REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei – J

CIVIL APPEAL CASE NO. 53 OF 2016

CO-OPERATIVE INSURANCE CO. LIMITED.....APPELLANT

VERSUS

CHARLES MWORIA M'ARANJA & JANE KAMBURA

Suing as legal representatives to the estate of

LENSON MUTHURI MWORIA (DECEASED).....RESPONDENTS

BETWEEN

CHARLES MWORIA M'ARANJA & JANE KAMBURA

Suing as legal representatives to the estate of

LENSON MUTHURI MWORIA (DECEASED).....PLAINTIFF

VERSUS

CO-OPERATIVE INSURANCE CO. LIMITED.....DEFENDANT

(Being an appeal from the Ruling and order of Hon. I.M. Kahuya (Senior Resident Magistrate) in Machakos CMCC No. 814 of 2014 delivered on the 5/05/2016)

JUDGEMENT

1. The appeal arises from the ruling and order, of Hon. I.M. Kahuya S.R.M. delivered on the 5/5/2016 in Machakos Cmcc No. 814 of 2014 wherein she allowed the Respondent's application dated 14/10/2015 seeking for the striking out of the Appellant's defence and entry of summary judgement against the Appellant as prayed in plaint.

2. Being aggrieved by the said ruling, the appellant lodged a Memorandum of Appeal dated 10th June, 2016 in which it raised the following grounds of appeal namely:

> ***(a) That the learned magistrate erred in law and in fact in proceeding on the wrong principles by allowing the Respondents application dated 14/10/2015 and filed on 23/10/2015 as prayed, hence summarily dismissing the Appellants Defence which raises substantive issues of law and facts which exonerate the Appellant from any liability in the declaratory suit before the court.***

(b) That the learned magistrate erred in law and in fact in granting drastic orders that the Appellant's statement of defence summarily be struck out and judgement be entered in favour of the Respondent as prayed in the plaint before appreciating the appellant's case.

(c) That the learned magistrate erred in law and in fact by failing to uphold the principles of natural justice by condemning the Appellant unheard and summarily determining the Respondent's suit despite the fact that the appellants defence raised serious triable issues that could only be determined upon full trial.

(d) That the learned magistrate erred in law and in face by failing to appreciate the fact the Appellant herein vide its letter dated 30/08/2013 had communicated its repudiation of liability to its insured which information was on the Respondent's record in declaratory suit.

(e) ***That the learned magistrate erred in law and in fact by entertaining an application which was pre-mature and not merited and therefore occasioned the appellant miscarriage of justice since in any event the case ought to have gone to full trial without any prejudice to the Respondent and that the appellant could be afforded an opportunity to demonstrate why in law it is not liable to compensate the Respondent***.

3. The appeal is opposed by the Respondent. Parties agreed to canvass the appeal by way of written submissions which both learned counsels duly filed and exchanged the same.

4. Learned counsel for the Appellant raised one issue for determination namely whether the trial court erred in striking out the Appellant's statement of defence. Counsel submitted that the principles upon which a court can strike out pleadings pursuant to Order 2 Rule 15 of the Civil Procedure Rules are well settled and sought reliance in the cases of **Trust Bank Limited –Vs- H.S Amin & Company Limited & Another [2000] eKLR** and **Uchumi Supermarkets Limited & Another –vs- Sidhi Investments Limited [2019] eKLR.** Counsel submitted that the Appellant's defence was not frivolous, vexatious or a sham and an abuse of the court process as claimed by the Respondent since it clearly raised triable issues warranting a trial and that the main issue was whether the deceased was covered by the Appellant's insurance policy so as to obligate the Appellant to settle the claim. It was submitted that the issue of whether the deceased was an employee of the Appellant's insured is a question of law and fact which can only be determined after a full trial and which had been duly raised vide paragraph 5 and 6 of the Appellant's defence. Reliance was placed in the case of **Cannon Assurance Company limited –Vs- Peter Mulei Sammy [2016] eKLR**. Finally it was submitted that the trial court's finding that the Appellant ought to have repudiated the insurance policy under Section 10(4) of the Insurance (Motor Vehicles Third Party Risks) Act was in error as the Appellant did not have a problem with the Respondent's presentation of the facts while obtaining the policy. Counsel urged the court to allow the appeal as prayed.

5. Learned counsel for the Respondents submitted that the Appellant does not deny insuring the motor vehicle that caused the accident and that the requisite statutory notice was duly issued to the Appellant vide Section 10(1) and (4) of Cap 405. It was submitted that the Appellant did not file suit within 3 months prior to institution of a suit or seek a declaration to repudiate the police of insurance. In the absence of such and with proof of service of the statutory notice then the defence ought to be struck out. Reliance was placed in the cases of **Intra Africa Assurance Company limited -Vs- Simon N. Njoroge & Another C.A No. 111 of 1996 (Nairobi), Kairu –Vs- Lion of Kenya Insurance Company limited [1988] KLR** where the court held that upon the Insurance company failing to obtain declaration within the stipulated timeline their statement of defence was amenable for striking out. It was finally submitted that the deceased in the primary suit was a pedestrian thus falling in the ambit of cover that the Appellant issued to the insured and therefore the Appellant's defence dated 18/02/2015 does not raise any single triable issue and ought to be struck out and summary judgment be entered in favour of the Respondent as prayed for in the plaint.

6. I have considered the submissions filed by both learned counsels herein. It is not in dispute that the Respondents has fully prosecuted the primary suit being **Machakos CMCC No. 812 of 2012** and have already obtained a judgement in their favour and which paved way for the filing of the declaratory suit **Cmcc No. 814 of 2014.** It is not in dispute that the trial court has already struck out the Appellant's defence which has prompted this appeal. I find the only issue for determination is whether the trial court erred in striking out the Appellant's statement of defence.

7. I must start by pointing out the fact that this being a first appeal my role is to re-evaluate and re-analyze the lower court record and come up with my own independent conclusion as to whether or not to uphold the lower court's ruling now appealed against. I note that the trial court considered the Respondent's application dated 14/10/2015 and proceeded to strike out the Appellant's defence and summarily entered judgement for the Respondent as prayed in the plaint. It is not in doubt that the trial court was exercising judicial discretion. That being the position i have to be circumspect in seeking to interfere with the said decision unless the trial court misdirected itself in some matter and a result arrived at a wrong decision or that the exercise of discretion resulted in a miscarriage of justice. The gist of the Respondent's application dated 14/10/2015 is that the appellant's defence was frivolous, vexations, a sham and an abuse of the court's process. The same was ordered struck out. It is trite that striking of pleadings is a draconian measure and that it is only resorted to in the clearest of cases which on the face of it are so hopeless and unsustainable. A court must keenly check and ensure that such a pleading does not warrant the court's precious time as it does not raise any tangible triable issues for determination before proceeding to strike out. In the case of **Trust Bank limited –Vs- Amin Company limited & Another [2000] KLR 164** the court held as follows:

> "***A pleading or an action is frivolous when it is without substance or is groundless or fanciful and is vexatious when it lacks bonafides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble or expenses. In addition, an action should not be treated as an abuse of the process of the court unless it is plain beyond a peradventure at the interlocutory stage that the action cannot succeed."***

Going by the above authority, it is necessary to have a look at the Appellant's defence dated 8/12/2014 (page 20-21 of the record of appeal) paragraph 5, 6, 7 and 8 thereof).

Para.5 The defendant in response to paragraph 5, 6 and 7 of the plaint states that it is aware of **Machakos CMCC No.820 of 2012 Charles Mworia M'aranja and Jane Kambura N'Nabea (legal representatives) –Vs - Samuel M. Mundia** and further state that the said suit was made on behalf of its insured's employee (turn boy) and such class of persons are not covered by the Defendants motor commercial insurance policy.

Par 6 - The defendant denies the contents of paragraph 8 of the Plaint in particular denies that the Defendant is liable to meet the plaintiff's claim and shall seek to raise a preli minary objection at an opportune time during the pendency of this suit.

para. 7 The defendant pleads no knowledge to the truth of the contents of paragraph 9 of the plaint and puts the plaintiff to strict proof thereof.

Para.8 The defendant denies that demand and notice of intention to sue have been given and that it has refused and/or neglected to make the plaintiff's claim good and the plaintiff is put to strict proof thereof.

From the above, it is clear that the Appellant's defence raises a germane issue namely whether the deceased who was involved in the accident was an employee of the Appellant's insured and whether he was covered by the insurance policy (third party risks). These are matter of fact which have to be determined in a trial. Indeed, the learned trial magistrate pointed this out in her ruling but later discounted it and ruled in favour of the Respondent. There seems to be a dispute as to whether or not the deceased was a turn boy (conductor) or a pedestrian and this calls for a hearing on the merits. The Respondent has also pointed out the fact that the Appellant should have repudiated its obligation under the insurance policy during the pendency of the primary suit. Such an issue is a matter of fact which should be taken for trial. Even though the primary suit has been finalized, the Appellant being an underwriter and who is expected to meet the claim should be given an opportunity to defend itself. The striking out of its defence had the effect of condemning the Appellant unheard. No prejudice will be suffered by the Respondent if the Appellant is given an opportunity of being heard. The Respondent should not entertain the illusion that once the primary suit is finalized then the road to actualizing the fruits of the judgement will be smooth since the sued party in the declaratory suit also has rights to be considered by the court. In this case the Appellant's Defence is seeking to inquire into the category or class of the passenger who had been involved in the accident *vis a vis* its insurance policy terms and conditions reflected in terms of the provisions of Section 5(b) (ii) of the Insurance (Motor vehicle Third Party Risks) Act Cap 405. On this aspect I wish to associate myself with the findings of Ogola – J in **Cannon Assurance Company Limited –Vs- Peter Mulei Sammy [2016] eKLR** where he held as follows:

> "***I have no doubt in my mind that where such issues are raised in the defence, the defendant must be given a chance to ventilate the same. A declaratory suit arising from an earlier suit in which damages had been awarded, is still a suit. In the declaratory suit, the Insurance Company is the Defendant. If it denies knowledge of the alleged insurance policy or knowledge that it was***

served with a notice as required by law the court must give the defendant a chance of a full hearing to ventilate its defence. Indeed, in the declaratory suit, the main issues for determination would be the validity of the alleged insurance policy and whether notice had been served. The issue as to whether the respondent was a passenger would have been settled in the suit preceding the declaratory suit, but even then under Section 5 (b)(ii) of Cap 405, the Defendant in such declaratory suit would still be entitled to enquire into the category or class of the alleged passenger."

8. Learned counsel for the Respondent has submitted that the Appellant has not complied with Section 10 of Cap 405 regarding settlement of the claims in accordance with the decree and hence the defence filed was a sham and rightly struck out by the trial court. However now that the Appellant has raised an issue that the deceased did not form part of the class of persons covered under the Insurance policy, it is imperative to hold a trial and thrash out the issues raised in the defence. The declaratory suit is not meant to be a walkover for a successful party in an earlier primary suit. It must be pointed out that in the primary suit the defendant was the insured while in the declaratory suit the defendant is the insurer and therefore each must be determined according to the circumstances or merits thereof.

9. In view of the foregoing observations, I come to the finding that the decision by the learned trial magistrate dated 5/5/2016 was arrived at in error and which must be interfered with. Consequently, I find merit in the appeal. The ruling dated 05/05/2016 is hereby set aside and substituted with an order dismissing the Respondent's application dated 14/10/2015 with costs to the Appellant. The Appellant is awarded the costs of the appeal.

Orders accordingly.

Dated and delivered at **Machakos** this **29th** day of **July, 2020.**

D. K. Kemei

Judge