



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 220 OF 2019

BRITISH AMERICAN INSURANCE CO.(K) LTD.....APPELLANT

VERSUS

LAZARUS SAGINI NYANGAU &

EUNICE NYABOKE SAGINI (Suing as the legal

representatives of the estate of

WYCLIFFE OSINYO SAGINI (DECEASED).....RESPONDENT

(Being an Appeal from the Ruling delivered on

25th October, 2019 by the Learned Senior Principal Magistrate,

Hon. F. Kyambia in Mombasa CMCC Civil Suit No.305 of 2019.)

JUDGMENT

1. Before the Court is an Appeal challenging a **Ruling** dated and delivered on the **25th October, 2019** by Hon. F. Kyambia wherein the Appellant's Amended Defence dated **24th April, 2019** was struck out under **Order 2 Rule 15(1)(b)(c) and (d)** of the **Civil Procedure Rules**.
2. The provenance herein is that the Respondent obtained a Judgment in **Mariakani RMCC No.13 of 2017, Lazarus Sagini Nyangau & Eunice Nyaboke Sagini (Suing as the legal representatives of the estate of Wycliffe Osinyo Sagini (Deceased) –vs- Duncan Gichohi Njoroge** for **Kshs.6,339,895/=** for an accident that occurred sometime on the **27th December, 2015**.
3. It was indicated that the Appellant was the Defendant's (**Duncan Gichohi**) insurer and on several occasions they tried to get them to settle the decretal sum to no avail, so they filed a declaratory suit against the Appellant before the trial court vide an Amended Plaintiff dated the **4th April, 2019**.
4. The Appellant responded to the Respondent's claim vide an **Amended Statement of Defence** dated the **24th April, 2019** that it was statutorily bound to pay **Kshs.6,339,895/=**.
5. On the **11th May, 2019**, the Respondent filed a **Notice of Motion** application dated **7th May, 2019** under **Order 2 Rule 15(1)(b)(c) & (d)** of the **Civil Procedure Rules** to have the Appellant's Defence struck out and judgment for the sum of **Kshs.6,339,895/=** be entered as prayed in the **Plaint**.
6. The Appellant responded to the Application by filing Grounds of Opposition dated the **12th June, 2019** and an Affidavit sworn on **19th June, 2019** by **Carolyn C. Kimeto**, the head of the Legal Department of the Appellant. The Appellant's case was that they were not liable to pay as they had repudiated liability in respect to the accident that occurred on the **27th December, 2015** and attached a letter dated the **22nd March, 2016**.
7. The parties herein took directions before the trial court on the disposal of the **Notice of Motion** dated **7th May, 2019** and the same was disposed of by way of written submissions. Both the Appellant and Respondent filed their submissions. After listening to the parties, the

Honorable Magistrate delivered his Ruling on the said Motion on the **25th October, 2019** whereby he found that under **Section 10(4)** of the **Insurance (Motor Vehicle Third Party Risks) Act** requires an insurer to institute a declaratory suit against an insured to avoid any liability and the same cannot be done via a letter. He thus found that the Defence **29th March, 2019** lacked triable issues, struck it out and entered Judgment in favor of the Appellant.

8. Being dissatisfied with the said finding in the Ruling dated the **25th October, 2019**, the Appellant filed an Appeal before this Court and in its Memorandum of Appeal dated **6th November, 2019** raised the following grounds: -

1. That the learned Senior Resident Magistrate erred in law and fact to disregard paragraph 7 of the defence filed by the defendant (the appellant in this appeal and hereinafter called the appellant) on 24th April 2019 which clearly states that at the material time (i.e 27th December, 2015) it was not on risk since vehicle Reg. No. KBX 693G was being used for purposes other than its permitted use under the terms of the policy of insurance issued by it to Duncan Gichohi Njoroge the owner of the motor vehicle Reg. No.KBX 693G.

2. That the learned Senior Resident Magistrate erred in not holding that the appellant had properly repudiated liability in respect of the accident on the 27th December, 2015 and consequently it was not liable to satisfy the judgment delivered by the trial court in Mariakani Civil Case Number 13 of 2017.

3. That the learned Senior Resident Magistrate erred in not holding that the defence filed by the appellant raised clear triable issues and that consequently the case should proceed to full trial and it would not be just and proper to dispose of the same under a summary procedure.

4. That the learned Senior Resident Magistrate erred in striking out the defence filed by the appellant in court on 24th April 2019 and entering judgment for the plaintiff as prayed in plaint.

5. That the learned Senior Resident Magistrate erred in failing to consider or properly consider the written submissions dated 22nd July, 2019 filed by the counsel for the appellant in court on 24th July 2019.

6. That the learned Senior Resident Magistrate erred in law in failing to order that this case should proceed to full hearing and be heard on its merits.

7. The Learned Senior Resident Magistrate erred in failing:-

a) To appreciate the significance of the various facts that emerged from the affidavit of Carolyne C. Kimeto sworn on 19th June 2019.

b) To consider or properly consider the Grounds of Opposition filed by the Appellant in court on 13th June 2019

c) To make any or any proper finding in respect of the pleadings before him.

8. The Appellant prayed that the Appeal be allowed with costs and the decision of the trial court dated **25th October, 2019** be set aside or varied.

Directions of the Court

9. On the **22nd April, 2021**, the court indicated that the Appeal be canvassed by way of written submissions. The Appellant's submissions are dated the **13th May, 2021** and filed on the **18th May, 2021** while the Respondent's submissions are dated the **29th May, 2021** and filed on the **1st June, 2021**. The parties highlighted their respective submissions before me on the **2nd June, 2021**.

The Appellant's submissions

10. The Appellant submitted that the trial court erred when it held that its Statement of Defence did not raise any triable issue yet the Appellant indicated that it had repudiated the policy with the insured (Duncan) when vide a letter dated the **22nd March, 2016** and thus were not liable to pay for the Judgment as has been entered by the trial court.

11. It has been submitted that the Appellant's case was not straightforward. It was averred before the trial court that the insured used his **Motor Vehicle Registration No.KBX 693G** for hire and reward contrary to the intended use in the policy hence necessary for the court to have heard witnesses and allowed the matter to proceed for full trial. It has been stated that it was imperative that the matter proceeds for trial for the trial court to determine whether the said policy was repudiated or not.

12. The Appellant submitted that striking out of pleadings is a draconian practice that courts are required to exercise with restraint and that a party in a civil suit should not be deprived of its right to have its case tried by a proper trial. This court was referred to the case of **Mercy Karimi Njeru & Another –vs- Kisima Real Estate Limited [2015]eKLR** in urging this.

13. It has been submitted that the Appellant is not statutorily bound to settle the decree issued by the court in **Mariakani Civil Suit No.13 of 2017** for the reason that it had repudiated the policy of insurance it had with the insured after he breached the terms contained in the policy.

The Appellant thus added that the trial court failed to consider its Defence that clearly had triable issues.

The Respondent's Submissions

14. The Respondent submitted that the Appellant intended to avoid a policy to bar them from enjoying the fruits of their judgment in **Mariakani Civil Case No.13 of 2017** and subsequently **CMCC No.305 of 2019**, the subject of this Appeal.

15. According to the Respondent, it is undisputed that the Appellant was the insurer of the owner of **Motor Vehicle Registration No.KBX 693G** at the time of the accident which occurred on the **27th December, 2015**. Further, that it is not in dispute that over the period of five (5) years after the said accident, the Appellant has not obtained any declaratory orders entitling it to avoid the insurance policy.

16. The Respondent submitted that it is the duty of the insurer to settle claims arising out of policies of insurance issued as provided under **Section 203 (1) and (2) of the Insurance Act** and **Section 10(1) of the Insurance (Motor Vehicles Third Party Risks) Act**.

17. It has been submitted that **Section 10(4) of the Insurance (Motor Vehicles Third Party Risks) Act** dictates mandatory guidelines to be followed when insurers seek to repudiate and avoid paying out Judgment for insurance policy. The Respondent stated that the trial court was right to hold that repudiate the policy under **Section 10(4) of the Insurance (Motor Vehicles Third Party Risks) Act**, the Appellant was required to do so by filing a declaratory suit and that the same could not be done vide a letter. In support of the submissions, the Respondent placed reliance on the case of **Britam General Insurance Co ((Kenya) Limited –vs- Josephat Ondiek [2018] eKLR**.

18. It has been stated that the Appellant's Defence only consisted of mere denials which could not be termed as triable issues and that the defence on repudiation of the subject is answered by law under **Section 10(4) of the of the Insurance (Motor Vehicles Third Party Risks) Act**.

19. The court was urged to note that the Appellant as an insurance is duty bound pay to persons entitled to the benefit of a Judgment a sum payable in respect of liability including any amount payable in respect of costs.

Analysis and determination

20. This being a first appeal, it is my duty to revisit and to 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 the case of **Selle & Another –vs- Associated Motor Boat Company Ltd & Others, [1968] EA 123**).

21. 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 and find the issue for determination being *whether the trial court was right to strike out the Appellant's Statement of Defence*.

22. As stated at the beginning of this Ruling, the trial court delivered a Ruling on the Respondent's application under **Section 10 of the Insurance (Motor Vehicles Third Party Risks) Act** that requires the insurer to satisfy the decretal amount awarded in the primary suit. Further, it was evident that the Appellant had been served with the requisite statutory notice and that it was clear the Appellant had no defence against their claim and sought for judgment to be entered.

23. On the other hand, the Appellant alleged that it was not duty bound to pay the Respondent as it had repudiated the policy vide a letter dated **22nd March, 2016** with the insured for the use of **Motor Vehicle Registration No.KBX 693G** outside the scope of the policy of the insurance and believed that in the circumstances it was not bound to satisfy the judgment in **Mariakani Civil Case No.13 of 2017**.

24. After hearing the parties herein the learned trial Magistrate held in his Ruling that the amended statement of defence filed by the Appellant did not raise any triable issue. The process to repudiate a policy by insurer as outlined under **Section 10(4) of the Insurance (Motor Vehicles Third Party Risks) Act** requires an insurer to institute a declaratory suit against its insured to avoid liability, thus he proceeded to strike it out and enter judgment for the Respondent against the appellant as sought in the Amended Plaint.

25. In this case, the Appellant claims the fact that there was present a repudiation letter dated **22nd March, 2016** which was enough to be a triable issue to enable them be heard and their matter proceed to full trial hence the court erred in striking out its defence under **Section 10(4) of the Insurance (Motor Vehicles Third Party Risks) Act**.

26. **Section 10(4) of the Insurance (Motor Vehicles Third Party Risks) Act**, to which the trial court relied on to strike out the Defence provides: -

*10 (4) No sum shall be payable by an insurer under the foregoing provisions of this Section if in **an action commenced before, or within three months after, the commencement of the proceedings in which the judgment was given, he has obtained a declaration that, apart from any provision contained in the policy he is entitled to avoid it on the ground that it was obtained by the non-disclosure of a material fact, or by a representation of fact which was false in some material particular, or, if he has avoided the policy on that ground, that he was entitled so to do apart from any provision contained in it:***

Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not thereby become entitled to the benefit of this subsection as respects any judgment obtained in proceedings commenced before the commencement of that action, unless before or within fourteen days after the commencement of that action he has given notice thereof to the person who is the plaintiff in the said proceedings specifying the non-disclosure or false representation on which he proposes to rely, and any person to whom notice of such action is so given shall be entitled, if he thinks fit, to be made a party thereto.

27. The Court of Appeal in the case of **Intra Africa Assurance Company Limited –vs- Simon N. Njoroge & Another [1997]eKLR**, interpreted **Section 10(4)** as hereunder: -

“...Under s.10(1) if, after a policy of insurance has been effected, judgement in respect of any such liability as is required to be covered by S.5 of the Act, is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel the policy or may have avoided or cancelled the policy, the insurer shall, subject to the provisions of that section, pay to the person so entitled to the benefit of the judgement any sum payable thereunder in respect of the liability. However, section 10(4) (herein above set out) is an exception to the above general rule enunciated by s.10 (1) of the Act. Plain meaning of s.10 (4) is that no sum shall be payable by an insurer under the earlier provisions of s.10 if (a) he has filed an action either before, or within three months after, the commencement of proceedings in which the judgment for damages was given and (b) has obtained a declaration that apart from any provisions contained in the policy he is entitled to avoid it on the ground that the policy was obtained by the non-disclosure of a material particular or by a representation which was false in some material fact...”

28. My understanding of the case above is that the Appellant herein was required to have filed an action before or within three months to the commencement of **CMCC No.305 of 2019** for a claim to repudiate the policy. Thus, as for whether the issue on repudiation was a triable issue, I think it was not, because the Appellant is in breach of the clear procedures provided to repudiate a policy after judgment for damages has been entered. The letter dated **22nd March, 2016** was not enough to repudiate the policy as the Appellant was served with the statutory notice to inform it of a claim against it, and to remove itself from any liability. It was obvious that they needed to comply with **Section 10(4)** of the **Insurance (Motor Vehicles Third Party Risks) Act**.

29. In view of the above, I find that the Appellant’s **Amended Statement of Defence** dated **24th April, 2019** did not raise any triable issue, thus I agree with the finding of the trial court in the Ruling dated **25th October, 2019**.

30. The upshot is that the Appeal is dismissed with costs to the Respondent. The court proceeds to decline the application to set aside the decision of the order striking out the Appellant’s Amended Statement of Defence. However, the Appellant is directed not to pay **Kshs.6,339,895/=** as directed by the trial court since **Section 5(b)(iv)** of the **Insurance (Motor Vehicles Third Party Risks) Act** sets the limit that an insurer can only pay a maximum of three million (3,000,000/=) of a decretal amount in an order directing settlement to one person. The Respondents herein are only representatives of the deceased one **Wycliffe Osinyo Sagini**.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 28TH DAY OF SEPTEMBER, 2021.

D. O. CHEPKWONY

JUDGE

In the presence of:

M. Musyoka counsel holding brief for Mr. Nyabena counsel for the Respondent

No appearance for and by the Applicant

Court Assistant - Winnie