REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 231 OF 2019

GATHUA ELIZABETH.....APPELLANT

= VERSUS =

CYRUS OMBUNA MACHINI.....1ST RESPONDENT

STEPHENE MAINA THEURI.....2ND RESPONDENT

(Being an appeal against the entire Ruling and Order of Honourable M.W. Murage (Mrs.),

Senior Resident Magistrate delivered on 2nd April, 2019

in Milimani CMCC No. 9420 of 2017)

JUDGMENT

The 1st Respondent herein instituted a suit before the Milimani Chief Magistrate's Court by way of a plaint dated 27th December, 2017 and sought judgment against the Appellant in the nature of general damages, special damages, costs of the suit, interests and any other relief that the Honourable court may deem fit and just to grant. In his plaint, the 1st Respondent averred that on 23rd July 2012, his Motor Vehicle KAT 269B was damaged in a collision with Motor Vehicle Registration No. KAL 491L. The 1st Respondent pleaded that the accident was as a result of the negligence of the 2nd Respondent, who was an agent, employee, servant and or driver of Motor Vehicle Registration No. KAL 491L belonging to the Appellant herein.

Subsequently, upon the request of the 1st Respondent, an ex parte judgment was entered against the Appellant on 26th November, 2018. Consequently, the Appellant filed an application dated 6th December, 2018 seeking to set aside the ex parte judgment. The 1st Respondent opposed the application via Grounds of Opposition and a Replying Affidavit both dated 18th December, 2018. Upon hearing the parties on the application, the trial court dismissed the application vide a ruling delivered on 2nd April, 2019.

Aggrieved by the aforementioned ruling, the Appellant sought to challenge the same by way of an appeal. Through her Amended Memorandum of Appeal dated 13th January, 2020 the Appellant put in the following grounds:

> ***i. THAT the learned trial magistrate erred in law and in fact in striking out the Supporting Affidavit sworn on behalf of the Appellant by a representative of the Appellant's Insurer M/s Britam General Insurance Company (K) Limited;***
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> ***ii. THAT the Learned Magistrate erred in law and fact in dismissing the Appellant's Notice of Motion Application seeking to set aside Default Judgment and leave to defend the Suit;***
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> ***iii. THAT the Learned Magistrate erred in law and in fact in dismissing the Appellant's Application based on averments that were not raised by the Plaintiff in the Replying Affidavit;***
>
> ***iv. THAT the Learned Magistrate erred in law and in fact in failing to appreciate that the Insurance Company which has a statutory duty to satisfy a judgment is entitled to apply to the Court to set aside default judgment;***
>
> ***v. THAT the Learned Magistrate erred in law and in fact in failing to find that the Appellant had presented a Defence which raised several triable issues for determination including the fact that the suit is time barred.***

This court gave directions to the parties to file written submissions on the appeal. The appellant vide submissions dated 25th January, 2021

argued that the interest of the insurance company herein is founded on its legal duty under Section 10 of the Insurance (Motor Vehicles Third Party Risks) Act, Cap, 405. It is the Appellant's argument that by virtue of Section 10 (2) a legal officer or an authorised officer of the insurer seized of the information pertaining to a suit has capacity to swear an affidavit. To buttress this position, the Appellant has relied on the decision of the court in ***Obonyo Walter Oneya & Another v Jackline Anyango Ogude (Suing as the Administrator of the estate of Fred rick Odhiambo Sewe (Deceased) [2018] eKLR*** where Justice Githua held that an insurance legal officer has authority to swear affidavit on behalf of the insured. The Appellant further argues that by issuing a Statutory Notice to the Appellant's Insurer, Britam General Insurance Co. Limited, the 1st Respondent appreciates the interests of the Insurance Company in the proceedings.

The Appellant further contends that a resolution by the Board of Directors of a company may be filed at any time before the suit is fixed for hearing and that there is no requirement that the same be filed at the same time as the suit. The Appellant referred to the case of ***Republic v Registar General and 13 Others [2005]eKLR*** where Kimaru J. further held that the absence of resolution is not fatal to a suit. Consequently, the Appellant faults the trial court's ruling for going against the Provisions of Order 19 Rule 17 and Order 51 Rule 10 (2) of the Civil Procedure Rules, 2010 and striking out the affidavit on mere irregularities and technicalities capable of being cured.

The Appellant argues that the allegation that the trial court based its decision to struck out the affidavit was never pleaded by the 1st Respondent in its response to the application but rather it was sneaked in through their submissions. The Appellant maintains that parties are bound by their pleadings and therefore the 1st Respondent should not have raised the same in his submissions.

It is the Appellant's argument that the court failed to consider the triable issues raised in the draft defence. Of great importance is the issue that the material damage claim before court was statute barred having being filed outside the statutory time limit. The Appellant argues that material damages unlike personal injuries are excluded from claims whose limitations can be extended under Section 27 and 28 of the Limitation of Actions Act, Cap 22. The case of ***John Kimathi Gikunda v Racheal Muthoni Njeru & 2 Others [2020] eKLR*** has been cited to support this proposition.

In response, the 1st Respondent vide his submissions dated 17th February, 2021 argues that the authority to plead does not mean that one is seized with the information pertaining to the proceedings but the full capacity and or ***locus standi*** to bring and advance that information in court. The 1st Respondent further points out that by its own admission and via an Authority Letter attached to the Appellant's application dated 25th April, 2019, Britam General Insurance Company (K) Limited appointed the firm of Wainaina Ireri Advocates LLP to represent its interest and further gave Caroline Kimeto the authority to plead and swear affidavits on its behalf on 1st April, 2019. The 1st Respondent has relied on the decision of Kariuki. J, in the case of ***Pamela Jebichii Koskei V Horizon Coach Co. Ltd others [2018] eKLR*** to buttress the position that whoever swears an affidavit on behalf of a juristic person must establish such capacity and authorization. The 1st Respondent further maintains that lack of capacity and or *locus standi* to depone to an affidavit and even to draw that affidavit on behalf of a litigant is not a mere technicality and or irregularity as contemplated under Order 19 Rule 7 of the Civil Procedure Rules but an illegality that goes to the root of the jurisdiction of the court to entertain it.

While acknowledging the valid interests of an Insurance Company in proceedings before the trial court as provided for under Section 10(2) of the Insurance (Motor-Vehicle Third Party Risks) Cap 405 laws of Kenya, the Appellant submits that an insurance company ought to approach the Court through the established provisions of Order 1 Rule 15 of the Civil Procedure Rules and not through any other way. Reference was made to the Court of Appeal decision in the case of ***Speaker of the National Assembly versus Karume (2008) 1 KLR 425***, where the Court reiterated its earlier decision in ***Kimani Wanyoike Case*** that:

> ***"In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed."***

The 1st Respondent submits that the Appellant's 2nd and 5th grounds should be dismissed for wanting in merit and incompetence. It is the 1st Respondent's submission that the Memorandum of Appearance was not in the Court file when the default judgment was entered and that it was only after the lapse of the stipulated period that the Appellant sought to file the same. The 1st Respondent argues that the allegation that the file was not available in the registry has not been substantiated as there is no evidence placed before court showing a formal protest and or communication to the Officer in charge of the Milimani Chief Magistrates Court. The Respondent made his request for default Judgment on 14.11.2018 and which was filed on the same day.

With regards to the 3rd ground of appeal, the 1st Respondent submits that where a litigant has seen and raised an illegality to the attention of the court, a court of law ought not to shy away from rendering itself on it as it overrides all questions of pleadings. The 1st Respondent placed reliance on the case of ***Board of Trustees National Social Security Fund vs Michael Mwaloi [2015]eKLR*** where the Court of Appeal cited with approval the decision in the Ugandan Court of Appeal in ***Makula International Ltd vs. His Eminance Cardinal Nsubuga Another (1982) H.C.B Il*** which had held that;

> ***"A court of law cannot sanction what is illegal, and illegality once brought to the attention of court overrides all questions of pleading, including any admission made thereon."***

The 1st Respondent contend that the Appellant had not alluded in her draft statement of defence that Britam General Insurance Company (K) Limited was her insurer at the material time of the accident. The 1st Respondent further contends that if indeed the said insurance company is the Appellant's insurer, it should invoke and follow the procedure provided for under Order 1 Rules 15-22 of the Civil Procedure Rules. Reference has been made to the case of ***Kenya Commercial Bank vs Suntra Investment Bank Ltd (2015) eKLR***, where the Court rendered itself thus;

> ***" <u>The defence does not even allude to the said third party</u>; the issue has just propped up in the submissions by the Defendant. In***

any case, the said third party is not a party in the suit and no claim has been laid against it by the Plaintiff or the Defendant. In law, a third party is enjoined in a suit at the instance of the Defendant and through the set procedure under (Order 1 rule 15 - 22 of the Civil Procedure Rules. And, liability between the Defendant and the third party is determined between the Defendant and the third party, but of course, after the court is satisfied that there is a proper question to be tried as to liability of the third party and the Defendant, and has given directions under Order 1 rule 22 of the Civil Procedure Rules."

Further reference has been made to the case of **John Wambua v Mathew Makau Mwololo & Another [2020] eKLR** where Odunga J. held inter alia that:

"Therefore, as was held by Birech, Commissioner of Assize in George O. Obondo vs. Matiko Aqoy Akedi Kisumu HCCC No. 306 of 1995, the action between a defendant and a third party being one based on contribution and indemnity the cause of action accrues when the judgment is given against the defendant or when he pays the amount admitted in discharge of his liability. What this means is that the liability of the third is conditional upon the finding of liability by the defendant to the plaintiff so that if the plaintiff's suit fails, no issue arises with respect to the third party's liability to the defendant. In other words, third party proceedings are not the same as a claim against a co-defendant or a counterclaim against another party."

In conclusion, the 1st Respondent makes reference to the Supreme Court decision in ***Patricia Cherotich Sawe -Vs- Independent Electoral & Boundaries Commission (IEBC) 4 Others (2015) eKLR*** where the court made reference to its earlier decision in the case of ***Law Society of Kenya Vs- The Centre for Human Rights & Democracy & 12 others, Petition No. 14 of 2013,*** stated that Article 159 (2) (d) of the Constitution is not a panacea for all procedural shortfalls as not all procedural deficiencies can be remedied by Article 159.

Analysis/Determination:

Having considered the trial court record, the grounds of appeal and submissions for and against this appeal and cited cases, the issue for determination is whether the trial magistrate erred in law and fact when, by her ruling dated 2nd April 2019, she dismissed the Appellant's application dated 6th December 2018 on the basis that the supporting affidavit was defective and incompetent.

The relationship between an insurance company and its insured is well captured Under *Section 10* of the *Insurance (Motor Vehicles Third Party Risks) Act Cap 405*, which provides that an insurance company which has issued a motor vehicle policy against 3rd party risks is under a mandatory legal duty to satisfy any judgment entered in favour of a 3rd party against the owner of the motor vehicle in question who is its insured. While *Section 10 (2)* of the same Act provides that the insurer will only be liable to satisfy the judgment entered against its insured if it was notified of the proceedings in which the judgment was delivered before or within 14 days of the commencement of the proceedings. It is for the above reasons that in his list of documents dated 27th December, 2017 the 1st Respondent sought to rely on a Statutory Notice dated 20th June, 2012 sent to Britam Insurance Company Limited. It is therefore evident that the 1st Respondent was well aware of the interests of Britam Insurance from the onset of the case and the assertion that the insurer is a stranger to the proceedings is misconceived.

This court when dealing with a similar issue in the case of ***Tahmeed Coach Limited & 2 others v Salim Mae Peku (Legal Representative of Sadiki Salim Peke (Deceased)) [2014] eKLR*** held that:-

"It is clear that this is a matter arising from a road accident. Ordinarily the insurance company would be called upon to satisfy the decretal sum. The insurers of the accident vehicle were served with a statutory notice and although the "insurance company is not a party to the suit, it is interested in the outcome of the dispute. It is therefore, in order for one of the officers of the insurance company to swear an affidavit in support of the application. The legal officer of the insurance company cannot be held to be a stranger to the dispute."

The deponent, Caroline Kimeto, swore the Supporting Affidavit as a Legal Manager at Britam General Insurance which averment has not been disputed by the 1st Respondent. Therefore the fact that she did not indicate that she had authority of her employer should not arise. In the case *of* ***PETER ONYANGO ONYIEGO vs - KENYA PORTS AUTHORITY [2004] eKLR***, Maraga J (As he was then) held that:

"All other affidavits can be sworn on behalf of individuals or corporations by anybody as long as that person is possessed of the facts and or information that he depones on, that in the rules of evidence, would be admissible. Mere failure to state that the deponent of such an affidavit has the authority of the corporation on whose behalf he swears it does not invalidate the affidavit. That is an irregularity which courts, can under Order 18 Rule 7 of the Civil Procedure Rules, ignore."

The 1st Respondent has alleged in his submissions that Caroline Kimeto was not duly authorized to swear the supporting affidavit but no averment to that effect was made in his replying affidavit. Since the averment by Caroline Kimeto amounted to evidence on oath, the 1st Respondent could have challenged the same by providing evidence to the contrary, this was not done. The 1st Respondent failed to effectively challenge the averment since it was only raised in the 1st Respondent's submissions but not in his replying affidavit. It is therefore my finding that the respondent's claim that the supporting affidavit is incompetent for want of capacity by the deponent is not well founded and cannot be sustained. The legal officer did not require the authority of the insured to swear the affidavit.

From the averments made by Caroline Kimeto in her affidavit sworn on 6th December, 2018 supporting the application to set aside the default judgment stated that the delay in entering appearance and filing defence was occasioned by the time taken for the summons to reach the insurance company for purposes of appointing an advocate. It is worth noting that the Appellant has not objected to the affidavit of service on record. A perusal of the court record reveals that an affidavit of service was filed on 14th November, 2018 indicating how the 1st Defendant was served. However, the affidavit of service does not reveal when the 2nd defendant was served. From the foregoing, and without contrary evidence, I concur with the holding of the learned trial magistrate that summons to enter appearance were taken out and properly served.

This brings me to the issue on whether the Appellant's draft statement of defence and counterclaim raises triable issues. In determining whether or not to set aside an ex parte/default judgment, a court is required to consider whether a party has a triable defence even where service of summons is found to be proper. In so saying, I cite with approval the holding in the case of **Tree Shade Motors Ltd v D.T. Dobie & Another (1995-1998) IEA 324** relied upon in **M/S Jondu Enterprises Limited v Spectre International [2019] eKLR** thus:

> ***"Even if service of summons is valid, the judgment will be set aside if defence raises triable issues. Where a draft defence was tendered together with an application to set aside a default judgment, the court hearing the application was obliged to consider if it raised a reasonable defence to the plaintiff's claim. Where the defendant showed a reasonable defence on the merits, the court could set the ex-parte judgment aside."***

I note that the learned trial magistrate did not delve into the subject of whether the draft statement of defence annexed to the Notice of Motion had triable issues. The Appellant raises the defence that the suit was brought after lapse of the stipulated statutory limit for material damages under the Limitation of Actions Act, Cap 22. The Appellant's defence that the claim is time barred goes to the root of the suit and I am of the view that this is a triable issue which can only be adequately ventilated at the hearing of the suit. Apart from the issue of limitation, the plaintiff's claim is based on a collision between two vehicles. The defence dated 28th November 2018 at paragraph 5 pleads negligence on the part of the 1st respondent's driver. This calls upon the trial court to evaluate the evidence to be adduced and see if there was any contributory negligence on the part of the 1st respondent's driver. This is by no means a sound triable issue.

The respondent contend that the insurer ought to have utilized the procedure under Order 1 rule 15 which involves notice to third and subsequent parties. The insurer did not intend to enjoin a third party. The applicant is attributing blame on the respondents. The law requires that a statutory notice be served upon the insurance company in a claim for damages. Upon service of such a notice, the insurer's interest on the claim crystalises. If the policy is in force, the insurer will ultimately be called upon to satisfy any judgment granted against its insured. It would be a fallacy to expect the insurer to remain indolent and wait to be given a copy of a judgment by its insured without taking an active role in the dispute at the initial stage. Should the insured fail to pay any decretal amount granted in favour of an accident victim, a declaratory suit against the insurer would be the next likely cause of action. The claimant cannot ask the insurer to keep off the case and simply wait to satisfy the decree or wait to be sued by way of a declaratory suit.

It is common practice that upon being served with summons, the insured would take such summons to his/her insurer who would appoint an advocate to defend the claim. The insured is expected to explain to the insurer how the accident occurred. All the relevant information in relation to the accident would be in the knowledge of the insurer. The insured normally relies on the expertise of his insured to defend the claim and to ultimately settle any decreed amount. It is therefore my considered view that given the normal operation of insurance companies, any officer who is versed with an accident claim can swear an affidavit in relation to such a claim. Such an officer does not require the authority of the insured. There is equally no requirement that such an officer must present the authority of the insurance company before swearing the affidavit. The reference to third party proceedings in this matter cannot arise as the insurer was simply trying to assist the insured.

Upon taking into account all the foregoing factors hereinabove, I am convinced that it would be a proper exercise of my discretion to interfere with the impugned ruling and to grant the Appellant the opportunity of defending the claim. In the end, the appeal is found to be merited and is hereby allowed. Consequently, the following orders are granted:

> ***a) The ruling delivered on 2nd April, 2019 is hereby set aside and is substituted with an order allowing the Motion dated 6th December, 2018.***
>
> ***b) The ex parte/default judgment entered on 26th November, 2018 and all consequential orders/proceedings are hereby set aside.***
>
> ***c) The appellant is granted leave to file and serve its statement of defence and counterclaim within 14 days from today.***
>
> ***d)Parties shall meet their own costs of this appeal.***

DATED AND SIGNED AT NAIROBI THIS 25TH DAY OF MAY, 2021.

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S. CHITEMBWE

JUDGE