



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL APPEAL NO. 54 OF 2017

KENYA ORIENT INSURANCE CO LTD.....APPELLANT

VERSUS

CAROLINE WANJIRU MWANIKI.....1ST RESPONDENT

CATHERINE JEMIMA NJOKI KINYUA.....2ND RESPONDENT

JUDGMENT

1. This appeal impugns the decision of *Hon. S.K. Mutai (PM)* dated 10th October 2017 delivered in Embu CMCC No. 71 of 2017 in which the learned trial magistrate struck out the statement of defence filed by the appellant and entered judgment in favour of the respondents on terms sought in the plaint dated 4th April 2017.
2. It is apparent from the record of appeal that CMCC No. 70 of 2017 was consolidated with CMCC No. 71 of 2017 which were declaratory suits filed by the two respondents. In the consolidated suits, the respondents sought the enforcement of judgments issued in their favour against the appellant's insured in Embu CMCC No. 163 of 2016 and 164B of 2016 in which they were awarded damages as compensation for personal injuries sustained in a road traffic accident which occurred on 21st January 2015. It was their case that at the time of the accident, they were travelling as passengers in motor vehicle registration number KBH 085U (the subject vehicle) which was insured by the appellant.
3. The ruling subject matter of the appeal was the outcome of an application filed vide Notice of Motion dated 25th April 2017 in which the respondents requested the court to strike out the appellant's statement of defence filed on 18th April 2017 and to enter judgment in their favour against the appellant as prayed in the consolidated suits.
4. The application was premised on the respondents' contention that the appellant was obligated under *Section 10* of the *Insurance (Motor Vehicles Third Party Risks) Act* (the Act) to satisfy the decretal amount awarded in the primary suits since no appeal was preferred against the trial court's judgment and there was no order staying execution. Further, the respondents claimed that there was no evidence to prove that the appellant had repudiated the policy at the time the accident occurred. It was thus the respondent's case that the statements of defence filed by the appellant did not raise any triable issue and ought to be struck out.
5. The application was opposed through a replying affidavit sworn by the appellant's legal officer *Mr. Ismael Muchiri* who deponed that the appellant's statement of defence raised serious triable issues which required to be investigated during a trial chief among them being that the insurance policy issued in respect of the subject vehicle was meant to cover transit of goods on hire namely caskets and not passengers; that given the circumstances in which the accident subject of the primary suits occurred, the appellant was not liable under the policy and it was not necessary for it to seek or obtain a declaration that it was entitled to avoid or repudiate the policy.
6. After considering the parties' rival oral submissions and the authorities cited, the learned trial magistrate held in her ruling that the statements of defence filed by the appellant did not raise any triable issue and she proceeded to strike them out and enter judgment for the respondents against the appellant as sought in the consolidated suits. The appellant was aggrieved by the trial court's decision hence this appeal.
7. In its memorandum of appeal, the appellant raised seven grounds of appeal in which it principally complained that the learned trial magistrate erred in law and fact in; striking out its defence on grounds that it did not raise triable issues; failing to consider terms of the insurance policy which covered the subject vehicle and the provisions of *Section 5 (b) (ii)* of the Act; failing to consider that an insurer is not under any legal or contractual obligation to obtain a declaration or repudiate a policy in cases of uninsured passengers; failing to consider the appellant's submissions and authorities relied on particularly the case of *M'Mairanyi & Others V Blue Shield Insurance Co Ltd, [2015] 1 EA 280*.

8. The appeal was by consent of the parties canvassed through written submissions.

9. This being a first appeal, it is my duty to revisit and to re-evaluate the material presented before the trial court to arrive at my own independent conclusions regarding the soundness or otherwise of the trial court's decision. See: **Selle & Another V Associated Motor Boat Company Ltd & Others, [1968] EA 123.**

10. I have carefully considered the grounds of appeal, the parties' written submissions and the authorities cited as well as the ruling challenged on appeal. I have also read the pleadings filed in the enforcement suits.

11. To start with, I find that it is not disputed that the appellant had issued an insurance policy in respect of the subject vehicle and that the respondents were the successful litigants in the primary suits in which the appellant's insured was ordered to pay them KShs.456,008 and KShs.473,817 respectively together with costs and interest. It is also not in dispute that the appellant was served with the requisite statutory notices in accordance with the provisions of the Act.

12. The only issue which in my view arises for my determination is whether the trial court erred in its decision to strike out the appellant's statement of defence on grounds that it did not raise triable issues.

13. I wish to state at the outset that though the power to strike out pleadings under *Order 2 Rule 15* of the *Civil Procedure Rules* is discretionary, it must be exercised cautiously and sparingly given the consequences attendant to the use of that power. Striking out pleadings is a drastic remedy which has the effect of driving a party away from the seat of justice without being heard on merit. This is why in applications seeking to strike out a defence, the court must be satisfied that the defence does not raise a single triable issue before allowing the application. What then is a triable issue? My understanding of a triable issue is that it is any issue which raises a *prima facie* defence which would merit adjudication in a trial. It is not an issue which must succeed in the trial.

14. Given the above test, the question that begs an answer is this: did the appellant's defence raise any triable issue?

In its defence, the appellant denied liability pleading that the insurance cover it had issued to one of the defendants in the primary suit was a motor commercial insurance policy which covered goods in transit and not fare paying passengers; that the respondents were not therefore covered under the policy and the appellant was for that reason not obligated to pay the judgment sums.

15. I have perused the insurance policy in question which is at pages 119-120 of the record of appeal. It is described as a motor commercial policy and the vehicle insured is registration number KBH 085U described as a van with a sitting capacity of one passenger. Its schedule shows that it covered several risks including death or personal injuries to third parties occasioned by use of the vehicle.

16. The gravamen of the respondents' argument is that the appellant was statutorily obligated under *Section 10* of the *Act* to satisfy the decree issued against its insured since though served with the requisite statutory notices it did not obtain a declaration that it was entitled to avoid or repudiate the policy. The relevant provision of *Section 10* of the *Act* is *Section 10 (i)*, which reads as follows:

***“If, after a policy of insurance has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of section 5 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.*”**

17. My close reading of *Section 10 (1)* reveals that an insurer's statutory obligation to satisfy decrees issued against its insured is limited to the liability accruing out of an insurance policy issued under *Section 4* as read with *Section 5 (b)* of the *Act* which makes it compulsory for owners of vehicles to insure their motor vehicles against third party risks. The insurance policy in question must meet the requirements specified in *Section 5* particularly *Section 5 (b)* which states that the insurance policy must be one which:

“(b) insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of, or bodily injury to, any person caused by or arising out of the use of the vehicle on a road: Provided that a policy in terms of this section shall not be required to cover—

(i) liability in respect of the death arising out of and in the course of employment of a person insured by the policy or of bodily injury sustained by such a person arising out of and in the course of his employment; or

(ii) except in the case of a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, liability in respect of the death of or bodily injury to persons being carried in or upon or entering or getting on to or alighting from the vehicle at the time of the occurrence of the event out of which the claims arose; or

(iii) any contractual liability;

(iv)”

[Emphasis added]

18. Juxtaposing the pleadings in this case to the provisions of *Section 10* as read with *section 5 (b)* of the *Act*, it is my view that the learned

trial magistrate erred when she failed to address her mind to the question whether the policy whose terms the respondents wanted enforced against the appellant fell within or outside the ambit of *Section 5 (b)* of the Act. To my mind, *Section 5 (b)* leaves no doubt that the statutory liability imposed on insurers under *Section 10* would only arise if the decree holder was either a third party or a passenger who at the time of the accident was carried for hire or reward or was conveyed in the insured vehicle by virtue of his or her contract of employment.

19. The Court of Appeal in *M'mairanyi & others v Blueshield Insurance Company Ltd, [2005] 1 EA 280* which was cited by the appellant before the trial court clearly pointed out that compulsory insurance in relation to motor vehicle passengers is only required for passengers who are carried for hire or reward or by reason of or in pursuance of a contract of employment. The court went further to state as follows:

***“The vehicles which carry passengers for hire or reward are classified under the Traffic Act as public service vehicles which include buses, matatus and taxi cabs if an insured obtains a commercial vehicle insurance policy, then that changes the nature of his business to carriage of passengers for hire, then such a change does not and cannot make the insurer liable for the passengers who are thereafter carried*”**

Though the learned trial magistrate referred to the above case in her ruling, she does not appear to have appreciated its *ratio decidendi* and this may explain why she did not apply it in this case. This amounted to an error of law since the authority was binding on her by virtue of the doctrine of *stare decisis*.

20. Given the basis of the respondents' claim as can be ascertained from the declaratory suits and given the terms of the policy issued by the appellant in this case which I referred to earlier, I am satisfied that the statement of defence filed by the appellant raised serious triable issues regarding whether the insurance policy issued by the appellant covered the respondents who were passengers in a vehicle commercially used for the transportation of goods namely, caskets and whether it had been issued as compulsory insurance to cover third party risks as contemplated under *Sections 4* as read with *Section 5 (b)* of the Act in order to bring into operation the provisions of *Section 10 (1)* of the same Act. These are issues which cannot be resolved by way of affidavit evidence. They required adjudication through a trial.

21. The learned trial magistrate also clearly erred by proceeding on the basis that the appellant was statutorily obligated to satisfy the judgment delivered in the primary suits against its insured without scrutinizing the terms of the policy issued by the appellant.

22. For the foregoing reasons, I find merit in this appeal and it is hereby allowed. The judgment entered by the trial court is hereby set aside. The consolidated suits should now proceed for trial before any competent court presided over by a magistrate other than *Hon. S.K. Mutai*.

23. Costs follow the event and are at the discretion of the court. In view of the circumstances that gave rise to this appeal, a fair order on costs would be that each party shall bear its own costs of the appeal.

It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 9TH DAY OF MARCH 2021.

C. W. GITHUA

JUDGE

DATED, SIGNED AND DELIVERED AT EMBU THIS 18TH DAY OF MARCH 2021.

L. NJUGUNA

JUDGE

In the presence of:

No appearance for the appellant

Mr. Njage for the respondents

Esterina: Court Assistant