



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL APPEAL NO. 144 OF 2018

DIRECTLINE ASSURANCE COMPANY LIMITED.....APPELLANT

VERSUS

SIMON KIPKORIR CHIRCHIR.....RESPONDENT

(An appeal from the judgment and decree of the Chief Magistrates Court at Kiambu, Hon. J. Kituku, PM in the CMCC No. 166 of 2018 dated 17th October, 2018)

JUDGMENT

1. **SIMON KIPKORIR CHIRCHIR (Simon)** on 17th October, 2018 obtained an order in his favour, before the Chief Magistrate's Court Kiambu in civil case No.1 66 of 2018, for the striking out of the defence of **DIRECTLINE ASSURANCE COMPANY LIMITED (Directline)** and the entry of judgment. That order aggrieved Directline and hence this appeal.

BACKGROUND

2. Simon instituted a suit before the Kiambu Chief Magistrate's Court being Civil Case No. 01 of 2017 against 1st defendant **WILSON MBOGO, (Mbogo)**, and the 2nd defendant **KAKA TRAVELORS SACCO**. Simon by that action sought to recover both special and general damages in respect of injuries he suffered while traveling in motor vehicle KBJ 357C (the subject vehicle). On 28th March, 2017, judgment was entered in that case, in favour of Simon for Kshs.183,500/= plus costs and interest. That judgment was not satisfied by the defendants. Simon filed before that same court **Civil Case No. 166 of 2018** against Directline. By that case, Simon sought declaratory judgment against Directline as the insurer of Mbogo in respect of the subject vehicle. Simon pleaded that Directline was statutory obligated, under the **Insurance Motor Vehicle (Third Party Risks) Act, cap 405** to pay the amount of that judgment. Directline filed a defence to that claim.

3. Simon, by a notice of motion application dated 25th April, 2018, applied for Directline's defence to be struck out and judgment to be entered in his favour. The application was heard before the Kiambu Chief Magistrate's court and by a Ruling dated 17th October, 2018 orders were granted as prayed. That is the Ruling which is the subject of this appeal.

THE APPEAL

4. Directline by its grounds of appeal faulted the trial court's order striking out its defence and stated that the orders of the trial court were contrary to the provisions of Cap 405, and that the trial court failed to take into regard that insurance of the subject vehicle was taken out by **Francis Thiongo Njiiri** who was not subject of the judgment and therefore Directline did not have contractual obligation for Mbogo.

5. An appeal is a retrial and this Court is guided by the principles set out in the case **SELLE & ANOR VS. ASSOCIATED MOTOR BOAT CO. LTD & OTHERS (1968) EA 123** as follows:-

"... I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. ..."

6. Simon's case against Directline was premised on the provisions of **Section 10(1)** of **Cap. 405** which provides:-

"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.”

7. The prerequisite of invocation of the above Section is that there must be judgment for a liability covered by the policy of insurance and that judgment must be against the person insured by that policy.

8. The defence raised by Directline is that Simon did not give it 14 days' notice after commencing the action against Mbogo as required under **Section 10(2)(a) of Cap 405** and that he did not give notice of entry of judgment. Directline also denied it insured the subject vehicle and denied that Mbogo was the registered owner of the subject vehicle. Directline therefore denied that Simon was entitled to institute the declaratory suit against it.

9. I shall proceed to consider those grounds raised by Directline Seriatim.

10. Simon by his application dated 25th April, 2018, and more particularly the affidavit in support, referred to the notice he gave to Directline, prior to filing suit against Mbogo which is dated 28th September. That notice which is annexed to Simon's said affidavit was stamped by Directline as received on 29th September, 2016. Simon also attached to his affidavit Notice of entry of judgment against Mbogo that was served upon Directline on 13th September, 2017.

11. In response to those depositions, Directline through the affidavit of **Pauline Waruhiu** dated 3rd June, 2018 stated that it had no obligation to indemnify Mbogo since he was not the insured under the policy of insurance. Directline annexed to that affidavit a letter addressed to **Francis Thiongo (Thiongo)** dated 10th June, 2016 advising him that they had issued him with an insurance policy in his name for the subject vehicle. The said insurance policy, it would seem from that letter was, to run from 22nd June, 2016 to 22nd July, 2016. What however is noteworthy is that Simon was injured while traveling in the subject vehicle on 18th September, 2016. What is also interesting to note is that the said Thiongo filed objection proceedings in Kiambu CMCC No. 1 of 2017, objecting to the attachment of the subject vehicle, and while being cross-examined in those proceedings he responded that the subject vehicle was still insured in the name of Mbogo who was the registered owner of that vehicle before 7th April, 2017.

12. But perhaps most importantly, is that Directline failed to avail to the court the proposal form filed with them by Thiongo if indeed Thiongo was their insured. The records held by NTSA clearly show that the subject vehicle up to 7th April, 2017 was registered in the name of Mbogo. There is no evidence presented by Directline showing that the subject vehicle at the date of the accident was registered in Thiongo's name and was insured by Thiongo. The police abstract issued to Simon reveals that the subject motor vehicle was in the name of Mbogo and was insured by Directline.

13. Close scrutiny of the evidence presented to the trial court reveals as was pleaded by Simon that, the subjected vehicle was owned by Mbogo and was insured by Directline. It is difficult to fathom why a company such as Directline would go such length to conceal that fact. If indeed the registered owner of the subject vehicle and the insured was Thiongo, as Directline alleges, Directline should have produce credible evidence of the same. Instead, Directline produced registration details of the subject vehicle which showed Thiongo was registered owner of the subject vehicle in April, 2017. Directline to repeat, did not show proposal form of Thiongo upon which it acted on to issue an insurance policy as alleged. I wish to believe that Directline would not go to the length of fabricating insurance policy to avoid liability.

14. Simon moved the trial court by his application under **Order 2 Rule 15** of the Civil Procedure Rules for the striking out of Directline defence and for entry of judgment in his favour.

15. I am alive to the jurisprudence on application to strike out pleadings and the caution set out in the famous case of **D.T. DOBIE & COMPANY LTD VS. MUCHINA (1982) KLRI** that courts should aim to sustain rather than terminate suits. Indeed, the power to strike out pleadings should be use sparingly and only on clearest cases.

16. This case indeed was such one that was clearly for striking out. The defence offered by Directline was in my view intended to prejudice Simon and intended to delay fair trial of the action. Directline had no reasonable defence that required a full hearing. I find it apt to repeat the holding of *Justice G.V. Odunga* in the case **FIRST ASSURANCE COMPANY LIMITED VS. FLORENCE WAVINYA MUTUA (2021) eKLR** thus:-

“49. Having considered the issues raised by the Appellant in light of the evidence placed before the trial court I find that the same did not constitute arguable triable issues. They were therefore brought merely for purposes of annoyance or for some fanciful advantage; and they could certainly really lead to no possible good. In other words, they were vexatious. To quote Omollo, JA in the case of J P MACHIRA VS. WANGETHI MWANGI & ANOTHER Civil Appeal No. 179 of 1997, although disputes ought to be heard by oral evidence in court, there is no magic in holding a trial and receiving oral evidence merely because it is normal and usual to do so since a trial must be based on issues; otherwise it may become a farce.

17. What my discussion above will show is that there is no merit in this appeal.

18. The same is hereby dismissed with costs. The money deposited in court in this appeal by **Directline Assurance Company Limited** shall henceforth be released to the Respondent in this appeal.

19. Orders accordingly.

JUDGMENT, SIGNED DATED and DELIVERED at KIAMBU this 28th day of OCTOBER, 2021.

MARY KASANGO

JUDGE

Coram:

Court Assistant: Nancy

For Appellant : Miss Achieng H/B Oreng

For Respondent: Mr. Banda.

COURT

Judgment delivered virtually.

MARY KASANGO

JUDGE