Madison Insurance Company Kenya Limited v Njiru & another (Suing as the Administrator of the Estate of Dorothy Muthoni - Deceased) (Civil Appeal 23 of 2020) [2022] KEHC 11112 (KLR) (26 May 2022) (Judgment)

Neutral citation: [2022] KEHC 11112 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CIVIL APPEAL 23 OF 2020

GWN MACHARIA, J

MAY 26, 2022

BETWEEN

MADISON INSURANCE COMPANY KENYA LIMITED ..... APPELLANT

AND

ROBERT NJIRU & ANOTHER ..... RESPONDENT

SUING AS THE ADMINISTRATOR OF THE ESTATE OF DOROTHY MUTHONI - DECEASED

JUDGMENT

The Appeal

1. The instant appeal is with respect to a ruling by Hon. J. Karanja, Senior Resident Magistrate in Naivasha Chief Magistrate's Court in CMCC No. 354 of 2019 delivered on the 29th day of May, 2020 where the court allowed an application filed on the 1st day of July, 2019 in which the Respondent sought to have the Applicant's statement of Defence dismissed.

2. The Appellant being aggrieved by the said decision filed a Memorandum of Appeal on 22nd day of June, 2020. The same contains the following grounds, That:

    a. The Honourable Magistrate erred in law and in fact by failing to consider the issues and authorities submitted by the Appellant in its submissions.

    b. The Honourable Magistrate erred in law and fact by failing to find that the Appellant had raised a reasonable defence on merit with triable issues which ought to have been canvassed at the hearing of the suit.

    c. The Honourable Magistrate erred in law and fact by failing to take into account the oral submissions submitted by the Appellant at the hearing of the Respondent's application.

d. The Honourable Court magistrate erred in law and in fact by failing to consider the Appellant's submissions on the question of the Respondents' claim not falling within the meaning of Section 5(b) (ii) of cap 405 Laws of Kenya.

e. The Honourable Magistrate erred in law and fact by finding that the Appellant's statement of defence amounts to an admission on record and entered judgment on the said basis.

f. The Honourable Magistrate erred in law and in fact by failing to be bound by the principle of stare decisis on legal questions pertaining to striking out of pleadings, judgment on admissions and section 5(b) (ii) of cap 405 Laws of Kenya.

g. The Honourable Magistrate erred in law and fact in considering extrinsic matters and based the ruling on the same.

h. The Honourable Magistrate's decision is contrary to and against the weight of evidence before the Court.

3. The Appellant urged the Court to allow the appeal, set aside the ruling and sequential orders and award it both costs of the appeal and the application in the Surbodinate Court.

4. The Appeal was canvassed by way of written submissions.

5. This being the first appeal I am required to consider the evidence adduced, evaluate it and draw my own conclusions, bearing in mind that I did not hear and see the witnesses who testified see *Selle & Another Vs Associated Motor Boat Company Ltd & Others* [1968] EA 123 here the Court stated as follows: -

> " 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 to 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.

Background

6. The Respondents filed a declaratory against the Appellant being Naivasha Cmcc No. 354 of 2019 on the 4th day of May, 2019 that the Appellant be held liable to satisfy the decree in Naivasha CMCC no. 806 of 2016 under the provisions of Section 10 of the Insurance (Motor Vehicle 3rd Party) Act, Cap 405 Laws of Kenya having obtained a judgment in the sum of Kshs. 1,213,889.00 together with costs of the suit and interests. The aforementioned suit proceed ex parte and was concluded leading to the filing of CMCC No. 354 of 2019.

7. The claim was based on the averment by the Respondents that the deceased did while a passenger on board motor vehicle registration number KBG 326L insured by the Appellant as at the date of the policy no. CTY/701/084543 which was active as at the date of the accident. The same is not denied by the Appellant.

8. The Appellant filed its statement of defence with respect to CMCC No, 354 of 2019 dated the 11th day of June, 2019. A reply to defence was filed by the Respondents on the 28th day of June, 2019 in which they reiterated the contents of the Plaint and averred that that the said statement of defence be struck out.

9. Irked by the statement of defence, the Respondents vide the Application dated the 1st day of July, 2019 sought to have the same struck out. The said application was brought pursuant to order 13 rule 2 and order 2 rule 15 (1) (a) (c) & (d)The following orders were sought:

    1. That judgment on admission be entered for the Plaintiff as per the Plaint.

    2. That in the alternative the statement of defence dated the 11th day of June, 2019 be struck out for failing to disclose any reasonable defence in law and for being an abuse of the court process.

    3. Thatjudgment be entered for the Plaintiff as per the Plaint.

    4. Thatcosts of the application be provided for.

10. The said Application by the Respondents was supported by the Affidavit of Benjamin G. Wainaina, an advocate and sworn on the even date

11. The grounds were that the statement of defence does not traverse the Plaint and contains mere denials. Further, the documentary evidence in support of the Respondents' case was overwhelming so as to conclusively aid the court reach a decision at the preliminary stage.

12. Further, it was averred by the Respondents that the said statement of defence amounted to admissions inter alia that the Appellant had insured the motor subject motor vehicle as at the time of insurance, the deceased was travelling in the said motor vehicle as a passenger, the notices prior to instituting the suit and upon instating the suit were served thus the said admissions meant the Appellant had no sustainable defence and/or one that raised any triable issues.

13. The Appellant opposed the said application vide a replying affidavit sworn by its legal officer one Charles Gathu on the 2nd day of July, 2019.

14. The Appellant averred that the application out to be struck out as it was brought under the wrong provisions of the law and on basis that the prayers sought were unattainable as the Appellant had a strong defence that raised multiple triable issues. It was the averment of the Appellant that the application sought to bar it from being heard.

15. It was further averred by the Appellant that being a declaratory suit, the same needed to proceed to full trial for purposes of establishment of whether the same falls under *Insurance (Motor Vehicles Third Party Risks) Act*, chapter 405 of Laws of Kenya.

16. It is was the Appellant's averment that the insured had breached the terms of the policy pursuant to which it had proceeded to file a suit being Naivasha CMCC No. 661 of 2017 which had not been concluded.

17. The Appellant in its statement defence had categorically disputed the existence of a valid judgment against it with respect to the claim.

18. Additionally, the Appellant averred that the Respondents were yet to justify their claim falling under applicable provisions of the *Insurance (Motor Vehicles Third Party Risks) Act*, chapter 405 of Laws of Kenya which would only be capable of ascertained upon full trial.

19. The Learned Magistrate proceeded to deliver a ruling on the said application allowing the same while noting:

> Having duly made consideration, I do find a summation that the following are factual and are admitted.

a. That the defendant insured the suit motor vehicle vide policy no. CTY/701/084543/2015

b. That judgment was entered in favour of the Plaintiff for the stated sum.

The Defendant relies largely on CMCC 661 OF 2017 which I had previously ruled vide an earler application and ruling was distinct to the present one. Even so, having considered the existence of CMCC 661 of 2017 and declaration sought therein, it is my opinion that the same would not satisfy the mandatory legal requirements and particularly to afford repudiation or overture as it were their obligations under the policy and ultimately entitled to the Plaintiff in the suit.

In conclusion therefore, I allow the Plaintiffs application in terms of prayers 1, 3 and 4

That judgment on admission be entered for the Plaintiff as per the Plaint

The judgment be entered as per the Plaint.

The Costs of the suit be provided for."

Appellant's Submissions

20. The Appellant filed its submissions on the 1st day of February, 2022 in support of the appeal.

21. The fist limb of the submissions was whether the statement defence that was struck out by the impugned ruling raised triable issues as having been raised as the second ground of appeal. In this regard, the Appellant submitted that it denied the allegations raised by the Respondents in the Plaint and the said statement of defence raised multiple triable issues.

22. The Appellant submitted that at paragraph 3 of the said statement of defence it had averred that it was only bound to pay and make good loss of injury occasioned to third parties through the use of the suit motor vehicle as per the terms of the insurance policy.

23. It was further submitted by the Appellant that the insured had breached the terms of the policy with respect to the accident that had occurred on October 4, 2015 and as such the Respondents were not entitled to any declaration thereon or at all pursuant to the policy. The same was stated to have been raised in paragraph 5.

24. Additionally, the Appellant submitted that the insured had been informed of the intention to repudiate the clam and a suit had been instituted seeking the said orders in Naivasha Pmcc No. 661 of 2017: Madison Insurance Company Limited vs Lilian Wanjiru Kiarie as contained in paragraphs 7 and 9 respectively of its statement of defence.

25. The Appellant urged the Court to find that the foregoing elements of its statement of defence were triable issues.

26. In a bid to persuade the Court, the Appellant invited the Honourable Court to consider the position in *Transcend Media Group Limited v Independent Electoral & Boundaries Commission (IEBC)* [2015] eKLR where the court considered what amounts to a triable issue as follows:

> "In the case of a defence, the court must also be satisfied upon examination of the defence that it is a sham, it raises no bona fide triable issue worth a trial by the court and note that a triable issue is not necessarily one which must succeed but one that passes the Sheridan J Test in Patel Vs Ea Cargo Handling Services Ltd(1974)EA 75 at p.76where Duffus P held

that "a triable issue is an issue which raises a prima facie defence and which should go to trial for adjudication."

27. The Appellants submitted that it was significant to have a defence go on trial if a triable issue was raised as was the position in *CFC Stanbic Bank Ltd v John Ndirangu Karega & 2 others* [2017] eKLR where it was held:

> " In Provincial Insurance Company of East Africa Limited now known as UAP Provincial Insurance Limited vs Lenny M. Kivuti, Civil Appeal No. 216 of 1996 (unreported) the Court of Appeal stated:-
>
> "In an application for summary judgment even one triable issue, if bona fide, would entitle the defendant to have unconditional leave to defend."

28. It was also submitted by the Appellant that the courts ought to be so cautious not to strike out pleadings with reference made to the case of *Kenya Orient Insurance Co. Ltd v Paul Mathenge Gichuki & another* [2017] eKLReKLR that:

> " The law therein enumerated is that courts should be slow at striking out a pleading and should only do so in the clearest of the clear cases and where such a pleading is so hopeless and plainly lacking in substance as to be incapable of injection with life even by an amendment."

29. On buttressing its position that it had raised several triable issues and it is only need that one triable issue be raised for a defence to sustain, the Appellant relied on *Africa Merchant Assurance Company Limited v Kiringoli Ngukalai Katitia & another* [2017] eKLR where it was stated:

> " Additionally in holding that the defence raised could not succeed, the trial court erred in its appreciation of the principles applicable. The principles applicable is that one only needs to raise a triable issue and a triable issue must not be a defence that must succeed.
>
> Once that is established, a single triable issue, the court has no discretion in the matter, the defendant must be given his right to defend the suit and so defend unconditionally."

30. The Appellant submitted that the Learned Magistrate had erred on the principles governing judgment on admission. In this regard, it consolidated ground 5 and 6 of the memorandum of Appeal.

31. The Appellant submitted that in its statement of defence it never admitted to be bound to satisfy the Respondents' claim as per the Plaint. The admission to having issued the policy aformention was not an admission of any and every claim arising from the said policy as per order 13 of the C*ivil Procedure Rules,* 2010 which provides:

[Order 13, rule 1.] Notice of admission of case.

> Any party to a suit may give notice by his pleading, or otherwise in writing, that he admits the truth of the whole or part of the case of any other party.
>
> (Order 13, rule 2.] Judgment on
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> 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 admissions 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 application make such order, or give such judgment, as the court may think just.

32. In urging the Honourable Court to consider what amounts to admission, the Appellant invited the Honourable Court to consider the position in *Koinari Leikari Kanamo v Athi River Mining Limited & another* [2015] eKLR where it was stated:

> "Choitram -V- Nazari (1984) KLR 327- .... admission can be expressed or implied either on the pleadings or otherwise, e.g. in correspondence. Admissions have to be plain and obvious, as plain as a pikestaff and clearly readable because they may result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning. "

33. In view of the foregoing, it was the Appellant's submission that acknowledging it had issued a policy was not an admission to settle the claims arising from the same even when it was of the strong conviction that the insured had breached the policy.

34. The Appellants further submitted that the Trial Court considered extrinsic matters and disregarded the evidence on record as per grounds 7 and 8 of the memorandum of Appeal.

35. It is the submission of the Appellant that it had sufficiently brought to attention of the court through its replying affidavit of the existence of Cmcc No. 661 of 2017 in which it was seeking orders that it repudiates the claims from the said policy. The said matter was not before the Trial Court and it was further informed that the Respondents were enjoined in the said suit as interested parties. The Trial Court ought to have restricted itself to the application and not addressed merits of the case in Cmcc No. 661 of 2017 as the same had not been placed before him to make a determination on.

36. In support of grounds 1, 3, 4 and 6 of the memorandum of appeal, it was submitted that the Trial Court erred by failing to be guided by the doctrine of stare decisis.

37. The Appellant submitted that in striking out the defence and allowing the prayes by the Respondents in their Plaint, the Learned Magistrate failed to be guided by authorities on applicability of section 5 (b) of the *Insurance (Motor Vehicles Third Party) Act,* what constitutes a triable issue, judgment on admission and the right to be heard.

38. In view of the foregoing, the Appellant urged the Honourable Court to allow the appeal by setting aside the ruling delivered on the May 29, 2020; and restoring the Appellant's right to be heard and trial in Naivasha Cmcc 661 of 2017.

Respondent's Submissions

39. The Submissions by the Respondents urging the Honourable Court to uphold the decision of the Learned Magistrate were filed on the February 7, 2022.

40. The Respondents submitted that the statement of defence inter alia that it had insured the subject motor vehicle as at the time of the accident and it had been served with a notice of institution of suit as required. It was the Respondents' case that the said admissions were clear, obvious and unequivocal thus qualifying for judgment on admission.

41. The Respondents further urged the Court to find that the Appellant had failed to raise any triable issue(s) and the issues raised in the submissions were not in the statement of defence thus contrary to the provisions of Order 2 Rule 4.

42. It was the strong conviction of the Respondents that they had proved that the deceased had been made a third party in a accordance with the provisions of section 5 (b) of the *Insurance (Motor Vehicles Third Party) Act*, the Appellant was left with no triable issue warranting the matter to go to full trial.

43. The Respondents urged the Court to find that the Learned Magistrate could not be faulted for having the dispute resolved without undue delay. They urged the Court to consider the position in *AAT Holdings Limited v Diamond Shields International Ltd* [2014] eKLR where it was stated:

> " There are sound legal and policy consideration which are responsible for the approach taken by the law on this subject; arising from the right of access to and to justice by all parties. On the one hand, there is the Defendant who will be driven from the seat of justice without trial if summary judgment is entered, and on the other hand, you have the Plaintiff who is entitled to expeditious disposal of his case without delay especially where the Defendant has not any defence worth a trial. Which, then places the court in a situation where it has to engage in a novel and delicate balancing act of ensuring that; 1) the Defendant gets a fair trial by considering whether a bona fide triable issue exists; and 2) the Plaintiff equally gets fair trial by eliminating such delay in the administration of justice which would keep him away from his just dues or enjoyment of property; this is the basis for the entry of summary judgment under Order 36 of the CPR in appropriate cases."

44. The Respondents prayed that the Appeal be dismissed with costs.

Analysis and Determination

45. The duty of this Honourable Court, being the first Appellate Court is to re-examine and re-evaluate the evidence on record and arrive at its own conclusion. It should also bear in mind that it did not see nor hear the witnesses and give an allowance for that. This position was emphasized in the case *Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR (Civil Appeal No. 161 of 1999) in the following manner:-

> " This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

46. I have perused said statement of defence dated the 11th day of June, 2019 filed by the Appellant. In paragraph 5, 7, 8, 9 and of the said statement of defence, the Appellants state as follows:

> 5. In the alternative and without prejudice to the foregoing, the defendant avers that if the alleged accident occurred, its insured was in breach of the contract and/or policy of insurance when the accident occurred and as such the Plaintiff herein is not entitled to a declaration therein or at all pursuant to the insured's breach of contract"
>
> 7. "The Defendant admits the contents of paragraph 7 in part and avers that pursuant to service of the statutory notice of intention to institution of suit per the provisions of CAP 405 Laws of Kenya and subsequent investigations carried out by the Defendant as relates to the events of 4/10/2015, the Defendant proceeded to notify its insured of the intention to repudiate any claims arising from the said policy and as a consequence of the aforementioned the Plaintiff was not entitled to any declaration".

8. The defendant denies the content of paragraph 8 of the plaint and in particular that it was ever served with a notice of entry of judgment in Naivasha Cmcc No.886 of 2016 having been entered against its insured for Kshs. 1,041,320.00 plus costs of Kshs, 165,690.00 plus interest of Kshs. 6,879.90 totaling to Kshs. 1,213,889.00. The Defendant further avers that pursuant to the aforementioned it is not liable to settle the total decretal sum in Naivasha Cmmc No. 886 of 2016 therein or at all."

9. The Defendant further avers that due to the said breach of policy by the insured, it proceeded to file a declaratory suit in Naivasha Cmcc No. 661 of 2017 , Madison Insurance Company Limited Versus Lilian Wanjiru Kiarie as it not duty bound to settle any claims arising out of the policy no. CTY/701/0845543/2015, Naivasha Cmcc 866 of 2016 being one of the claims arising thereof"

10. The Defendant will at the opportune moment seek stay of the instant suit proceedings pending hearing and determination of Naivasha Cmcc 661 of 2017 Madison Insurance Co. Ltd V Lilian Wanjiru Kiaries. Without prejudice to the foregoing, in the event the Defendant's declaratory suit as against its insured for breach of contract takes precedence as it was filed on priority to the Plaintiff's suit herein seeking a declaration that the defendant is liable to satisfy the decree in Naivasha Cmcc No. 886 of 2016"

47. I have considered the above paragraphs of the statement of defence and note that the issue of breach of the policy was raised in paragraphs 5, 7, 9 and 10. This begs the question as to how the Defendant was to establish that indeed there was breach of obligations by its insured. It is the foregoing averment that led it to file the declaratory suit against the insured. The said breach if indeed was occasioned would have been established pursuant to trial in the said proceedings which would have then established whether or not in the contract repudiates. The parties conceded that the said suit being Naivasha Cmcc No. 661 of 2017 was yet to be concluded.

48. In said statement of defence, the Appellant raised the issue of having not been served with a notice of entry of judgment in the Naivasha Cmcc 886 of 2016. The Respondents denied that the same was served. However, in the Respondent's claim in 354 of 2019, the annexed list of documents does not list such notice was filed and/or intended to be relied on by the Respondents.

49. In view of the foregoing, a cursory perusal of the defence shows that it raises triable issues and should not be struck out at this stage. I associate with the position of the court in *D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another* Civil Appeal 37 of 1978 [1980] eKLRby Madan JA thus:

> The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof, before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage the court ought not to deal with any merits of the case for that 'is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits "without discovery, without oral evidence tested by cross-examination in the ordinary way". (Sellers, L.J. (supra)). As far as possible, indeed not at all, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks it right.
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> If an action is explainable as a likely happening which is not plainly and obviously impossible the court ought not to overact by considering itself in a bind summarily to dismiss the action.

A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it.

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."

50. In *Saudi Arabian Airlines Corporation v Sean Express Services Ltd* Civil Case No. 79 of 2013 [2014] eKLRthe court held:

> "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." Therefore, on applying the test, a defence which is a sham should be struck out straight away."

51. The Honourable Court finds persuasive the authority of *Africa Merchant Assurance Company Limited v Kiringoli Ngukalai Katitia & another* [2017] eKLR where the Court stated:

> "It is clear from the exerpt that the trial court fully ignored to consider any aspect of the defence filed beyond the issue of notice to the Appellant. To that extent it failed to consider a relevant issue it was bound to consider and thus this court is bound to correct that error by setting the judgment aside. That issue was whether the policy issued covered the plaintiff as a passenger in the motor vehicle.
>
> Additionally in holding that the defence raised could not succeed, the trial court erred in its appreciation of the principles applicable. The principles applicable is that one only needs to raise a triable issue and a triable issue must not be a defence that must succeed.
>
> Once that is established, a single triable issue, the court has no discretion in the matter, the defendant must be given his right to defend the suit and so defend unconditionally."

52. In view of the foregoing, the Court is convinced the said statement of defence is not a sham and should not be struck out. The issue of whether the policy issued covered the deceased as a passenger in the motor vehilcle was raised in the defence. I find the same triable. The Appellant ought to be accorded the opportunity to proffer its defence on merit.

53. The next issue whether the Learned Magistrate erred in entering judgment on admission against the Appellant. The Honourable Court notes that judgment on admission can either be in express or in implied. In both instances the facts relied on ought to be clear and unambiguous as was held in the case of *Choitram v Nazari* (1984) KLR 237 that:

> " For purpose of Order XII rule 6 admission can be express or implied either on the pleading or otherwise eg in correspondence. Admission have to be plain and obvious, as plain as a pikestaff and clearly readable because they may result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning. Much depends on the language used. The admission must leave no room for doubt that the parties passed out of the stage of negotiations onto to a definite contract. It matters not if the situation is arguable, even if even if there is a substantial argument, it is an ingredient of the jurisprudence, provided that a plain and obvious case is established upon admissions by analysis. Indeed, there is no other way, and analysis is unavoidable to determine whether admission of fact has been made either on the pleadings or otherwise to give such judgment as upon such admission any party may be entitled to without waiting for the determination of any other question between the parties. In considering the matter, the judge must neither become disinclined nor lose himself to the jungle of words even when faced with a Plaint such as the one in this case. To analyze pleadings, to read correspondence, and to apply the relevant law is a normal function performed by judges which has become established routine in our courts..."

54. The court is alive to the principle that judgments on admission are discretionary in nature and should be cautiously applied. This was the position in *Cassam vs Sachania* [1982] KLR 191 where it was held that:

> " Granting judgment on admission of facts is a discretionary power which must be exercised sparingly in only plain cases where the admission is clear and unequivocal... Judgment on admission cannot be granted where points of law have been raised and where one has to resort to interpretation of documents to reach a decision."

55. In view of the foregoing authorities, the court is tasked with establishing whether the Appellant implied or expressly admitted the claim against it for satisfaction of the decree in Naivasha Cmcc No. 886 of 2016. The Learned Magistrate in affirming the existence of an admission that was plain and ambiguous stated that the Appellant had acknowledged issuance of the policy and the existence of a judgment against its insured. I do not find the same to be an implied or express admission to the averments and prayers in the Plaint in Naivasha Cmcc No 354 of 2019 as the Appellant in its statement of defence refutes that it is liable to satisfy the said decree as the insured had breached the terms of the policy and it had since filed a suit with respect to having the same declared so.

56. In the premises, the admission of the Appellant was limited to the issuing an insurance policy, occurrence of an accident and the existence of a judgment against its insured. It did not in clear and unequivocal way either expressly or impliedly admit it was liable to satisfy the decree in favour of the Respondents.

57. On the issue of whether the Learned Magistrate considered extrinsic matters, it would appear the Learned Magistrate in his ruling based his conclusions on their personal evaluation of the suit filed by the Appellant seeking declaratory orders against their insured. The said suit was not for consideration in the Application by the Respondents. However, the Learned Magistrate suo moto evaluated the same and was of the conviction that it was bound to fail. The merit(s) of the said suit was not subject to the determination as per the Respondents' application.

58. It is trite that both the parties and the court are bound by pleadings as was held in *Raila Amollo Odinga & Another vs Independent Electoral & Boundaries Commission & 2 Others* [2017] eKLR where the Supreme Court cited the decision of the Malawi Supreme Court of Appeal in *Malawi Railways Ltd vs Nyasulu* [1998] MWSC 3, in which the learned judges quoted with approval from an article by Sir Jack Jacob entitled "The Present Importance of Pleadings" the same was published in [1960] Current Legal Problems at p 174 whereof the author had stated:-

> " As the parties are adversaries, it is left to each one of them to formulate his case in his own way subject to the basic rules of pleadings .....for the sake of certainty and finality; each party is bound by his own pleadings and cannot be allowed to raise a different fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....
>
> In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."

59. In the foregoing circumstance, I find that the Learned Magistrate faulted allowing the Respondents' application based on his opinion on the merits of the Appellants case in Naivasha Cmcc No.661 of 2017.

Disposition

60. Accordingly, this appeal succeeds, the ruling of the learned trial magistrate delivered on 29th day of May, 2020 in Naivasha CMCC No. 354 of 2019 is hereby set aside and it is hereby directed that the case be heard on its merits.

61. The Trial Court is hereby directed to fix Naivasha Cmcc No. 661 of 2017 for hearing on priority basis.

62. In the circumstances of this case, there will be no order as to costs.

It is hereby so ordered.

DATED AND DELIVERED AT NAIVASHA THIS 26TH DAY OF MAY, 2022.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

Ms. Mukami h/b for Mr. Kinyanjui for the Appellant.

Mr. Wainanina for the Respondent