29 October 2024) (Judgment)

Neutral citation: [2024] KEHC 13263 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL APPEAL 164 OF 2019

HI ONG'UDI, J

OCTOBER 29, 2024

BETWEEN

GATEWAY INSURANCE COMPANY LIMITED ..... APPELLANT

AND

RENNY KIMUTAI MARITIM ..... RESPONDENT

(Being an appeal from the Ruling of Honourable S. Wahome (CM) in Molo Civil Suit No. 332 of 2015, delivered on 9th October 2018)

JUDGMENT

1. This appeal arises from the ruling entered in Molo Civil Suit No.332 of 2015. The same being a declaratory suit arising from Molo SPMCC No. 1 of 2012 where the respondent (who was the plaintiff) vide the plaint dated 14th October, 2015 sued the appellant's insured for the sum Kshs. 170,751/=, costs of the suit plus interest and any other relief that the court may deem fit.

2. The respondent through an application dated 12th March 2018 sought for an order that the defence be struck out and the costs of the application and suit be provided for.

3. The trial court in its ruling dated 9th October 2018 allowed the respondent's application with costs in its favour.

4. Being aggrieved with that Ruling the appellant lodged the appeal dated 2nd October, 2019 on the following grounds:

    i. That the learned magistrate erred in law and in fact and misdirected herself in holding that the respondent had in his application met the threshold for the grant of orders of striking out the appellant's statement of defence.

ii. That the learned magistrate erred in law and fact when he failed to appreciate that the appellant had demonstrated through a Replying Affidavit that it was not the insurer of the suit motor vehicle in the primary suit at the time of the accident.

iii. That the learned magistrate erred in holding that the appellant's contained mere denials whereas the same raised bonafide triable issues among which is whether indeed the defendant in the primary suit had an insurance policy with the appellant covering the risk complained of by the respondent.

iv. That the learned trial magistrate erred in law and fact in failing to appreciate the efficacy of the provision of the *Evidence Act*, in respect of the question of the whether the appellant was the insurer of the suit motor vehicle in the primary suit.

v. That the learned trial magistrate misapprehended the principles applicable in the matters before him thus arriving at an erroneous decision.

vi. That the learned magistrate erred in law and in fact by failing to properly evaluate the evidence on record thus reaching an erroneous decision.

vii. That the learned magistrate erred in law and in fact by failing to take into account relevant facts and law and considering extraneous matters.

viii. That the learned magistrate erred in both law and fact by not considering the submissions and authorities tendered on behalf of the appellant.

5. The appellant prayed that the appeal be allowed and the trial's court ruling be set aside in its entirety. Further, that the respondent be condemned to pay costs of the appeal and that of the subordinate court.

6. The Appeal was canvassed through written submissions.

Appellant's submissions

7. These were filed by B. O. Akang'o advocates and are dated 19th March 2024. Counsel identified three (3) issues for determination.

8. The first issue is whether the learned Magistrate erred in law and in fact and misdirected himself in holding that the respondent had in his application met the threshold for the grant of striking out the appellant's statement of defence.

9. Counsel submitted in the affirmative while citing Articles 25, 48 and 50 of *the Constitution* and several decisions among them being Blue Sheild Insurance Company Ltd v Joseph Mboya Oguttu [2009] eKLR where the Court of Appeal held as follows;

> " The principles guiding the Court when considering such an application which seeks striking out of a pleading is now well settled. Madan J.A. (as he then was) in his judgment in the case of D.T. Dobie and Company (Kenya) Ltd vs Muchina 1982 KLR 1 discussed the issue at length and although what was before him was an application under Order 6 Rule 13 (1) (a) which was seeking striking out a plaint on grounds that it did not disclose a reasonable cause of action against the defendant, he nonetheless dealt with broad principles which in effect covered all other aspects where striking out a pleading or part of a pleading is sought."

10. The second issue is whether the learned trial Magistrate erred in law and in fact in holding that the appellant's defence contained mere denials whereas the same raised bona fide triable issues among

which is whether indeed the defendant in the primary suit had an insurance policy with the appellant covering the risk complained of by the respondent.

11. Counsel submitted that through its replying affidavit, the appellant had demonstrated that it was not the insurer of the suit motor vehicle in the primary suit at the time of the accident. He relied on several cases among them being the case of Job Kilach v Nation Media Group Ltd Salaba Agencies Ltd & Michael Rono [2015] eKLR where the learned Judges of Appeal stated as follows: -

> " Before the grant of summary judgment, the court must satisfy itself that there are no triable issues raised by the defendant, either in his statement of defence or in the affidavit in opposition to the application for summary judgment or in any other manner. What then is a defence that raises no bona fide triable issue? A bona fide triable issue is any matter raised by the defendant that would require further interrogation by the court during a full trial. The Black's Law Dictionary defines the term "triable" as, "subject or liable to judicial examination and trial". It therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the Court."

12. The last issue is whether the learned trial magistrate erred in law and fact in failing to appreciate the efficacy of the provision of the *Evidence Act*, in respect of the question of whether the appellant was the insurer of the suit motor vehicle in the primary suit. Counsel submitted that the respondent should have tendered the insurance certificate as documentary proof. Further, whether there was privity of contract between the defendant and the insurance company at the time of the accident was a triable issue.

13. Counsel submitted further that the certificate of insurance is the document which settles the question as to the existence of an insurance contract. That any other document ought to be tested through cross examination to ensure the applicant does not rely on forged documents. He placed reliance on the cases of: Richard Makau Ngumbi & Another v Cannon Assurance Company Limited [2016] eKLR and Kenya Orient Insurance Co. Ltd v Farida Hemed [2015] eKLR.

Respondent's submissions

14. These were filed by Gekong'a & Company advocates and are dated 26th April 2024. Counsel identified one issue for determination which is whether the respondent met the threshold for striking out the appellant's statement of defence. Counsel cited Order 2 rule 15 of the Civil Procedure Rules and submitted that the appellant had failed to prove or rebut the police abstract evidence that the accident occurred involving motor vehicle registration number KBD 886 J and that the insurer of the said motor vehicle under the policy number indicated in the police abstract was the appellant. Further, that the appellant thoroughly demonstrated the existence of a policy contrary to the allegations in the statement of defence.

15. Counsel submitted further that the appellant had a chance to file a declaration within three (3) months of service of the notice of institution of suit in order to avoid an obligation to make payment but it failed to do so. He cited section 10(1) of the Insurance (motor vehicle third party risks) Act, Cap 405 and the case of *Bluesheild Insurance Co. Limited v Raymond B. M'Rimberia (Civil Appeal No. 107 of 1997*) where the court held as follows;

> 'the insurer is bound under section 10(1) to satisfy the judgement obtained against its insured and to pay the person entitled to the benefit of that judgement all sums payable there under with costs and interests, notwithstanding that the insurer may be entitled to

avoid or cancel the policy vis a vis the insured and may have even avoided it or cancelled it.
.....

Whether the Respondent was a fare paying passenger or not may be a ' matter which would entitle the Appellant to avoid or cancel the policy but could not entitle him to avoid the Judgement obtained against his insured. Once that judgement was in place, any challenge to its illegality or finding could only be done by way of appeal, applying to set it aside or review but could not be raised in the declaratory suit..... Also, whether the Appellants insured had been served with summons to enter appearance was an issue to be canvassed in the primary sult. The Respondent's only obligation was to comply with the statutory conditions of the Act..."

16. He went on to submit that since there was no appeal and the appellant had not applied the provisions of section 10(1), CAP 405, the appeal ought to be dismissed with costs to the respondent.

Analysis and determination

17. This being a first appeal, it is this court's duty under Section 78 of the *Civil Procedure Act* to re-evaluate and re-consider the evidence tendered before the trial court and come to its own independent conclusion considering the fact that it did not have the advantage of seeing and hearing the witnesses as they testified. This principle of law was well settled in the case of Selle v Associated Motor Boat Co. Ltd (1968) 123 where Sir Clement De Lestang (V.P) stated that:

> " An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally".

18. Having carefully perused the proceedings, the ruling and the record of appeal and both parties' submissions, I find that the issue arising for determination is whether the appeal herein has merit.

19. The appellant contends that the learned trial Magistrate erred in law and in fact in holding that the appellant's defence contained mere denials whereas the same raised bona fide triable issues. The respondent on the other hand argued that the appellant thoroughly demonstrated the existence of a policy contrary to the allegations in the statement of defence

20. The learned trial Magistrate in his ruling noted that the appellant in its application demonstrated the requirements to be established in order for a declaratory suit to succeed. However, in his view the said compliance was not sufficient upon giving due regard to the evidence tendered by the respondent. He proceeded to allow the respondent's application dated 12th March 2018 with costs.

21. Order 2 Rule 15 of the Civil Procedure Rules which provides for striking out of pleadings states as follows:

Rule 15

"(1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

(a) it discloses no reasonable cause of action or defence in law; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under sub rule (1)(a) but the application shall state concisely the grounds on which it is made."

22. Further Order 13 Rule 2 of the Civil Procedure Rules provides: -

> " any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the court may upon such judgment, as the court may think just."

23. The Court of Appeal in Swapan Sadhan Bose v Nyali Beach Hotel Limited & 3 others [2011] eKLR held as follows;

> " ...As it has been stated in some of the cases cited to us, the power of the Court to strike out pleadings is exercised without the court being fully informed on the merits of the case through discovery and oral evidence and hence this power to strike out pleadings should be used sparingly and cautiously. In D. T. Dobie & Company (Kenya) LTD. V. Muchina [1982] KLR 1 at p. 9 Madan, J.A. said:-
>
> "No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it."

24. The key consideration in determining whether to strike out a defence is the consideration as to whether the said defence raises triable issues. In the case of Job Kwach –vs- Nation Media Group Ltd it was held as follows:-

> " Before the grant of summary judgment the court must satisfy itself that there are no triable issues raised by the Defendant, either in his statement of defence or in the affidavit in opposition to the application for summary judgment or in any other manner. What then is a defence that raises no bonafide triable issue. A bona fide triable issue is any matter raised by the defendant that would require further interrogation by the court during a full trial. The Black's Law Dictionary defines the term "triable" as "subject to liable to judicial examination and trial." It therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the court."[own emphasis]

25. In the instance appeal the respondent (who was the plaintiff in the declaratory suit) sought in his application dated 12th March 2018 to have the defence struck out on the basis that the same did not disclose any reasonable defence. Further, that the police abstract indicated that the appellant was the

insurer and so there was a valid policy. The appellant in its defence denied being the insurer and that there was no valid policy issued by it at the time of the accident.

26. In my view the respondent in raising the issue of the police abstract indicating that the appellant was the insurer of the motor vehicle KBD 886J at the time of the accident is seeking to rely on evidence that the appellant had no opportunity to challenge or counter. The issues raised by the respondent ought to have been reserved for trial and the grounds on the face of his application without proof were not valid grounds for striking out the defence. Rather the same could have been raised or ventilated during the trial of the suit.

27. For the said reasons, I find that the learned trial Magistrate erred in law and fact in allowing the application dated 12th March 2018 which sought to have the appellant's defence struck out.

28. I find merit in the appeal which I hereby allow and order that:

    i. The Ruling dated 9th October, 2018 is hereby set aside.

    ii. An order reinstating the suit (Molo CM's Civil Suit No. 332 of 2015) is hereby issued.

    iii. The suit to be heard and determined within twelve (12) months from today's date.

    iv. Both parties to appear for mention before the Hon. Chief Magistrate Molo on 12th November, 2024 for reallocation of the matter and further directions on the hearing.

    v. Costs in both the Lower court and High court to be in the cause.

    vi. Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 29TH DAY OF OCTOBER, 2024 IN OPEN COURT.

H. I. ONG'UDI

JUDGE