



REPUBLIC OF KENYA



**KENYA LAW**  
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**Saham Assurance Company Kenya Limited v Salim (Civil Appeal  
E045 of 2021) [2023] KEHC 704 (KLR) (31 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 704 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL E045 OF 2021**

**OA SEWE, J**

**JANUARY 31, 2023**

**BETWEEN**

**SAHAM ASSURANCE COMPANY KENYA LIMITED ..... APPELLANT**

**AND**

**MWANASHA HASSAN SALIM ..... RESPONDENT**

*(Being an appeal from the Ruling and Order of Hon. J.M. Nyariki, RM,  
delivered on 16th December 2020 in Mombasa CMCC No. 1500 of 2019)*

**JUDGMENT**

1. This is an interlocutory appeal arising from the ruling and orders issued by the Resident Magistrate in Mombasa CMCC No 1500 of 2019: Mwanasha Hassan Salim v Saham Assurance Company Kenya Limited. The brief background of the matter is that the respondent sued one David Mburu Mwangi and the Cooperative Bank of Kenya in Mombasa CMCC 1140 of 2018 in respect of injuries sustained by her in a road traffic accident that took place on December 9, 2016. She had alleged that she was crossing the road at Jomvu near Total Petrol Station when she was knocked down by Motor Vehicle Registration No KBK 447J/ZB 9308. She attributed the accident to the negligence of the driver of Motor Vehicle Registration No KBK 447J/ZB 9308.
2. Although the 1<sup>st</sup> defendant in the primary suit denied the respondent's allegations in his Defence filed on March 8, 2019, the suit was ultimately compromised by consent in the sum of Kshs 800,000/= vide a consent letter dated June 19, 2019. The aforesaid sum was to be paid within 45 days from the date of filing of the consent; and the record of the lower court shows that, on July 17, 2019, a cheque for Kshs 400,000/= was forwarded to the respondent by the defendants through the firm of M/s Murimi, Ndumia, Mbago & Muchela Advocates, in partial settlement of the decretal amount. Apparently, the balance of Kshs 400,000/= was never paid in spite of demand and reminders by the respondent. She consequently opted to look to the appellant for payment in its capacity as the insurer of the suit motor vehicle.



3. Thus, upon issuing the statutory notice to the appellant, the respondent filed Mombasa CMCC No 1500 of 2019 praying for judgment in the sum of Kshs 400,000/= together with interest and costs. The appellant opposed the suit vide its Defence dated September 13, 2019. It conceded, at paragraph 3 of the Defence that it insured Motor Vehicle Registration No KBK 447J; and that the motor vehicle was towing a trailer Registration No ZB 9308 when it was involved in a road traffic accident on December 9, 2016 at Jomvu area. The appellant further conceded that the lower court suit was compromised and partially settled by it; but alleged that this was on the understanding that M/s Geminia Insurance Company Ltd which had insured the trailer Registration No ZB 9308 would settle the balance of the decretal sum of Kshs 400,000/=; and that in default, the outstanding balance would be borne by David Mburu and Aldonai Enterprises Ltd.
4. Accordingly, the appellant contended that it was not statutorily or contractually liable to settle the balance of the decretal sum; to which end it averred that it would commence Third Party Proceedings against David Mburu and Aldonai Enterprises Ltd. The lower court record confirms that a Third Party Notice was issued on January 13, 2019 as had been intimated in the Defence, but was not pursued to conclusion because, on the October 2, 2019, the respondent filed an application for the striking out of the defence, which application was allowed by the lower court (Hon. Nyariki, RM) on the December 16, 2020.
5. Being aggrieved by the lower court's ruling, the appellant filed this appeal on the following grounds:
  - (a) That the learned magistrate erred in failing to appreciate and correctly apply the requisite principles in an application to strike out Statement of Defence.
  - (b) That learned magistrate erred and misdirected himself in law by failing to consider the appellant's prima facie defence, which raised significant triable issues that could only be ventilated on a full hearing or trial on the merits.
  - (c) That the learned magistrate erred and misdirected himself in in law by striking out the Statement of Defence notwithstanding that the appellant had commenced its claim for indemnity against the Third Party.
  - (d) That the learned magistrate erred and misdirected himself in law by striking out the Statement of Defence summarily without according the appellant an opportunity to ventilate its Defence and its demonstrable claim for indemnity against the Third Party.
6. Consequently, the appellant prayed that the ruling and orders of the subordinate court dated on December 16, 2020 be reviewed and/or set aside; and that the Court be pleased to remit the matter to the trial court for hearing on its merits. The appellant also prayed that costs of the appeal be borne by the respondent.
7. The appeal was urged by way of written submissions pursuant to the directions given herein on October 24, 2022. The appellant's written submissions were filed on September 16, 2022 by Mr. Mbago. His basic argument was that the learned magistrate applied the wrong principles of law in arriving at his decision. He contended, on the authority of *Job Kilach v Nation Media Group Ltd & Another* [2015] eKLR and *Mercy Nduta Mwangi t/a Mwangi Keng'ara & Company Advocates v Invesco Assurance Company Limited* [2017] eKLR among others, that striking out of a pleading is a draconian act which should only be resorted to in plain and obvious cases; and that a defence which raises a triable issue does not mean a defence that must succeed.
8. On his part, Mr. Kenza, learned counsel for the respondent pointed out that the primary suit was settled by consent and the requisite statutory notice was served before the declaratory suit was



instituted. He further submitted that it is the obligation of the appellant to settle the decretal sum and thereafter seek indemnity, if it so wishes. In support of his argument that once it is established that the driver of the prime mover was to blame the issue of liability for the trailer should not arise, Mr. Kenza relied on *Cosmas Mutiso Muema v Kenya Road Transporters Ltd & Another* [2014] eKLR. He consequently urged the Court to uphold the decision of the lower court.

9. This being a first appeal, it is the duty of this Court to re-evaluate the evidence placed before the lower court and make its own conclusions thereon. The words of Sir Clement de Lestang, VP, in *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123, are apt, namely, that:

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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...”

10. Moreover, it is now settled that when it comes to the exercise of discretion, an appellate court ought to exercise caution before setting aside the decision of the court appealed from. Hence, in *United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd* [1985] E.A 898, the Court of Appeal reiterated that:

“The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”

11. The principles are equally applicable to appeals from the subordinate court to the High Court. Guided thereby, I have perused and considered the grounds of appeal raised herein in the light of the proceedings and ruling of the lower court as well as the submissions made herein. It is manifest that the lower court paid attention to the applicable provisions of the law, including the implications of Section 10 of the *Insurance (Motor Vehicles Third Party Risks) Act*, Chapter 405 of the Laws of Kenya and correctly found that whereas the appellant may have a ground to repudiate liability under the insurance contract, that ought not to affect the right of a third party such as the respondent herein.

12. More importantly, both Mr. Mbago and Mr. Kenza made reference to the decision of Hon. Kasango, J. in *Cosmas Mutiso Muema v Kenya Road Transporters Limited & Another* (supra), with which I am in agreement, in which it was held:

“where no evidence was adduced as to ownership of the trailer, and if the trailer was being towed by the defendant’s motor vehicle at the time of the accident, liability of the trailer should not be determined distinctly and separately from the prime mover itself. Once it is established that the driver of the prime mover was to blame that ... is enough to hold the owners of the same liable for the negligence of the driver.”

13. In the result, I find no merit in the appeal. It is hereby dismissed with costs.



14 It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 31<sup>ST</sup> DAY OF JANUARY  
2023**

**OLGA SEWE**

**JUDGE**

