



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 240 OF 2019**

**TRIDENT INSURANCE COMPANY LIMITED.....APPELLANT**

**VERSUS**

**MIRRIAM WAYUA DAUDI & FESTUS MWANZIA MUTUNE**

**(Suing as the Administrators of the**

**Estate of the late DAUDI MUTUNE) .....RESPONDENTS**

**(Being an appeal from the ruling and decree of the Chief Magistrate's court at Nairobi Hon. E.N. Wanjala SRM delivered on 28<sup>th</sup> March, 2019)**

**JUDGMENT**

The lower court delivered a ruling on 28<sup>th</sup> March, 2019 following an application by the plaintiff under Order 2 Rule 15 of the Civil Procedure Rules which sought the striking out of the statement of defence and entry of the judgment in favour of the plaintiff, and that in the alternative summary judgment be entered in the sum of Kshs. 3 Million plus costs and interest.

The application had been opposed by the defendant but the lower court found in favour of the plaintiffs and allowed the application. In allowing the application, the lower said in part as follows,

**“.....I find that based on my findings above that the statement of defence does not raise triable issues to the plaintiff's claim to warrant the same to proceed to trial since the procedure in Section 10(2) Cap 405 Laws of Kenya was never followed by the defendant with respect to avoiding liability herein hence they have no defence to the plaintiff's claim”.**

It is that ruling that aggrieved the appellant leading to the filing of the memorandum of appeal dated 24<sup>th</sup> and filed on 26<sup>th</sup> April, 2019.

There is the allegation in the first ground of appeal that the court gave contradictory rulings in that, in open court the respondent's application was dismissed with costs in the cause, but it turned out that the application had been allowed. There is nothing on record to show that such a declaration was made in open court and if it was made at all, the record does not support that .

The other grounds relate to whether or not the appellant issued any policy or that it was valid on the date of the accident. Another question that begged resolution is whether or not a police abstract constitute evidence that is irrebuttable.

Finally, whether or not any triable issues had been raised in the statement of defence. It is now established that where the defendant raises a triable issue, an opportunity to be heard should be granted. A triable issue has been defined as one that may not necessarily succeed. The right to fair hearing should always be accorded so that any party who approaches the court should have his day in court.

Looking at the statement of defence filed by the appellant herein, and in particular paragraphs 3,4,5,6 and 7, it is clear that several triable issues stand out. Again the court of law should not appear to stand as a witness in any matter before it. Regrettably, the lower court's approach in the ruling tilted in that direction. This clearly resulted in prejudice towards the appellant.

Some of the issues raised by the parties in their respective submissions belong to a trial, and it will be prejudicial to delve any deeper in this appeal. I am persuaded that there is merit in this appeal and therefore, the same is allowed but each party shall bear their own costs.

I order that there shall be a retrial before another court of competent jurisdiction so that both parties may present their respective positions with a view to arriving at a just decision.

***Dated, signed and delivered at Nairobi this 23<sup>rd</sup> day of July 2020.***

**A. MBOGHOLI MSAGHA**

**JUDGE**