



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 197 OF 2019

DIRECTLINE ASSURANCE COMPANY LIMITED.....APPELLANT

VERSUS

JUMA ALI SIKIRO.....RESPONDENT

(An Appeal from the ruling and order of Hon. J. Kasam, Senior Resident Magistrate, delivered on 22nd March, 2019 in Mombasa Chief Magistrate's Court Civil Case No. 1542 of 2016).

JUDGMENT

1. The suit in the lower Court was that the appellant issued a policy of insurance No. 4003816 where it agreed to insure the insured and/or her authorized driver in respect of any liability for the death or bodily injuries to any person caused by or arising out of the use on a road accident of their motor vehicle registration No. KAY 495S against road accidents as required by a policy of insurance under the Insurance (Motor Vehicles Third Party Risks) Act 405 Laws of Kenya.
2. The plaintiff/respondent averred that on or about 16th August, 2009, during the pendency of the said policy of insurance and while the same was in full force and effect, he sustained certain injuries as a result of an accident which took place at Buxton involving the said motor vehicle caused by the negligent driving of the appellant's insured's authorized driver, servant and/or agent.
3. Through a notice dated 6th November, 2009 sent to the appellant's insured, the respondent through his Advocate notified the appellant of the aforesaid accident and of his intention to sue the appellant's insured for the recovery of damages. The respondent stated that on or about 12th October, 2009, he brought an action being Mombasa Resident Magistrate's Court Civil Case No. 2892 of 2009 against the appellant's insured, for recovery of damages in respect of the said personal injuries, being such liability as was covered by the terms of the aforesaid policy of insurance.
4. On 27th May, 2016, judgment was entered in favour of the respondent against the appellant's insured for the sum of Kshs. 402,000/= in general and special damages, plus costs and interest. The respondent averred that by virtue of the Insurance Motor Vehicle (Third Party Risks) Act Cap 405 Laws of Kenya, the appellant was liable to pay the aforesaid amount plus costs of Kshs. 105,260.00 making a total of Kshs. 507,260.00 plus interest at 12% per annum from 27th May, 2016 until payment in full but failed to do so.
5. In a declaratory suit filed thereafter by the respondent, the appellant filed its statement of defence dated 26th August, 2016, where it denied all the averments contained in the respondent's plaint. The appellant averred that the respondent was a conductor of motor vehicle registration No. KAY 495S as at the time of the accident, and it was not liable for any claims filed by the conductor (respondent) under the Insurance Motor Vehicle (Third Party Risks) Act and under the provisions of the policy for the said vehicle. The appellant stated that its insured was not a party to Mombasa RMCC No. 2892 of 2009 and if any judgment was entered in the said suit, the appellant was never notified of the same. The appellant therefore challenged the validity of the judgment in the said case.
6. On 29th September, 2016, the respondent filed an application dated 28th September, 2016, where it sought the appellant's defence to be struck out and judgment to be entered for him as prayed in the plaint on grounds that the appellant's defence was an abuse of the Court process and was incapable of raising any triable issues. The appellant in opposition to the said application, filed a replying affidavit sworn on 7th November, 2016 by Patrick Ngaine, the appellant's Advocate, who deposed that the appellant's defence raised triable issues and should therefore be heard on merit. He further deposed that striking out the appellant's defence would be a highly drastic move which had the effect of denying the appellant its constitutional right to be heard in Court.
7. The lower Court delivered a ruling on 22nd March, 2019, where it allowed the respondent's application dated 28th September, 2016 with costs. The appellant being dissatisfied with the Trial Magistrate's decision filed a memorandum of appeal on 8th October, 2019 raising the following grounds of appeal –

(i) That the learned Trial Magistrate erred in law in striking out the appellant's statement of defence notwithstanding that the same had triable issues thereby determining the respondent's suit summarily contrary to the well settled principles governing striking out of pleadings;

(ii) That the learned Trial Magistrate erred in fact and law in failing to appreciate that no liability could lie against the appellant since the respondent herein was an employee of the beneficial owner and/or insured of motor vehicle registration No. KAY 495S as opposed to a fare paying passenger;

(iii) That the learned Trial Magistrate erred in fact and law and further misdirected herself in failing to appreciate the express provisions of Section 10 of the Insurance (Motor Vehicle Third Party Risks) Act Cap 405 Laws of Kenya;

(iv) That the learned Trial Magistrate erred in law and fact and further misdirected herself in failing to appreciate that the judgment obtained in Mombasa CMCC No. 2892 of 2009 Juma Ali Sikiro vs Rose Kioko & another (sic) was incapable of being executed against the appellant for the following reasons -

a) The judgment was unlawful and/or irregular as it was procured against a person who was neither the owner of the said motor vehicle nor the insured under any policy of insurance subsisting over the said vehicle (if any).

b) The judgment was unlawful and/or irregular as the same was procured through misrepresentation of material facts, to wit that the plaintiff therein was a passenger when the accident in question occurred while indeed the plaintiff therein was a conductor of the said motor vehicle.

(v) That the learned Magistrate erred in fact and in law and further misdirected herself by failing to appreciate that since the respondent herein was the conductor of motor vehicle registration number KAY 495S, liability for the accident was specifically excluded under the terms of any policy of insurance subsisting in relation to motor vehicle registration number KAY 495S;

(vi) That the learned Magistrate erred in fact and in law and further misdirected herself by failing to appreciate that any claim by the plaintiff could only be pursued under the Work Injury Benefits Act (Act No. 13 of 2007) since the plaintiff was an employee of the owner of motor vehicle registration number KAY 495S, accordingly, liability could not attach under the Insurance (Motor Vehicle Third Party Risks) Act, Cap 405 Laws of Kenya; and

(vii) That the learned Trial Magistrate erred in law and further misdirected herself in disregarding the numerous binding authorities cited by the appellant's Counsel and thereby based the ruling on erroneous principles.

8. The appellant's prayer is for this Court to allow the appeal herein with costs and set aside the ruling and order of the lower Court delivered on 22nd March, 2019 and for substitution with an order dismissing the respondent's application dated 28th September, 2016 before the lower Court.

9. This appeal was canvassed by way of written submissions. On 18th December, 2020, the appellant's submissions were filed by the law firm of KRK Advocates LLP. The respondent's submissions were filed on 8th March, 2021 by the law firm of Kanyi J & Company Advocates.

10. Mr. Kuria, the appellant's learned Counsel submitted that an order to strike out pleadings is discretionary in nature. He relied on the Court of Appeal decision in **Carl Ronning vs Societe Naval Chargeurs Delmas Vieljeux (The Francais Bieljeux)** [1984] eKLR, where it was held that a Court sitting in appellate jurisdiction does not interfere with the exercise of discretion by the lower Court unless satisfied that the Court misdirected itself in law, misapprehended the facts, or took account of considerations that it should not have taken into account, or failed to take account of considerations that it should have taken into account, or the decision is plainly wrong.

11. He submitted that there was improper exercise of judicial discretion by the Trial Court when it struck out the appellant's statement of defence without appreciating the substance of the triable issues raised therein. He also submitted that Order 2 Rule 15(1)(b) of the Civil Procedure Rules, 2010 deals with striking out of pleadings. He relied on the case of **DT Dobie & Company (Kenya) Ltd vs Muchina** 1980 [eKLR], where the Court laid down the principles governing the striking out of any pleadings by stating that 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.

12. The appellant's Counsel also relied on the case of **Nation Media Group vs Communication Concept** [2006] eKLR, where the Court held that the summary remedy of striking out is applicable whenever it can be shown that the action is one which cannot succeed or is in some way an abuse of the process of the Court or that it is inarguable. He stated that the respondent alleged that the suit in issue ought to be struck out as it is scandalous, frivolous and vexatious. In rebuttal of the said averments, Mr. Kuria relied on the case of **Kiama Wangai vs John N. Mugambi & another** [2012] eKLR, where the Judge held that a matter is frivolous if it has no substance, it is fanciful, where a party is trifling with the Court, when to put up a defence would be wasting the Court's time, or when it is not capable of reasoned argument.

13. He took the position that the appellant's statement of defence raised a reasonable defence as against the respondent's claim. He indicated that the said defence raised the critical issue on liability of the appellant to settle and/or honour a claim filed by an employee of its insured, given that the defence was raised under Section 5 of the Insurance (Motor Vehicle Third Party Risks) Act (the Act). Mr. Kuria further submitted that the liability of an insurer to satisfy judgments obtained against their insured is provided under Section 10 of the said Act and that the said duty is not absolute as a policy of insurance covers certain classes of persons pursuant to Section 5(b) of the Act.

14. He contended that an insurer is not bound by law to satisfy any judgment obtained against its insured by a person who at the material

time was an employee of the insured as is the case herein. He relied on the case of **Gateway Insurance Company Limited vs Ng'ang'a Njuguna** [2005] eKLR, where it was held that the plaintiff was not entitled to a declaration as sought in prayer (a) of the plaint in that the risk of death or injury to a passenger in the motor vehicle was not a liability required to be covered by the policy of insurance under Section 5 (b) of the Act.

15. Mr. Kuria also relied on the case of **Postal Corporation of Kenya vs Inamdar & 2 others** [2004] 1 KLR 359, where the Court of Appeal held that if the defence filed by a defendant raises even one bonafide issue, then the defendant must be given leave to defend. He therefore stated that a Court of law within our jurisdiction should spare the exercise of the draconian power to strike out any pleading and thus with the subordinate Court proceeding to exercise the same in the capricious manner it did, there was no doubt that the judicial discretion was abused and improperly exercised.

16. Mr. Maundu, learned Counsel for the respondent in opposing the appeal relied on the case of **Diamond Trust Bank Kenya vs Peter Mailanyi & 2 others** [2006] eKLR, to show that the appeal herein is an abuse of the Court process. He indicated that in the said case, the Court held that it is an abuse of the Court where its process is used, not in good faith and for proper purpose but as a means of vexation or oppression or for ulterior purposes or more simply where the process is a defence which is an abuse of the Court process and equally the Court may strike out a sham defence as an abuse of the process.

17. He also relied on the case of **Equatorial Commercial Bank Ltd v Jodam Engineering Works Limited & 2 others** [2014] eKLR, where the Court referred to the case of **Blue Sky EPZ Limited vs Natalia Polyakova & another** [2007] eKLR, in which the Court held that a mere denial or a general traverse will not amount to a defence as a defence must raise a triable issue and that a defence that does not raise triable issues and consists of mere denials and general traverse without reasons, will be struck out.

18. Mr. Maundu indicated that a defence must contain bonafide triable issues, one which warrants an interrogation by the Court in a trial and not consist of mere denials and it must also give reasons or information. He stated that the appellant's defence before the Trial Court denied the contents of the plaint and averred that the respondent was a conductor and was not liable to claims under Cap 405, Laws of Kenya. He stated that the appellant in its defence also averred that service upon the insured was not done procedurally. It was submitted by the respondent's Counsel that the issue on whether the respondent was a conductor of motor vehicle registration number KAY 495S was conclusively determined by the Trial Court as evidenced at page 56 of the Record of Appeal.

19. He submitted that after subjecting the appellant's defence to the same process as in the above decisions relied upon by the respondent's Counsel, it failed the test laid down in law since it did not give reasons or volunteer information. Mr. Maundu urged that the appellant's statement of defence was only meant to buy time and delay the just conclusion of the case and that the Trial Court was right in striking it out as it did.

20. It was submitted by Mr. Maundu that a police abstract has been held to be sufficient to prove the existence of insurance. He cited the case of **Wangechi & 2 others vs United Insurance Co. Ltd** [2004] eKLR, where the Court held that the police abstract therein further confirmed that the motor vehicle in issue was insured by the defendant. Counsel stated that in this matter, after being presented with the insurance details, the appellant did not dispute them by either reporting a case of forgery to the police to indicate that the details had been falsified and/or obtaining a declaration within the time allowed or at all as required under Section 10(4) of the Act.

21. Mr. Maundu also relied on the case of **United Insurance Co. Ltd vs Lawrence Ruthi Mwangi** [2004] eKLR, in which the Court held that the appellant was entitled to avoid the policy on grounds of non-disclosure of material facts or false representation and that it had given the respondent notice of intention to do so according to Section 10(4) of the Act or that it sought the clarification as to the proper date of the accident. He submitted that the appellant herein failed to tender any evidence to prove that it had given any notice to the respondent while the latter had satisfied the Trial Court that he had fully complied with all the conditions of Section 10 of the Act.

ANALYSIS AND DETERMINATION.

22. In the instant appeal, this Court has carefully considered the grounds of appeal raised, the submissions by both parties and the evidence that was adduced before the Trial Court. The issue that arises for determination is whether this appeal is merited.

23. As the first appellate Court, I have the duty to consider matters of fact and the applicable law. On facts, I am duty bound to analyse the evidence afresh, evaluate it, and arrive at my own independent conclusion, but always bearing in mind that I did not have the advantage of seeing and hearing the witnesses testifying and make allowance for the same. See **Selle and another vs Associated Motor Boast Company Ltd & others** (1968) E A 123 -126 (CA-2) and **Peters vs Sunday Post Ltd.** 1958 EA 424, 429 on the duty of the 1st appellate Court.

24. On the issue of striking out of proceedings, Order 2 Rule 15(1) of the Civil Procedure Rules, 2010 provides as follows -

“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, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.”

25. In **D T Dobie & Company (K) Ltd vs. Muchina** (supra), the Court laid down the principles guiding the striking out of pleadings as follows: -

“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. On the other hand, if there is a point of law which merits a serious discussion the court should be asked to proceed under order XIV rule 2.”

26. The power to strike out pleadings at any stage of the proceedings as provided under Order 2 Rule 15 of the Civil Procedure Rules, 2010 is discretionary and should be exercised with utmost care and only in the clearest of cases since it is considered to be draconian and drastic. The Court has a duty to carefully examine all the facts placed before it without necessarily engaging in a trial, before striking out a defence. Numerous authorities state that if a pleading raises a triable issue that may not succeed at the end of the trial, the suit ought to go to trial and be determined on merit. However, if the suit does not disclose a reasonable cause of action or is only meant to drag out the case and abuse the Court process then the same ought to be struck out.

27. In **Francis Kamande v Vanguard Electrical Services Ltd** [1998] eKLR, the Court of Appeal when dealing with a similar issue held that -

“A pleading is embarrassing if it is so drawn that it is not clear what case the opposite party has to meet at the trial. If the defendant raises relevant issues, his defence cannot be termed as embarrassing or delaying the fair trial of the suit. Nor can it be struck out because the other party declares it to be untrue.”

28. The provisions of Order 2 Rule 15 of the Civil Procedure Rules, 2010 exist in order to bar a party from instituting a claim and/or filing a statement of defence that discloses no reasonable cause of action. In the present appeal, the respondent filed a declaratory suit against the appellant seeking to enforce the judgment and decree it obtained in Mombasa RMCC No. 2892 of 2009 where it had sued the appellant's insured in a road traffic accident pursuant to the provisions of Section 10 of the Insurance (Motor Vehicles Third Party Risks) Act Cap 405 Laws of Kenya. The said provisions state as follows: -

“(1) 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.....”

29. Section 5(b) of the said Act provides as follows: -

“5. In order to comply with the provisions of Section 4, the policy of insurance must be a policy 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 his employment of a person in the 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) liability of any sum in excess of three million shillings, arising out of a claim by one person. [Act No. 46 of 1960, s. 48, Act No. 10 of 2006, s. 34.] (emphasis added).

30. The appellant filed a statement of defence dated 26th August, 2016, where it not only denied all the averments raised in the respondent's plaint but also challenged the appellant's liability on the ground that the respondent was a conductor in motor vehicle registration number KAY 495S, thus an employee of the owner of the said motor vehicle. The appellant contended that by virtue of the employer-employee

relationship between the owner of the suit motor vehicle and the respondent, respectively, the appellant was not bound by law to satisfy any judgment against its insured.

31. In the Trial Court, the respondent's application was based on the ground that the statement of defence filed was incapable of raising any triable issues and was therefore an abuse of the process of the Court. In **Lynette B. Oyier & another v Savings & Loan Kenya Ltd HCCC No. 891 of 1996 UR** which was cited in **Fred Kiithusi Kula & another v Housing Finance Company Limited & another** [2021] eKLR, the Court held as follows -

“A party applying for striking out a defence on the ground that it tends to prejudice, embarrass or delay the fair trial of the action should persuade the Court that the defence falls within the well-known meaning of those words and he should specify, whether, it's the whole defence or only parts of it, and if any parts offend the rules of pleadings.”

32. A pleading is said to be an abuse of the process when it is frivolous or vexatious or both. The respondent herein contended that the issue of liability was dealt with by the Trial Court conclusively hence the appellant cannot rely on the same as a defence under Section 10 of the Act. This Court has gone through the judgment of the Trial Court at page 56 of the Record of Appeal and found that although the appellant filed a defence, the suit proceeded in its absence and/or its Advocates on record. The appellant submitted that during the pendency of the trial before the subordinate Court, it concluded its investigations into the road traffic accident involving motor vehicle registration No. KAY 495S, and the outcome of its investigations was that the respondent herein was employed as a conductor by the owner of the said motor vehicle and that as an employee of the appellant's insured, the respondent was not entitled to benefit from the policy by the appellant.

33. It is apparent that the appellant did not take up the defence of its insured in the primary suit. It is clear that the issue on whether or not the respondent was an employee of the appellant's insured, will certainly call for evidence from either side so that the Court can consider the rival positions taken on whether or not the appellant is liable to satisfy the judgment and decree obtained by the respondent against its insured. The function of this Court at this stage of the proceedings is to peruse the defence together with any documents filed in support of the averments to satisfy itself whether the express or implied allegations of facts are sufficient to sustain a suit at the hearing.

34. In the case of **Co-operative Merchant Bank Ltd. vs George Fredrick Wekesa** Civil Appeal No. 54 of 1999 which cited the decision of the Court of Appeal in **Uchumi Supermarkets Limited & another v Sidhi Investments Limited** [2019] eKLR, the Court stated thus -

“The power of the Court to strike out a pleading under Order 6 rule 13(1) (b) (c) and (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 is a matter of fact....A Court may only strike out pleadings where they disclose no semblance of a cause of action or defence and are incurable by amendment.”

35. The appellant had contended that the judgment the respondent sought to satisfy was irregular on the ground that pleadings in the primary suit were not procedurally served upon its insured. The Trial Magistrate in the ruling the subject of this appeal only addressed the issue of service of the requisite statutory notices.

36. It is my finding that the lower Court was also required to determine whether or not the respondent was an employee of the appellant's insured so as to ascertain if the appellant is liable to satisfy the decree obtained in the primary suit. This Court's finding is that the decision striking out the appellant's defence was improper and had no basis in law as the appellant's statement of defence disclosed some triable issues.

37. The upshot is that the appeal succeeds. The ruling of the learned Trial Magistrate delivered on 22nd March, 2019 in Mombasa CMCC No. 1542 of 2016 is hereby set aside. It is hereby directed that the said case shall be heard on merit by a different Magistrate, other than Hon. Kasam, whose ruling is the subject of this appeal. Each party shall bear its own costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 23RD DAY OF JULY, 2021. In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020, the ruling herein has been delivered through Teams Online Platform.

NJOKI MWANGI

JUDGE

In the presence of:-

Ms Njuguna holding brief for Mr. Kuria for the appellant

No appearance for the respondent

Mr. Cyrus Kagane – Court Assistant