REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 94 OF 2019

ESTHER MOKEIRA NYAMBANE

suing as legal representative of the estate of the late

MARADONA MOGAKA .....APPELLANT

VERSUS

XPLICO INSURANCE COMPANY LIMITED.....RESPONDENT

(Being an appeal from the ruling of Hon. E.A. Obina (P.M.) delivered on 11th July, 2019 at the Chief Magistrates Court at Kisii in CMCC No. 690 of 2018)

JUDGMENT

1. The Memorandum of Appeal dated 12thAugust 2019 and filed in court on 13th August 2019 sets out the following grounds of appeal against the trial court's decision;

a. The learned trial magistrate erred in his interpretation and application of the law on striking out pleadings;

b. The learned trial magistrate erred in failing to hold that the respondent's defence did not disclose any bona fide triable issue and that the same was a sham;

c. The learned trial magistrate's ruling was against the weight of evidence placed before him;

d. The learned trial magistrate treated the appellant's submissions perfunctorily; and

e. The learned trial magistrate's ruling is a miscarriage of justice.

2. The background to this appeal is that the appellant filed the substantive suit against the respondent for a declaration that it is liable to pay the judgment sum in Kisii CMCC No. 306 of 2015 (herein "the primary suit") where judgment had been entered against its insured. Judgment in the primary suit was entered in favor of the plaintiff who had sustained grievous injuries when he was knocked down by motor vehicle registration number KBN 284Q ("the subject vehicle"). The appellant, suing as the legal representative of the plaintiff's estate, averred that the respondent had been served with the requisite statutory notice under **Section 10 (2) (a)** of the **Insurance (Motor Vehicles Third Party Risks) Act ("CAP 405")** and was obliged to pay the decretal sum of Kshs. 1,006,549/= and costs of Kshs. 118,600/= together with interest at court rates.

3. In its statement of defence, the respondent denied that an accident involving the subject vehicle had ever occurred. The respondent also denied that it had issued a policy for the vehicle as alleged by the appellant and also claimed that it was never notified about the accident. The respondent further denied that the appellant had filed the primary suit or that judgment had been issued in the suit as claimed by the appellant. In the alternative, the respondent averred that judgment in the primary suit had been obtained through forgery, collusion and misrepresentation. The respondent notified the appellant that it intended to apply to have the suit struck out for being premature, bad in law, incompetent and untenable.

4. Soon after the filing of that statement of defence by the respondent, the appellant moved the trial court by an application dated 17 th February 2019 to have it struck out. The appellant also sought for judgment as prayed in the plaint and costs of the application. The trial court's dismissal of that application is what led to the instant appeal.

5. Directions were given to have this appeal disposed of by way of written submissions.

SUBMISSIONS

6. The appellant's counsel, in his written submissions, contends that the trial magistrate failed to appraise the law on abuse of court process. He submits that the court should have considered whether the issues raised were proper issues capable of reasoned argument. For instance, counsel argued, in the face of a police abstract, Certificate of Insurance, a plaint and decree in the primary suit, the respondent could not aver that the accident had not occurred or that the suit had not been filed and that the accident did not involve its insured.

7. Counsel submitted that by finding that the declaratory suit was different from the primary suit, the court misdirected himself on the doctrine of subrogation. Counsel also contended that the trial magistrate failed to consider that the only way the respondent could avoid liability was if a declaratory order had been obtained against its insured within 3 months of the institution of the primary suit.

8. It was also the appellant's argument that the trial magistrate ignored the purport of **section 3(5)** of the **Interpretation & General Provisions Act** given the fact that no contradictory evidence was laid before the trial court with respect to service of the statutory notice. The trial court's decision was also assailed for failing to appreciate that there was a lawful judgment enforceable against the respondent. Counsel argued that no benefit will be served by submitting the declaratory suit to a full trial. He urged this court to strike out the defence to expedite the course of justice.

9. The respondent's counsel for his part submitted that the power to strike out pleadings is a draconian step which should only be resorted to in the clearest of cases. Counsel argued that it will be against the interest of justice to deny the respondent a chance to be heard and compel it to settle a judgment that was obtained *ex parte*. It was his submissions that the statement of defence raises numerous cogent issues which should be ventilated before the court and determined on merit.

10. The respondent's counsel also argued that it was upon the appellant to convince the trial magistrate that there were no triable issues raised in the statement of defence. He contends that the trial magistrate was not bound to conduct a mini trial based on affidavit evidence. That the court properly exercised its jurisdiction to allow the parties to ventilate the issues through trial and this appeal should be dismissed.

ANALYSIS AND DETERMINATION

11. The question in this appeal is essentially whether the respondent's statement of defence raised any *bona fide* triable issues worth determination at a full hearing.

12. The power to strike out pleadings is conferred upon the court under **Order 2 Rule 15** of the **Civil Procedure Rules** which stipulates;

> *15(1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—*
>
> *(a) it discloses no reasonable cause of action or defence in law; or*
>
> *(b) it is scandalous, frivolous or vexatious; or*
>
> *(c) it may prejudice, embarrass or delay the fair trial of the action; or*
>
> *(d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.*

13. Due to the drastic nature of the power to strike out pleadings courts are cautioned to exercise that power only when it is obvious that the pleading is unarguable and cannot be salvaged by amendment. The principles applicable to striking out of pleadings were articulated in the case of ***D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another Civil Appeal 37 of 1978 [1980] eKLR*** where Madan JA held;

> *The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof, before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage the court ought not to deal with any merits of the case for that 'is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits "without discovery, without oral evidence tested by cross-examination in the ordinary way". (Sellers, L.J. (supra)). As far as possible, indeed not at all, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks it right.*
>
> *If an action is explainable as a likely happening which is not plainly and obviously impossible the court ought not to overact by considering itself in a bind summarily to dismiss the action. A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it.*
>
> *No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.*

14. In the case of ***Kivanga Estates Limited vs National Bank of Kenya Limited Civil Appeal No. 217 of 2015 [2017]eKLR*** the Court of Appeal held;

> *"It is not for nothing that the jurisdiction of the court to strike out pleadings has been described variously as draconian, drastic, discretionary, a guillotine process, summary and an order of last resort. It is a powerful jurisdiction, capable of bringing a suit to an end before it has even been heard on merit, yet a party to civil litigation is not to be deprived lightly of his right to have his suit determined in a full trial. The rules of natural justice require that the court must not drive away any litigant from the seat of justice, without a hearing, however weak his or her case may be. The flip side is that it is also unfair to drag a person to the seat of justice when the case brought against him is clearly a non-starter. The exercise of the power to strike out pleadings must balance these two rival considerations.*
>
> *Although the court exercises discretionary powers in striking out pleadings, because of its far reaching consequences,* ***order 2 rule 15*** *of the Civil Procedure Rules, has established clear principles which guide the court in the exercise of that power …*
>
> *The language as highlighted demonstrates that, as a drastic measure in litigation, the remedy must be resorted to sparingly. It is only where a pleading cannot be salvaged by an amendment that the court will utilise this procedure, hence the use of the word "may".*

15. That said, a court will not allow pleadings that are merely aimed at prolonging the course of justice and unnecessarily vexing parties by offending pleadings. In **Continental Butchery Limited V Nthiwa Civil Appeal No 35 of 1977 [1978] KLRt**he Court opined that;

> *"If a bona fide triable issue is raised the defendant must be given unconditional leave to defend but not so in a case in which the court feels justified in thinking that the defences raised are a sham."*

16. The power to strike out pleadings is discretionary in nature. An appellate court will not interfere with the exercise of the trial court's discretion unless it is shown that the court misdirected itself in law, misapprehended the facts, took account of considerations of which it should not have taken account or the decision was plainly wrong. (See ***Mrao Ltd Vs. First American Bank of Kenya Ltd*****[2003] KLR125)**Being a first appeal, this court is also called upon to analyze and re-assess the evidence on record and reach its own conclusions. (see ***Selle v Associated Motor Boat Co. [1968] EA 123***).

17. The appellant contends that the issues raised by the respondent in its defence were a sham and the trial magistrate erred in failing to exercise its discretion to strike it off. The appellant also claimed that the trial court failed to consider its submissions but it is clear from a reading of the decision that the trial court took into account the submissions of the parties and carefully analyzed the authorities cited before it.

18. The impugned statement of defence was filed by the respondent in opposition to the appellant's declaratory suit which sought to compel it to satisfy the judgment in the primary suit.

19. **Section 10 (1)** of **CAP 405**places a duty on an insurer to satisfy judgment and any amount payable in respect of costs and interest entered against its insured notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer. An insurer can only avoid payment of the sum under **Section 10 (2)** of the Act, if statutory notice under section **10 (2) (a)** was not issued, if there is a stay of the court's decree pending appeal, if the policy of insurance was cancelled as per Section 10 (2) (c) or the insurer obtained a declaration under **Section 10 (4)** of the Act.

20. Pursuant to the foregoing provision, the appellant filed the suit seeking a declaration that the respondent was obliged to satisfy the judgment entered in favor of the plaintiff in the primary suit. The appellant claimed that when the accident occurred on 1 st June 2014, the respondent had insured the subject vehicle under policy number 070/066740/14/05/040.

21. The respondent, in paragraphs 3, 4, 7, 9 and 10 of its defence, denied that the accident involving the subject vehicle had ever occurred. It also denied that the primary suit had ever been commenced or that a decree was issued in favor of the plaintiff in that suit. In her application dated 17th February 2019, the appellant annexed a copy of the plaint in CMCC No. 306 of 2015 as well as a copy of decree issued by the court in that suit. There was no contention that these copies were a forgery. The respondent did not care to explain the claim that the primary suit had not been filed or that judgment had not been entered for the plaintiff in that suit in its reply to the application to strike out the defence. I am therefore in agreement with the appellant that the denial was not *bona fide*.

22. The court in ***Anne Wambui Maina v United Insurance Co. Ltd HCCC 562 of 2004 [2005] eKLR*** dismissed a similar defence thus;

> *"To a supplementary affidavit sworn on 8th April, 2005 by Abida Ali-Aroni, an advocate practising with the firm of advocates which has the conduct of this suit on behalf of the applicant, a copy of the judgment in Machakos HCCC No.238 of 1996 is attached. The respondent did not react to that affidavit. The judgment shows explicitly that the court indeed awarded the sum of Kshs. 1,802,490/= which is also spelt out in words. A denial of such a judgment is a denial of the obvious and clearly time wasting."*

23. I am also inclined to disregard the respondent's defence that it was not the insurer of the subject vehicle. The respondent raised this defence at paragraph 5 and 6 of its defence. In response to this issue, the appellant deposed that she had attached a police abstract and a Certificate of Insurance to her affidavit which clearly showed that the respondent had insured the subject vehicle. The police abstract and the Certificate of Insurance indicate that the respondent had issued policy cover no. 070/066740/14/05/040 for the subject vehicle from 31 st May 2014 to 29th June 2014. Since the accident involving the subject vehicle occurred on 1st June 2014, it is beyond question that the respondent was the insurer of the subject vehicle at the material time.

24. The respondent also claimed that it had not been notified of the accident when it occurred and that the requisite statutory notice imposed under CAP 405had not been issued. The duty to notify the insurer of the occurrence of the accident is a duty usually imposed upon the insured in the policy and not the third party. However, a third party is required to alert the insurer that it intends to or has instituted a suit

against the insured in **Section 10 (2) (a) of CAP 405**. Under that provision, no sum shall be payable by an insurer 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.

25. The appellant exhibited a copy of a statutory notice dated 9th February 2015 addressed to the respondent in her application to strike out the respondent's defence. In the notice, the respondent was informed that the plaintiff intended to institute proceedings against the respondent's insured in respect of an accident that had occurred on 1st June 2014 involving the subject vehicle and the plaintiff. The appellant also annexed a Certificate of Posting in her affidavit depicting service of the statutory notice to the respondent.

26. The appellant submitted that the respondent could not argue that the statutory notice had not been served in light of the provisions of **section3(5)**of the **Interpretation & General Provisions Act** which stipulates that;

> "*Where any written law authorizes or requires a document to be served by post, whether the expression "serve" or "give" or "send" or any other expression is used, then, unless a contrary intention appears, the service shall be deemed to be effected by properly addressing the last known postal address of the person to be served, prepaying and posting, by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of the post."*

27. The Certificate of Posting indicates service of the statutory notice on 10th February 2015 before the filing of the primary suit in July of the same year. The respondent did not dispute the authenticity of the notice or Certificate of Posting. There was also no claim by the respondent that the address in the notice was improper. Evidently therefore, this line of defence was not sustainable and the trial court erred in finding otherwise.

28. I note that at paragraph 12 of its statement of defence, the respondent claimed, *inter alia*, that there was no insurance policy issued to the alleged insured in respect of the subject vehicle. Although the parties did not deal with this issue extensively in their submissions, it is must be acknowledged that there needs to be a determination of this issue on merit. The Certificate of Insurance annexed to the appellant's affidavit shows that the owner of the vehicle was one "Felista Nyambura". In contrast, the primary suit by the plaintiff was filed against one "Keffah Nyakundi". At this juncture, it cannot be said that the identity of the insured is obvious. To my mind this is an issue that warrants a determination by full trial.

29. Faced with a similar scenario, the Court of Appeal in ***Blue Shield Insurance Company Ltd vs Joseph Mboya Oguttu Civil Appeal 262 of 2003 [2009] eKLR*** **h**eld;

> "*The third point raised in the defence and in the grounds of opposition to the application for striking out defence was that the insurance cover was not in the name of Juma Construction Company Limited. We have seen another name in the triplicate copy of the certificate and that defence cannot be termed scandalous, frivolous and vexatious. One would need to investigate the connection of the name in the certificate, which is "John Waluke", and Juma Construction Company Limited and their respective connections with the offending motor vehicle."*

30. The court proceeded to find that;

> "*In law, only one issue raised in defence, if it constitutes a genuine defence and not necessarily a successful defence, would warrant a full hearing."*

31. The respondent was only required to demonstrate that the defence on record raised a triable issue however implausible. The defence does raise a triable issue and the respondent should be allowed to defend the suit at trial.

32. In the end, I find this appeal unmerited and I hereby dismiss it. The lower court file will be returned to the Chief Magistrate's court for hearing and determination. Costs shall be in the cause.

Dated, **signed** and **delivered** at **KISII** this **24th** day of **September 2020.**

R.E.OUGO

JUDGE

In the presence of:

Miss Kebungo For the Appellant

Miss Wanjohi For the Respondent

Ms Jackie Court Assistant