REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

(CORAM: R. MWONGO, J.)

CIVIL APPEAL NO. 6 OF 2018

KENYA ORIENT INSURANCE CO. LTD.....APPELLANT

VERSUS

RAEL CHELIMO ALIAS RACHEL CHELIMO.....RESPONDENT

(Being an appeal from the Ruling of the Hon. E. Kimilu (PM) delivered on the 23rd January 2018 in Naivasha CMCC No. 425 of 2017)

JUDGMENT

1. Rael Chelimo was a passenger in Motor Vehicle No. KBB 129S driven along at Kikopey on 1st June, 2013, when a vehicle registration number KAZ 314J J-ZC 3900 owned by Swaleh Hashil and driven by Elias Dawood collided with vehicle KBB 129S. The Defendant's vehicle was allegedly insured by the Appellant herein. She suffered injuries, in the accident and filed a personal injuries suit - **Naivasha CMCC No. 758 of 2015** (the Primary suit), and was awarded damages of Kshs 8,142,186/= plus costs and interest, in a judgment of Hon. E. Kimilu. The judgment was entered on formal proof after the Defendants in the primary suit failed to enter appearance.

2. Following that judgment, the Plaintiff/Respondent filed suit against the Appellant herein in **CMCC Civil Suit No. 425 of 2017** (the Declaratory Suit) seeking a declaration that the Defendant is liable to satisfy the judgment in **CMCC No. 758 of 2015** dated 23rd January, 2018.

3. The Appellant filed a defence in the Declaratory Suit. It was challenged for being vexatious frivolous and an abuse of the court process. The trial court following the motion challenging the defence, in its ruling dated 23rd January, 2018 found that it:

> ***"……it (the defence) does not raise bona fide triable issues. It consists of mere denials and general traverse, without reasons why [the] claim was not settled. It is lacking in merit and raises no reasonable defence."***

The trial court struck out the defence.

4. Dissatisfied, the Appellant has filed this appeal. The grounds of the appeal are:

> *1. THAT the learned magistrate erred in law and in fact in making a declaration for a sum of Kshs 6,641,245/= in a declaratory suit, which is clearly contrary to statute and or its not in tandem with* ***Section 5b (iv)*** *of the* ***Insurance (Motor Vehicles Third Party Risks) Act, CAP 405****.*
>
> *2. THAT the learned magistrate erred in law and fact in making and award and/or declaratory judgment for KShs 6,641,245/=, in a matter where she had no jurisdiction arising from* ***Section 5b (iv)*** *of the* ***Insurance (Motor Vehicles Third Party Risks) Act, CAP 405****.*
>
> *3. THAT the learned magistrate erred in law and fact in finding that the appellant was insurer within the meaning of CAP 405 which was against the weight of evidence.*
>
> *4. THAT the learned magistrate erred in law and fact in finding that a judgment had been entered against the insurer of the appellant in a primary suit which was against the provisions of* ***Section 10 (1)*** *of the* ***Insurance (Motor Vehicles Third Party Risks) Act, CAP 405*** *and the weight of evidence.*
>
> *5. THAT the learned magistrate erred in law and in fact in failing to find the issue of whether the liability of an insurer under the provisions of the* ***Insurance (Motor Vehicles Third Party Risks) Act, CAP 405*** *had not been made out.*

*6. THAT the learned magistrate erred in law and in fact in failing to find that the **Insurance (Motor Vehicles Third Party Risks) Act, CAP 405** set a limit on her jurisdiction which was triable issue.*

7. THAT the learned magistrate erred in law and fact in failing to find that no evidence of judgment obtained was established in the evidence presented in court.

8. THAT the learned magistrate erred in law and fact in finding that the plaintiff was a third party within the meaning of the Act which was against the weight of evidence.

9. THAT the learned magistrate erred in law and fact in finding statutory notice was served as per the law which was against the weight of evidence.

10. THAT the learned magistrate erred in law and fact in entering judgment against the weight of evidence and decided cases.

11. THAT the learned magistrate erred in law and fact in failing to find that there were triable issues and that the appellant was entitled to unconditional leave to defend.

*12. THAT the learned magistrate erred in law and fact in failing to find the supporting affidavit of the respondent ought to have been struck out of offending **Order 19, Rule 3** of the **Civil Procedure Rules, 2010**.*

13. THAT the learned magistrate failed to follow and be bound by the principles of stare decisis and the list of authorities.

5. The parties filed written submissions which I have carefully perused and taken into account. I have also carefully considered the ruling of the trial court of 23rd January, 2018 which struck out the defence.

6. The trial court in its impugned ruling, considered the application for striking out the defence and the replying affidavit sworn by Ishmael Muchiri, the Appellant's legal officer, before making her determination. She also considered the parties' submissions and the authorities availed.

Analysis and Determination

7. The trial court was thus faced with the following situation: The Applicant there exhibited a police abstract indicating that the defendant was the insurer; the defendant denied insuring the vehicle; the plaintiff had attached a demand letter shown as having been received by the defendants on 11th May 2015, and a statutory notice dated 2nd December 2015; however, the defendant had not appointed counsel or entered appearance in the primary suit with the result that the matter had proceeded for formal proof and the consequent judgment was the outcome of the formal proof.

8. The Appellant impugns the trial magistrate's Ruling in CMCC 425 of 2017 dated 23rd January, 2018 in which the trial court struck out the Appellant/Defendant's defence. In so doing, the learned magistrate applied the provisions of **Order 2 Rule 15 (1)** of the **Civil Procedure Rules** which provides as follows:

"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."

Issues

9. Having carefully perused all the material placed before me I would summarise the issues for determination in this appeal as follows:

a) Whether there were triable issues in the defence.

b) Whether the trial magistrate had jurisdiction to make the award for a declaratory suit given the provisions of Section 5 (b) (iv) of the Insurance (Motor Vehicles Third Party Risks) Act Cap 405.

c) Whether a judgment had properly been entered and a finding of liability made under Cap 405 given that no evidence of judgment had obtained.

d) Whether statutory notice had been served.

Whether the defence raised triable Issues

10. The kernal issue to be determined in a matter where striking out a defence is in issue is whether there is any triable issue raised in the defence. The parties submitted on this issue extensively in the trial court and on appeal. What constitutes a triable issue was well explained in **Patel v E.A. Cargo Handling Services Ltd [1974] EA 75** and reiterated in **Transcend Media Group Limited v Independent Electoral & Boundaries Commission (IEBC) [2015] eKLR** Page 11:

> ***"In the case of a defence, the court must also be satisfied upon examination of the defence that it is a sham, it raises no bona fide triable issue worth a trial by the court and note that a triable issue is not necessarily one which must succeed but one that passes the Sheridan J Test in Patel vs EA Cargo Handling Services Ltd (1974) EA 75 at p.76where Duffus P held that "a triable issue is an issue which raises a prima facie defence and which should go to trial for adjudication."*** (Emphasis added)

11. Accordingly, I have carefully considered the defence filed in the lower court. In paragraphs 3 - 4 the defendant denied issuing an Insurance Policy No. B6244535 MSA/106/002361/2012 TPO in favour of the accident vehicle, and - the alternative denied that such a policy was in effect at the material time.

12. In paragraph 6 of the defence it asserted that the duty to satisfy the judgment in the Primary Suit *"would only arise from the contract of insurance with the insured and there being no such insurance contract the defendant has no duty to make good or satisfy the alleged judgment."*

13. The trial court considered the issues in paragraph 3 - 6 of the defence at Paragraph 10 of her impugned ruling. The trial court, reiterating the principle that it is a draconian action to strike-out a pleading pointed out the holding in **Blue Sky EPZ Limited v Natalia Polyakova & another [2007] eKLR** where the court held:

> ***"The power to strike out pleadings is draconian, and the court will exercise it only in clear cases where, upon looking at the pleading concerned, there is no reasonable cause of action or defence disclosed. In the case of a defence, a mere denial or a general traverse will not amount to a defence. A defence must raise triable issues."***

14. In submissions on appeal, the appellant reiterates that it was not the insurer of the judgment debtors and that the Respondent has not exhibited the Certificate of Insurance which would have been conclusive; and instead only relied on the information on insurance contained in the Police Abstract.

15. In response, the Respondent has cited the case of **Bernard Mutisya Wambua v Kenya Orient Insurance Company Limited [2020] eKLR** where this court dealt with the very same accident that occurred on 1st June 2013 involving the same motor vehicles registration numbers KAZ 314J-ZC 3900 and KBB 129S. The driver Swale Hashil and the owner of the vehicle Elias Dawood did not, in that case, present any evidence. This court held as follows:

> ***"15. I agree with Mabeya J, that the insurance certificate is a document usually in the possession of the insurer and insured. The evidence by the police in the police abstract that such and such was the insurance policy, giving its number and the name of the insurer is, in my view, evidence of such a nature that that it must be controverted. If objected to by the insurance company, it would easily bring the correct policy to the attention of the court because it keeps copies of these."***

And at paragraph 22:

> ***"22. I am satisfied that the plaintiff here has shown from the evidence of the PW1 and the findings in HCCC 28 of 2015 that Swale Hashil was the insured and that the defendant the insurer. The Defendant having not taken advantage of section 4 of the Insurance (Motor Vehicle Third Party Risks) Act, this court is entitled to find in favour of the plaintiff on this point, as we hereby do."***

16. The present case followed a similar pattern as the aforesaid case of **Bernard Mutisya Wambua**: the Insurance Company failed to avail evidence in the main personal injuries trial and later appealed arguing that there was no insurance policy proved. In the present appeal, I find that the argument that there was no proved insurance policy is disingenuous. The horse has bolted. **Section 117** of the **Evidence Act** provides:

> ***"In civil proceedings when any fact is especially the knowledge of any party to the proceedings, the burden of proving or disproving that fact is upon him."*** (Emphasis added)

17. Had the appellant's statement of defence simply stated that the Insurance Policy No.B6244535 MSA/106/002361/2012 TPO alleged to have covered the defendant, covered XYZ and not the defendant that would have been a substantial, not bare defence. That fact was specially within its knowledge. I thus agree that the mere defence of not having issued the insurance cover, without more, was a delaying sham. In addition, the finding of this court in **Bernard Wambua** disposes of this issue concerning the same insurance policy. I thus adopt the position taken in **Bernard Wambua's** case.

Jurisdiction of Trial Court

18. On the issue as to whether the trial court had jurisdiction to make an award which would exceed the award to which the insurance company would be liable under **Section 5 (b) (iv)** of the **Insurance (Motor Vehicle Third Party Risks) Act Cap 405**, I find as follows.

19. **Section 5 (b) (iv)** of the **Insurance (Motor Vehicle Third Party Risks) Act Cap 405** provides as follows:

> ***"In order to comply with the requirements of section 4, the policy of insurance must be a policy which***
>
> ***(a) is issued by a company which is required under the Insurance Act, 1984 (Cap. 487) to carry on motor vehicle insurance business; and***
>
> ***(b) insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of, or bodily injury to, any person caused by or arising out of the use of the vehicle on a road:***
>
> ***Provided that a policy in terms of this section shall not be required to cover-***
>
> ***(i) liability in respect of the death arising out of and in the course of his employment of a person in the employment of a person insured by the policy or of bodily injury sustained by such a person arising out of and in the course of his employment; or***
>
> ***(ii) except in the case of a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, liability in respect of the death of or bodily injury to persons being carried in or upon or entering or getting on to or alighting from the vehicle at the time of the occurrence of the event out of which the claims arose; or***
>
> ***(iii) any contractual liability;***
>
> ***(iv) liability of any sum in excess of three million shillings, arising out of a claim by one person. [Act No. 46 of 1960, s. 48, Act No. 10 of 2006, s. 34.]"*** (Underlining added)

20. Clearly, the section avails motor vehicle insurers protection against paying third party risks an amount in excess of Kshs 3,000,000/= in respect of a single third party claim. To that extent, therefore, the trial court had jurisdiction to make an award against the defendant in that case, limited of course, to a maximum of Kshs 3,000,000/=. This position is accepted by the Appellant in its submissions at paragraph 10 therein. On this I quote the sentiment of Githua J in **Patricia Mona Antony & Another v African Merchant Assurance Co. Ltd [2019] eKLR** where she aptly stated:

> ***"I therefore wholly concur with the defendant's argument that it is only obliged to satisfy the decree by paying the plaintiffs the amount limited by the law in the sum of KShs.3,000,000/=. This does not however mean that the plaintiffs cannot recover the full decretal amount. They have the option of pursuing the defendant's insured for recovery of the amount in excess of the KShs.3,000,000 they are entitled to receive from the defendant."*** (Emphasis added)

Mandatory Statutory Notice

21. The appellant also submitted that it was never issued with the Mandatory Statutory Notice under **Section 10** of the **Insurance (Motor Vehicle Third Party Risks) Act Cap 405**. It, however, admits in paragraph 5 of its submissions that the respondent in her application dated 21st August 2017 attached a copy of a Notice dated 2nd December, 2015. It says this Notice was *"allegedly served"* and that:

> ***"It is not clear when the purported notice was allegedly served. There are statutory timelines set for service of such a notice……the same could have been served outside the prescribed statutory time limit.*** (Emphasis added)

22. In response, the respondent submitted that she made numerous attempts to prompt the appellant to participate in the lower court matter, and referred to Page 55 of the Record of Appeal and pages 3 - 5 of the Supplementary Record of Appeal.

23. I have perused the Respondent's Supporting Affidavit deponed on 21st August 2017 in support of the Notice of Motion of even date referred to by the Appellant. Annexed to the Supporting Affidavit is annexture "RC 5", a "Statutory Notice" dated 2nd December 2015, giving notice to the Appellant concerning the filing of the Primary Suit it relates to the motor vehicle Registration No. KAZ 314B and Trailer No. ZC300. It also cites the insurance policy numbers in issue. The notice is stamped *"Received 2nd December, 2015"* with the stamp of or in the name of the Appellant.

24. In spite of this annexture, the Appellant/Defendant in its Replying Affidavit deponed on 27th October, 2017 at paragraph 8 as follows:

> ***"That there is no evidence to confirm that statutory notice was ever effected at all or in respect to a specific mode of service set out by the law."*** (Emphasis added)

25. I am not sure I understand what the Appellant's intendment in that paragraph on statutory notice is: whether a technical form of service was not followed; or whether the time of its service and the filing of suit was inadequate; or whether the stamp showing receipt of the notice did not belong to the appellant, etc.

26. My view is that any reasonable person or court looking at the said notice as exhibited would readily say: *"Ah, this is a statutory notice dated 2nd December, 2015 and it clearly seems to have been received by the defendant on 2nd December, 2015 given the defendant's stamp appearing on it."*

27. I think the argument that service of the notice was somehow not effected would have to be premised on a more concrete basis such as: the receipt stamp is a forgery, or does not belong to the defendant, or something along those lines. Indeed, the defendant did not argue that the notice was not received by it.

28. To that extent, it was for the appellant to show in what way the statutory notice did not comply with Section 10 of the **Insurance (Motor Vehicle Third Party Risks) Act Cap 405** so as to indemnify it from liability to pay. I thus agree with the respondent on page 3 of her submissions that:

> ***"From the submissions of the Appellant is not disputing that the said Statutory Notice was received in its office, it is not only sure when the same was received. The Appellant has not disputed the stamp on the face of the said Statutory Notice. The trial court was satisfied that the Statutory Notice was received within the required timeline which informed its ruling to strike out the Appellant's Defence. Furthermore the appellant has not denied receiving all the letters contained in the Supporting Affidavit which are continued in the supplementary Record of Appeal page 12 - 18, page 20-21. It is therefore our submissions that the Appellant was duly served with the Mandatory Statutory Notice."***

29. Accordingly, I so find that service of Statutory Notice was given.

Disposition

30. All in all and given the foregoing discussions, I am unable to find a basis on which to criticize the premises on which the decision of the trial magistrate to strike out the defence was made. I uphold the said decision. In the result, the appeal is dismissed with costs.

Administrative directions

31. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

32. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.

33. Orders accordingly.

Dated and Delivered in Naivasha by teleconference this 30th Day of November, 2020.

_____

R. MWONGO

JUDGE

Attendance list at video/teleconference:

1. Mr. Ochieng for the Appellant

2. Ms Amboko for the Respondent

3. Court Clerk - Quinter Ogutu