



REPUBLIC OF KENYA



**KENYA LAW**  
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**Wangui v Monarch Insurance Co. Ltd (Civil Appeal E275 of 2020)  
[2022] KEHC 10584 (KLR) (Civ) (26 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 10584 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E275 OF 2020**

**CW MEOLI, J**

**MAY 26, 2022**

**BETWEEN**

**JOHN MWANGI WANGUI ..... APPELLANT**

**AND**

**MONARCH INSURANCE CO. LTD ..... RESPONDENT**

*((Being an appeal from the ruling of L T Lewa (SRM) Delivered on  
October 15, 2020 in Nairobi Milimani CMCC No 8473 of 2019))*

**JUDGMENT**

1. This appeal emanates from the ruling delivered on October 15, 2020 in Nairobi CMCC No 8473 of 2019. The events leading to the ruling were that in 2019, John Mwangi Wangui, (hereafter the Appellant) filed a declaratory suit in the lower court against Monarch Insurance Company Ltd (hereafter the Respondent) seeking payment of a sum of Kshs 3,824,537/= being the decretal sum in Kikuyu SPMCC No 235 of 2013 (hereafter the primary suit). The Appellant averred in the declaratory suit that the Respondent had insured motor vehicle registration number KBJ 751U and that on December 20, 2016, judgment in favour of the Appellant against the Respondent's insured was entered in the sum of Kshs 2,636,424/= and a decree issued. The Appellant averred that under the provisions of the *Insurance (Motor Vehicle Third Party Risks) Act* (Cap 405) Laws of Kenya the Respondent was under a statutory obligation to satisfy the decree in the primary suit.
2. The Respondent filed a statement of defence on December 11, 2019 denying the key averments in the plaint including the existence of a valid insurance cover to its alleged insured in the primary suit and asserted that the Appellant had no valid claim against it. On December 18, 2019 the Appellant filed the motion dated December 17, 2019 expressed to be brought under Sections 1A, 1B & 3A of the *Civil Procedure Act* and Order 2 Rule 15 of the *Civil Procedure Rules* *inter alia* seeking that the statement



- of defence filed by the Respondent be struck out on grounds that it was scandalous, frivolous and vexatious, and that judgment be entered for the Appellant as prayed in his plaint.
3. The grounds on the face of the motion were amplified in the supporting affidavit of Benson Kamunge, counsel having conduct of the matter on behalf of the Appellant. To the effect that the cause of action in the primary suit arose out of a road traffic accident that occurred on March 3, 2013, involving the Appellant, a pedestrian and motor vehicle registration number KBJ 751U insured by the Respondent under their policy number 2011/080/010830/TPO; that the Appellant was therefore a third party within the meaning of the provisions of the Insurance (Motor Vehicle Third Party Risks) Act Cap 405 Laws of Kenya; that the Respondent was served with a statutory notice on September 9, 2013 in accordance with the provisions of Section 10(2) of the *Insurance (Motor Vehicle Third Party Risks) Act* Cap 405; and that the primary suit proceeded to full hearing and judgment was granted in favour of the Appellant against the Respondent's insured. Counsel further deposed that the Respondent's appeal with respect to the primary suit was dismissed and the Respondent could not possibly have credible or triable defence against the Appellant's claim.
  4. The Respondent opposed the motion through a replying affidavit dated aFebruary 13, 2020 and thereafter parties canvassed the motion by way of written submissions. The ruling dismissing the Appellant's motion delivered on October 15, 2020 provoked this appeal, which is based on the following grounds:
    1. That the Learned Trial Magistrate erred in law and in fact in failing to appreciate the provisions of the law under the Insurance (Motor Vehicle Third Party Risks) Act Cap 405 Laws of Kenya.
    2. That the Learned Trial Magistrate erred in law in failing to appreciate and or correctly interpret the judicial authorities of the High Court referred to by the Appellant in his submissions and which authorities are legally binding on her.
    3. That the Learned Trial Magistrate erred in law and in fact in failing to determine whether the Respondent had complied with the law by availing itself to the provisions of Section 10(2) and (4) of the Act." (sic)
  5. The appeal was canvassed by way of written submissions. Counsel for the Appellant contended that the trial magistrate allowed the Respondent to defend the suit on the ground that the statement of defence traversed the averment in the plaint that the Respondent had insured the accident motor vehicle, and yet the Appellant had a tendered a copy of the police abstract produced in the primary suit indicating that the said motor vehicle was insured by the Respondent. Further, that the Respondent had been served with a statutory notice following the filing of the primary suit as required by law.
  6. Citing several decisions, including *Blueshield Insurance Co Ltd v Raymond M Rimberia* [1998] eKLR, Civil Case No 132 of 2003 *Edwin Ogada Odongo v Phoenix of East Africa Assurance Co Ltd* and Civil Appeal No 84 of 2016 *John Karanja Njenga v Invesco Assurance Co. Ltd* counsel argued that interpretation of Section 10 of the Insurance (Motor Vehicle Third Party Risks) Act Cap 405 was settled in the foregoing decisions and the trial magistrate erred in distinguishing the matter before her from the said precedents.
  7. He asserted that the Respondent's response to the motion and statement of defence contained mere denials that raised no triable issues as envisaged in several decisions, including *Patel v E A Cargo Handling Services Ltd* [1974] E A 75 and *Industrial and Commercial Development Corporation v Daber Enterprises Limited* (2000) 1 E A 75 and the motion ought to have been allowed. The court was therefore urged to allow the appeal with costs.



8. The Respondent supported the trial court's findings. The Respondent's counsel condensed the Appellant's grounds of appeal into two key issues, namely, whether the trial court was entitled to distinguish the instant case from the authorities tendered by the Appellant and the proper application of Section 10 of the Insurance (Motor Vehicle Third Party Risks) Act (Cap 405) in the matter. Revisiting the Appellant's authorities, counsel argued that the circumstances of the case before the court differed from those obtaining in the said authorities in the key sense that though the authorities affirmed the obligation of the insurer under section 10(1) of Cap 405 to satisfy a decree passed against their insured, they were important for the substantive determination of the main dispute rather than motions seeking to strike out a defence where the key consideration was whether the defence raised a triable issue. Equally, concerning the application of Section 10 of Cap 405 counsel cited *D.T Dobie & Co (Kenya) Limited v Muchina & Another* [1982] KLR, *Lalji t/a Vakkep Building Contractors v Carousel Limited* [1989] eKLR and *Kenya Trade Combine Ltd v MShah* Civil Appeal No 193 of 1999 to submit that although the suit before the lower court was a declaratory suit, the motion leading to this appeal was primarily premised on the provisions of Order 2 Rule 15 of the Civil Procedure Rules. Thus, counsel asserted that the trial court applied the relevant principles in determining the motion. He urged that the appeal be dismissed.
9. The court has perused the record of appeal as well as the original record and considered the material canvassed in respect of the appeal. The duty of this court as a first appellate court is to re-evaluate the evidence adduced in the lower court and to draw its own conclusions, but always bearing in mind that it did not have opportunity to see or hear the witnesses testify. See *Peters v Sunday Post Ltd* [1958] EA 424; *Selle and Anor v Associated Motor Boat Co Ltd and Others* [1968] EA 123; *William Diamonds Ltd v Brown* [1970] EA 11 and *Ephantus Mwangi and Another v Duncan Mwangi Wambugu* [1982] – 88) 1 KAR 278.
10. The Court of Appeal stated in *Abok James Odera t/a A J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR that:
- “This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze 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.”
11. The lower court in allowing the motion expressed itself in part as follows:
- “I have gone through the grounds cited in support of the motion, the averments made in the affidavit in support and the flipside arguments captured in the replying affidavit.
- In similar vein, I have taken time and considered the submissions filed by both parties.
- In my view, what stands for determination is whether or not the application bears merit, and whether the statement of defence as is, raises triable issues.
- .....Accordingly, I have weighed on these arguments and sought guidance from various authorities addressing such like applications. For starters, it is trite law that striking out of pleadings is draconian and should only be resorted to in extremely clear cases.
- ...I have gone through the statement of defence subject of this application.
- Paragraph 9 intimates that there was no valid insurance cover subsisting between the defendant herein and the defendant in the primary suit. Thus the plaintiff's claim as is, is invalid, and strict proof should be adduced to prove otherwise. In my view this is enough



reason why the defendant should be given their day in court. The denial may in the eye of the applicant be deemed as “vexatious”. However, for this court, this is a fact in issue that ought to thrashed out and ventilated during hearing.

...In as much as the plaintiff has a right to pursue summary judgment as provided for under the civil procedure rules, I am of the school of thought that this avenue, in most cases curtails the respondent from a fair trial and that and that only in the most clearest or cases, can the court be generous enough to allow such applications. To this end and considering all the foregoing arguments, I am not persuaded to allow the prayers sought. As such I proceed to dismiss the application with costs.” (sic)

12. The appeal turns on the question whether the trial court misdirected itself in dismissing the motion before it. The motion leading to the impugned ruling was saliently based on the provisions of Order 2 Rule 15(1) of the Civil Procedure Rules; which provides that:

“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”

13. The Court of Appeal in *Cooperative Merchant Bank Ltd V George Fredrick Wekesa* Civil Appeal No 54 of 1999 as cited in [Jubilee Insurance Co Ltd V Grace Anyona Mbinda](#) [2016] eKLR the court stated that:

“The power of the court to strike out a pleading under Order 6 Rule 13 (1) (b) (c) & (d) is discretionary and an appellate court will not interfere with the exercise of the power unless it is clear that there was either an error on principle or that the trial Judge was plainly wrong. Striking out a pleading is a draconian act, which may only be resorted to, in plain cases. Whether or not a case is plain in a matter of fact....”

See also [Kivanga Estates Limited v National Bank of Kenya Limited](#) (2017) eKLR.

14. Further, concerning discretion, the same court later in [Mashreq Bank P S C v Kuguru Food Complex Limited](#) [2018] eKLR stated:

“This Court ought not to interfere with the exercise of a Judges’ discretion unless it is satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it is manifest from the case as a whole that the Judge was clearly wrong in the exercise of discretion and occasioned injustice. Conversely, a court exercising judicial discretion must be guided by law and facts and not ulterior considerations. This much was stated by the Court of Appeal in the case of *Mbogo v Shah*, (*supra*):

“A court of appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising this discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and as a result there has been injustice”.



See; *United India Insurance Co Ltd v East African Underwriters (K) Ltd* [1985] E A 898: -

15. In the DT Dobie (*supra*) Madan J A (as he then was) enunciated several principles to be applied in an application brought under then Order VI Rule 13 (now Order 2 Rule 15) of the Civil Procedure Rules. Referring to various English decisions, Madan J A distilled the following principles:

- “a) The rule is to be acted upon in plain and obvious cases and the jurisdiction exercised sparingly and with care.
- b) ...
- c)....”

It is relevant to consider all averments and prayers when assessing under Order 6 Rule 13 whether a pleading discloses a reasonable cause of action, and also the contents of any affidavits that may be filed in support of an application that a pleading is otherwise an abuse of the process of the court... The court ought to act very cautiously and carefully and consider all the facts of the case without embarking on 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... A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal... 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.”

16. Similarly, in *Isaac Awuondo v Surgipharm Limited & Another* [2011] eKLR the Court of Appeal stated:

“Summary judgment is a drastic remedy which may be granted in the clearest of cases in which there is no bonafide defence to the plaintiff’s claim.... In *Moi University V Vishva builders Limited* Civil Appeal No 296 of 2004 (unreported) this Court said:

“The law is now settled that if the defence raises even one bonafide triable issue, then the defendant must be given leave to defend...As we know, even one triable issue would be sufficient – see *HD Hasmani v Banque Congo Belge* [1938] 5 EACA 89. We must however hasten to add that a triable issue does not mean one that will succeed. *Indeed, in Patel v EA Cargo Handling Services Ltd* [1974] EA 75 at P 76 Duffus P said:

“In this respect defence on the merits does not mean, in my view a defence that must succeed. It means as Sheridan J put it “a triable issue” that is, an issue which raises a prima facie defence and which should go for trial for adjudication”

17. In the case of *Crescent Construction Co Ltd v Delphis Bank Ltd* Civil Appeal No 146 of 2001; [2007] eKLR cited in Jubilee Insurance Co (*supra*) the Court of Appeal stated the rationale for the exhortation that the power of striking out a pleading ought to be exercised with the greatest care and caution. The court stated that:

“This comes from a realization that the rules of natural justice require that the court must not drive away any litigant however weak his case may be from the seat of justice. This is a



time-honoured legal principle. At the same time, it is unfair to drag a person to the seat of justice when the case purportedly brought against him is a non-starter.”

18. These then are the guiding principles. In the plaint filed on December 20, 2017 before the lower court, the Respondents had pleaded at paragraph 4, 5, 6, 7 and 10 that:

- “4. At all material times the defendant had insured motor vehicle registration number KBJ 751U wherein the policy holder is Kikuyu Town Council (hereinafter referred to as the insured)
5. On the 2<sup>nd</sup> day of September 2013 the Plaintiff instituted a suit against the insured namely Civil Case Number 235 of 2013 in the Senior Principle Magistrate’s Court at Kikuyu to recover damages arising out of a traffic road accident on the 3<sup>rd</sup> day of March 2013 where the Plaintiff suffered severe bodily injuries.
6. The Plaintiff duly caused the requisite statutory notice under the provisions of the Insurance (Motor Vehicle Third Party Risks) Act (Cap 405) of the Laws of Kenya) to be served upon the defendant and the defendant took up the defence of the suit for and on behalf of the insured.
7. On December 20, 2016 the Plaintiff obtained judgment against the insured in the sum of Kshs 2,636,424/= all-inclusive and the Plaintiff proceeded and obtained a decree accordingly.
10. The Plaintiff contends that the defendant is under statutory obligation to settle the claim aforesaid as per the said judgment under the provisions of the Insurance (Motor Vehicle Third Party Risks) Act (Cap 405) of the Laws of Kenya” (sic)

19. In the statement of defence statement filed on December 11, 2019 the Respondent averred at paragraph 5, 8 and 9 that;

- “5. The Defendant is a total stranger to the contents of paragraph 5, 6 and 7 of the Plaint, in particular that a notice was issued under Cap 405 Laws of Kenya judgment was issued in the suit CMCC No 235 of 2013 at Kikuyu Law Courts to the tune of Kshs 2,636,424/= all-inclusive on 20/12/2016 and the Plaintiff is put to strict proof thereof.
8. The Defendant denies that it was served with any notices of the primary suit of the interlocutory judgment, of the hearing notices of the judgment and finally notices of intention to file a declaratory suit and puts the plaintiff to strict proof thereof.
9. The Defendant in the alternative avers that there was no valid insurance cover with the defendant in the primary suit and as such the Plaintiff had no valid claim against the said defendant and the plaintiff is put to strict proof.” (sic)

20. The Appellant did not join issues with the Respondent by filing a reply to the statement of defence. Did the statement of defence disclose a triable issue? The Appellant clearly did not think so. As stated in *Kenya Trade Combine Ltd v Shah* - Civil Appeal No 193 of 1999, “a defence which raises triable issues does not mean a defence that must succeed.” At paragraph 9 above in the alternative that “there was no



valid insurance cover with the defendant in the primary suit and as such the Plaintiff had no valid claim against the said defendant and the plaintiff is put to strict proof". Evidently therefore, the existence of a valid policy of insurance was disputed by the Respondent and that alone as rightly observed by the trial court amounted to a triable issue entitling the Respondent to defend. The provisions of section 10 of Cap 405 though well-articulated in the authorities of the Appellant could not avail much in the Appellant's favour in this instance where the very existence of the insurance cover was disputed in the defence. The trial magistrate cannot be faulted, in the circumstances.

21. Indeed the decisions cited by the Appellant concerning principles that govern an application for striking out a defence, namely, *Continental Butchery Ltd V Nthiwa Industrial & Commercial Development Corporation v Daber Enterprises Limited*, *Patel v E A Cargo* all reiterate the settled principle of law that where even a single triable issue is demonstrated, the defendant ought to be allowed to defend the suit, in furtherance of the time-honored principle that no litigant should be peremptorily driven from the seat of justice and condemned unheard.

Consequently, this court is persuaded that the trial court properly exercised its discretion in dismissing the Appellant's motion. The appeal is without merit and is hereby dismissed with costs.

**DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 26TH DAY OF MAY 2022**

**C MEOLI**

**JUDGE**

**In the presence of:**

For the Appellant: Mr Mwangi

For the Respondent: Mr Muriuki

**C/A: Carol**

