



**Saham Assurance Co. (K) Limited v Okwaro (Civil Appeal E850 of 2021)
[2022] KEHC 14126 (KLR) (Civ) (21 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14126 (KLR)

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

CIVIL

CIVIL APPEAL E850 OF 2021

JK SERGON, J

OCTOBER 21, 2022

BETWEEN

SAHAM ASSURANCE CO. (K) LIMITED APPELLANT

AND

LIYENGWA FRANCIS OKWARO RESPONDENT

*(Being an appeal from the preliminary decree and orders of Honourable A.N. Makau (Ms.)
(Principal Magistrate) delivered on 17th December, 2021 in CMCC No. E9606 of 2021)*

JUDGMENT

1. By way of a plaint dated July 5, 2021 the respondent instituted a civil suit against the appellant namely CMCC No E9606 of 2021 ('the declaratory suit') and sought a declaratory order to the effect that the appellant be held liable to satisfy the decree issued in CMCC No 1060 of 2017 ('the primary suit') in the sum of Kshs 1,274,169/= plus costs of the suit, arising out of a road traffic accident involving the respondent and the registered owner of the motor vehicle registration number KXX XXXR ('the subject motor vehicle') insured by the appellant.
2. Upon being served with summons and a copy of the pleadings, the appellant entered appearance and filed its statement of defence dated July 22, 2021 to deny the averments made in the plaint.
3. Subsequently, the respondent filed the notice of motion dated August 13, 2021 and sought to have the statement of defence filed by the appellant struck out and for the entry of summary judgment against the appellant on the declaratory sum.
4. To oppose the abovementioned application, the appellant put in the replying affidavit sworn by advocate Colleta Wambua on September 8, 2021. Parties then filed written submissions on the motion.



5. In the end, the said motion was allowed, with the trial court striking out the statement of defence and entering summary judgment as prayed, in its ruling delivered on December 17, 2021.
6. The appellant has now moved this court by way of an appeal against the aforesaid decision. The memorandum of appeal dated December 28, 2021 is premised on the grounds of appeal hereunder:
 - i. That the learned trial magistrate erred in law and in fact in striking out the appellant's statement of defence.
 - ii. That the appellant's statement of defence raises a fundamental issue, which is that the suit E9606 of 2021 is sub judice.
 - iii. That the learned trial magistrate erred in law and in fact in prematurely entering summary judgment in favour of the respondent as against the appellant.
 - iv. That the learned trial magistrate erred in law and in fact by its failure to determine the suit on merit.
7. When the appeal came up before this court on June 20, 2022 for directions, the parties were directed to file and exchange written submissions. However, at the time of writing this judgment, it is apparent from the record that none of the parties had availed their submissions for consideration.
8. I have considered the grounds of appeal as laid out in the memorandum of appeal. I have equally re-evaluated the evidence tendered before the trial court in support of and in opposition to the motion.
9. The grounds of appeal all revolve around the learned trial magistrate's analysis and decision to enter summary judgment in favour of the respondent upon striking out the appellant's statement of defence. I shall therefore address the four (4) grounds contemporaneously.
10. The key issue for determination has to do with whether the appellant's statement of defence raises triable issues.
11. Turning to the application for summary judgment filed before the trial court, the same was premised on the grounds that the defence is frivolous, constitutes mere denials, lacks merit and is purely aimed at delaying the respondent's enjoyment of the fruits of his judgment.
12. The application was also premised on the grounds that judgment was entered in the primary suit and which judgment remains unchallenged, and hence the respondent is entitled to the reliefs sought in the declaratory suit.
13. In reply, advocate Colleta Wambua stated that the appellant is aggrieved by the finding of the trial court on liability in the primary suit and therefore filed an application before the High Court in Misc Application No E307 of 2021 and sought for leave to file an appeal against the decision and for a stay of execution pending appeal.
14. The advocate also stated that by virtue of the above, the aforementioned application is sub judice or res judicata and hence striking it would be greatly prejudicial to the appellant.
15. In her ruling, the learned trial magistrate reasoned that the application for leave to appeal out of time has no bearing on the orders relating to the declaratory suit and hence the appellant ought to satisfy the decretal sum issued in the primary suit.
16. The learned trial magistrate further reasoned that the primary suit was defended and hence the appellant being the insurer of the subject motor vehicle cannot argue that it was not aware of the existence of the primary suit.



17. Upon considering the above, I now seek to define the term ‘triable issue.’ In so doing, I am guided by the Court of Appeal’s rendition in the case of *Job Kilach v Nation Media Group Ltd & 2 others [2015] eKLR* thus:

’ A bona fide triable issue is any matter raised by the defendant that would require further interrogation by the court during a full trial.’
18. The court further observed that a triable defence need not be one that will ultimately succeed.
19. I have had the opportunity of perusing the appellant’s statement of defence and noted that the issues raised therein pertain to the doctrine of sub judice as relates to the primary suit and High Court Misc Application No E307 of 2021.
20. Upon my re-examination of the pleadings and material placed before the trial court, it is not in dispute that the subject motor vehicle was at all material times insured by the appellant herein and that the subject motor vehicle was involved in the material accident.
21. Upon my further re-examination of the pleadings and material presented at the trial, it is also not in dispute that the primary suit was decided in favour of the respondent.
22. From my study of the record, I observed that the appellant’s insured filed High Court Misc Application No E307 of 2021 subsequent to the filing of the declaratory suit. Though the appellant did not annex a copy of the ruling in respect to the application filed in the above misc application, upon my perusal of a copy thereof, I confirmed that the appellant was granted leave of 14 days within which to lodge an appeal against the judgment delivered in the primary suit.
23. That notwithstanding, I concur with the reasoning of both the High Court in the above matter and the learned trial magistrate in the declaratory suit, that the declaratory suit is independent of the misc application and has no bearing on the outcome thereof.
24. In view of the foregoing circumstances, I am of the view that the sub judice doctrine does not apply in respect to the declaratory suit and the misc application.
25. Going by the record, there is nothing to indicate that an appeal has been filed to challenge the judgment in the primary suit and it is also apparent that there are currently no orders staying execution of the decree in the primary suit.
26. In view of all the foregoing circumstances, I am satisfied that the learned trial magistrate correctly found that upon being faced with a declaratory suit, the statement of defence on record did not raise triable issues that would necessitate a determination on merit.
27. Upon arriving at the above finding, I am persuaded that the learned trial magistrate acted correctly in allowing the respondent’s application and in consequently entering judgment as prayed in the plaint relating to the declaratory suit.
28. The upshot therefore is that the appeal lacks merit and it is therefore dismissed with costs to the respondent. The ruling delivered by the trial court on December 17, 2021 and consequent orders are hereby upheld.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 21ST DAY OF OCTOBER, 2022.

.....
JK SERGON



JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent

