



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

CORAM: R. MWONGO, J.

CIVIL APPEAL NO. 20 OF 2017

FIDELITY SHIELD INSURANCE COMPANY LIMITED.....APPELLANT

VERSUS

MATHAM MUKASA.....RESPONDENT

(Being an appeal from the ruling of the Chief Magistrate's Court delivered

by Hon. Z. Abdul (RM) 16th May, 2017 in CMCC 939 of 2016)

JUDGMENT

1. The appellant appeals against the ruling of the trial court striking out their defence in **CMCC No. 939 of 2016** for being vexatious frivolous and an abuse of court process.
2. To put the case in perspective, the following brief facts are relevant. The Respondent was injured in an accident and awarded damages in the lower court in **CMCC 517 of 2016 Matham Mukasa v Watson Wanjohi and David Kariuki** (the primary suit). The latter, David Kariuki, was insured by Fidelity Shield Insurance Co. Ltd, the Appellant herein. Following the award, the plaintiff filed a plaint in **CMCC No. 939 of 2016** seeking a declaration that the Appellant is liable to satisfy the judgment of Kshs 1,513,1010/=.
3. The Defendant (Appellant herein) filed a defence which is the subject of the striking out motion, and the subsequent appeal herein.
4. The grounds in the notice of motion were that: the defence had not raised any triable issue and was a sham; the defendant had insured on David Kariuki who was the 2nd defendant in the Primary suit; that the 1st and 2nd defendants in the Primary Suit were served with summons and accepted service; that that if the insured failed to notify the Appellant about the accident, that failure should not be visited on the plaintiff.
5. The trial court, properly, isolated two issues for determination arising from the motion:
 - a) Whether a statutory notice was served on the respondent (Appellant herein); and
 - b) Whether the defence raised any triable issues.
6. On the first issue the trial court answered in the affirmative; and on the second issue the trial court determined that there were no triable issues raised in the defence.
7. As this is a first appeal, this court's roles is to re-evaluate the material on record and upon consideration come to a determination as to whether the trial court correctly analysed and interpreted the material or misapplied or failed to apply the correct legal principles.
8. The grounds of appeal complain of the following errors or failures of the trial court:
 - a) *Failure to appreciate striking out principles in finding that the defence did not raise triable issues.*
 - b) *Failure to find a triable issue in the defence that it had not insured the defendant in the Primary Suit.*

c) Failure to appreciate that **Section 10 of the Insurance (Motor Vehicle Third Party Risks) Act, Cap 405** requires respondent to serve insurer with notice of institution of the suit.

d) Failure to address the correct issues arising from the parties pleadings.

e) Erred in sustaining judgment that awarded an excessive amount of Kshs 1,550,000/= as general damages for a single fracture of right inferior pubic ramus.

9. At the outset, I would point out that issue (e) above is truly a subject of appeal from the judgment in the Primary Suit and not a subject of the present Ruling appealed from. I will thus not address it here.

10. I will consolidate the grounds into two issues.

a) Issues as to statutory and requisite notices.

b) Issues as to applicable principles for striking out and whether there were triable issues.

Statutory and Requisite Notices

11. Paragraph 6 of the Plaintiff on notice was denied in paragraph 6 of the defence. Reference is made to the Insurance (Third Party Risks) Act. **Section 10 of the Insurance (Motor Vehicle Third Party Risks) Act, Cap 405** deals with the duty of the insurer to satisfy judgment against persons insured. Section 10 (2) of the **Insurance (Motor Vehicle Third Party Risks) Act, Cap 405** provide as follows:

“(2) No sum shall be payable by an insurer under the foregoing provision of this Section -

(a) In respect of any judgment, unless before or within thirty days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings.” (Underlining added)

The question is whether the Respondent complied with the provision to notify the insurer prior to filing the Primary Suit in the lower court.

Notice of suit:

12. Paragraph 5 of the defence alleged that the Appellant was a stranger to Paragraph 5 of the plaintiff that asserted that the Primary Suit had been filed. I note that the Primary Suit had been filed. I note that the Primary suit was filed on 17th October 2016. Annexed to the Plaintiff's list of documents filed on that date is a "Statutory notice" dated 14th August 2015 addressed by the plaintiffs to M/s Fidelity Shield Insurance Company Limited. It is stamped with the Appellant's receipt stamp indicating the date 18th August 2015. This confirms that the Plaintiff complied with **Section 10 of the Insurance (Motor Vehicle Third Party Risks) Act, Cap 405**.

Demand Notice:

13. Paragraph 10 of the defence denies that any demand was made as asserted in Paragraph 9 of the plaintiff. Was any demand made? Attached to the Plaintiff's list of documents is a demand letter dated 28th September, 2016. It bears the Appellant/defendant's receipt stamp dated 29th September 2016, eighteen days before the suit was filed. The defence is therefore baseless *ab initio*.

Notice of Accident:

14. At Paragraph 4 of the Defence in answer to Paragraph 4 of the Plaintiff, the Appellant denied receiving a report of the accident from the insured. It may be pointed out that the contract of insurance is entered into between the insured and insurance company. Any breaches of the provisions of the insurance contract are disputes for resolution between the contracting parties. Third parties like the plaintiff not being privy to the contract have no role therein. That aspect of paragraph 4 of the defence is therefore a bare denial.

Whether there are Triable issues in the Defence and Applicant Principles

15. At paragraph 7 of the Defence the defendant denies Paragraph 7 of the Plaintiff asserting that a judgment for Kshs 1,513,110/= was delivered on 9th May, 2016. As already pointed out, in the Plaintiff's List of Documents filed with the Plaintiff on 17th October, 2016, a Decree for a decretal sum of Kshs 1,579,770/= comprised of a Principal sum of Kshs 1,513,110/= and Interest of Kshs 66,660/= was attached together with a warrant of attachment and execution. These are part of the pleadings served on the Plaintiff/Appellant, bringing to their knowledge the case and outcome of the Primary Suit. This defence is also a bare defence.

16. At paragraph 8 of the Defence, the defence states that it is a stranger as to the Plaintiff's assertion that there is no other suit or proceedings between the parties. This is not a kernel denial. In any event the Defendant's paragraph 9 of the Defence is positive assertion that there are no other proceedings between the parties on the same subject matter.

17. I now turn to Paragraph 3 of the Defence which denies Paragraph 3 of the Plaintiff that asserts that the 2nd Defendant was insured by the Defendant/Appellant. In the statutory Notice dated 14th August 2015, the Plaintiff clearly notified the Defendant of the Insurance Policy and indicated the policy number.

18. However, neither the policy instrument nor the cover note were exhibited in the Plaintiff's documents. There can be no serious contention that the Plaintiff, in this case a third party victim of an accident, can get access to an insurance policy or cover between the insurer and his client. Thus I do not consider it proper to expect a victim to exhibit the policy. He did nevertheless bring to the notice of the defendant /Appellant the Policy Number: MC 0337400208 and the insured Motion Vehicle Registration Number KBU 985J.

19. In my understanding, having received that statutory notice with the said information the Defendant could only avoid invoking a bare defence not by demanding strict proof of insurance as they did in paragraph 3, by giving additional reasons for denial. Such reasons could be, for example, that no such policy was issued or that the policy had lapsed; or that it was fraudulent; that it did not relate to the person named as insured; or that the vehicle was not the insured vehicle, and so on.

20. As paragraph 3 of the defence stands, I think it is a bare defence. The applicable principle in this regard is whether the defence raises a bona fide issue worthy of a trial. In **Kenya Commercial Bank v Sufra Investment Bank Ltd. [2015] eKLR** the court stated:

“.....on the other hand a defendant who has a bona fide issue worth of trial should not be denied the opportunity to be heard on his defence on merit to enable the court determine the real issues in controversy completely; that is serving substantive justice on consideration of all facts of the case.”

21. I am alert to the extreme and grave consequences of snuffing out a party's suit peremptorily at a preliminary stage. It is not lost in me that the power to strike out should be used rarely as stated in **DT Dobie v Joseph Mbaria Muchina CA 371**, where the court held:

“As the power to strike out pleadings is exercised without the court being fully informed on the merits of the case through discovery and oral evidence, it should be used sparingly and cautiously.”

22. The question I have grappled with is whether the Appellant/defendant's denial of being the insurer is a bona fide issue, and whether it is an issue that is genuine and real and raised in good faith. My conclusion is that in terms of **Order 2 Rule 15** of the **Civil Procedure Rules**, it **“discloses no reasonable defence in law”** without a clarifying rationale.

23. Accordingly, I am unable to uphold the appeal which I hereby dismiss with costs.

24. Orders accordingly.

Dated and Delivered at Naivasha this 10th Day of March, 2020

RICHARD MWONGO

JUDGE

Delivered in the presence of:

1. No representation for the Appellant
2. Muchela holding brief for Amboko for the Respondent
3. Court Clerk - Quinter Ogutu