



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 80 OF 2019

FIDELITY SHIELD INSURANCE COMPANY LTD.....APPELLANT

VERSUS

**ELIZABETH NYABOKE MANDERE (SUING AS THE LEGAL REPRESENTATIVE OF THE
ESTATE OF THE DECEASED POLYCAP MANDERE, DECEASED).....RESPONDENT**

(Being an appeal from the decision of SRM Caroline R.T. Ateya delivered on 30/10/2018 in Ogembo SPMCC No. 60 of 2018)

JUDGMENT

1. On the 30th October 2018 Hon. Caroline Ateya delivered a Ruling on an application filed by the Respondent to have the appellant's defence filed in Civil Suit No. 60 of 2018 struck off and judgment entered for the respondent as prayed in the plaint. The trial court found that the defence filed was frivolous and an abuse of the court process. This Ruling promoted the appellant to file the present appeal. The appellant's memorandum of appeal filed on the 2nd July 2019 has 4 grounds of appeal as follows;

- i. That the Learned Magistrate erred both in law and in fact in failing to appreciate the parameters and the threshold for striking out pleadings in view of the Provisions of Section 1A and 1B of the Civil Procedure Act (Cap 21).*
- ii. That the Trial Court erred both in law and in fact in failing to appreciate that the statement of defence that was struck out raised serious and plausible grounds of defence both in law and fact which would have entitled the defendant to be heard.*
- iii. That the Trial Court failed to take into account the standard of proof in a civil suit which made him arrive at a skewed decision contrary to the evidence on record.*
- iv. The judgment, findings and award by the trial magistrate is against the weight of the evidence on record.*

2. The appellant seeks that the appeal be allowed and the judgment, findings and the orders by the Trial Court be set aside and in its place a finding and order made reinstating the Statement of Defence by the Defendant/ appellant and the suit be listed for hearing on merits.

As the first court considering this appeal I am required to review and evaluate the evidence or proceedings of the trial court and reach a finding. (*See Selle -vs- Associated Motor Boat Co. [1968] EA 123*)

3. The respondent filed a plaint seeking judgment against the respondent for; a declaration that the appellant is obliged and liable to satisfy in full the decree and costs of suit and all other/ further incidental costs arising from OGEMBO PMCC No. 150 of 2014 and that interest be at court rates of 14% p.a. on the award and costs in OGEMBO PMCC No. 150 of 2014 from 21st day of August 2017 till payment in full. At paragraph 5 of the plaint the respondent averred that "On or about the 12th day of August 2014 the plaintiffs herein instituted suit vide OGEMBO PMCC No. 150 of 2014 against the insured and the plaint verifying affidavit, Notice of Institution of suit were served upon the defendant herein as the insurers of the Insured as is required under section 10 of The Act and subsequently obtained judgment against the insured on the 21st August 2017 for Kshs. 1,720,500/- together with costs assessed at Kshs. 193,160/- and interest at court rates."

Paragraph 6 "Despite demand being made and Notice of Intention to sue having being given the defendant had failed, ignored, refused and / or neglected to liquidate the said decree rendering the filing of the suit."

4. The appellants filed a Statement of Defence on the 24th May 2018. Part of defence that denies that respondent's claim filed by the defendant was as follows;

Paragraph 3. "In specific reply to the Plaintiff's allegations, claims and or averments, the Defendant states that:-

- a) It was not the insurer and neither was it in cover in respect of motor vehicle registration number KBC 549S as alleged or at all.
- b) It is a stranger to the matter of insurance of the said motor vehicle
- c) It never issued policy number 5031055974/TPO to Yobesh Ngwono Nyaingiri as alleged or at all.”

Paragraph 4. The Defendant states that:

- a) The suit is statutorily time barred on account of it being based on contract which was allegedly entered into in 2010
- b) The suit is a nullity, is misconceived and an abuse of the process of the court as the same has been brought against the procedure set out in the Insurance (Motor Vehicle Third Part Risks) Act Cap 405.
- c) The alleged insurer did not notify the Defendant of the alleged accident and or incident in time or at all and hence there was a breach of a term of the insurance contract which voids the contractual obligations under the policy of insurance.
- d) The alleged insurer has violated the doctrine of **uberrimae fidei** and hence cannot purport to benefit from his breaches
- e) The Plaintiffs have no **locus standi** to institute and prosecute the suit.

5. The appeal was canvassed by way of written submissions. The appellant submitted that the cause of action was a declaratory suit. That the defence by the appellant raised several issues as deponed in paragraphs 3 and 4. Reliance was made on the findings in **Olympic Escort International co. Ltd & 2 Others –vs- Paraminder Sing Sandhu & another [2009] eKLR**, the Court of Appeal held that, “It is trite that, a triable issue is not necessarily one that the Defendant would ultimately succeed on. It need only be bona fide.” It was further submitted that it has been held that striking out a pleading is a draconian in nature and should not only be exercised in clearest cases but also cautiously. That a court can only strike pleadings if the defence has no merit and is a sham. (See **RamjiMegjiGudka Ltd-vs- Alfred Morfat Omundi Michira & 2 Others [2005] eKLR& D.T Dobie & Company (Kenya) Ltd-vs- Machina [1982] KLR 1**). It was further argued that the trial court did not apply the germane principles that ought to be considered in an application for striking out a pleading or part of a pleading.

6. The respondent in response submitted that the issue at hand is whether the defence filed at the trial court raised any triable issue to warrant the hearing of the suit on merit. It was argued that the vehicle registration number KBC 549 S was insured by the appellant at the time of the accident vide policy number 503/055974/TPO and a valid insurance policy was issued to the insured. It was further submitted that the statutory notice was served as evidenced by the letter dated 8th August 2013 and the courier waybill confirming service of the said letter upon the appellant. Reliance on this point was made on the case of **Invesco Assurance Co. Ltd vs Annette Wataka [2016] eKLR**. Lastly it was submitted that the appellant did not adduce evidence of repudiation of the policy nor did it allude to the same and therefore there was no triable issue to warrant a full trial and that the appeal lacks merit and should be dismissed. (see **BlueShield Insurance Co. Ltd vs Raymond Buuri M’rimberia [1998] eKLR**)

ANALYSIS AND DETERMINATION

7. Having considered the record of appeal, rival submissions the issue for determination in this appeal is whether the trial court erred in striking out the appellant’s pleadings. The trial court in its ruling stated as follows;

“Section 10 of the Insurance (Motor Vehicle) Third Party Risks Act (Cap 405) which provides as follows;

“ If after a policy of an 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 be avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section pay the person entitled to the benefit of the judgment any sum payable there under 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’

But then section 10(1) under s. 10 (1) is subject to the following provisions of s.10(4) of the Act which reads:-

(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.

There being no such declaration I find that the defendant is estopped, by their conduct, from denying liability”.

The trial court stated that it had looked at the documents annexed and noted that the defendants claim that new documents had been introduced had no basis. The trial court relied on the case of **D.T Dobie and Company (Kenya) Ltd vs Muchina (1982) KLR**. The Trial court also stated it had considered the pleadings and found that the defence was indeed frivolous and an abuse of the court process and ought to be struck out.

8. The trial magistrate considered the principles to be applied in an application to strike out a pleading. Justice Madan in the case of **D.T. Dobie & company (Kenya) ltd –vs- Muchina (Supra)** held that the court ought to act very cautiously and carefully and consider all facts without embarking upon a trial thereof before dismissing a case for disclosing a reasonable cause of action or for being otherwise an abuse of the process of court. Upon perusal of the court proceedings in the suit that led to the declaratory suit it appears that the matter proceeded ex parte. In the declaratory suit the defence has raised triable issues on whether it insured the said vehicle, the issue of the suit being time barred and that they were not served with the statutory notice these are just some of the issues. In the affidavit filed by the appellant's counsel he raised the issue that the notice was sent to the wrong address this is stated at paragraph 10 (b) of the affidavit of Mr Richard Onsongo dated the 5th October 2018. This is an issue that ought to be subjected to a hearing. As was held in the case of **Olympic Escort International Co. Ltd & 2 others vs Paraminer Singh, Sandhu & Another [2009] eKLR**, "*a triable issue is not necessarily one that the defendant would ultimately succeed on. It need only be bona fide*". In my view the issues raised are bona fide and the appellant ought to have been heard on the said issues. I therefore set aside the ruling of the trial court's ruling striking off the appellant's statement of defence. The defence is reinstated. The appeal is allowed with costs to the appellant. The parties shall take a mention before the Chief Magistrate for directions on the hearing and determination of the suit.

Dated, signed and delivered at KISII this 11th day of March 2020.

R.E.OUGO

JUDGE

In the presence of;

Mrs Assuna h/b Miss Kusa For the Appellant

Miss Olago h/b for Mr. Onsongo For the Respondent

Ms. Rael Court Assistant.