



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL NO. 12 OF 2018

BETWEEN

UAP INSURANCE.....APPELLANT

VERSUS

LAMECK BORORIO MWENE (Suing as the legal representative of

BRIAN LAMECK MOMANYI – Deceased).....RESPONDENT

JUDGMENT

1. The Respondent sued the Appellant's insured in *Kisii CMCC No. 52 of 2011*, for recovery of general damages, special damages costs as a result of a traffic accident and was awarded a sum totalling to Kshs 918,170/-.

2. Following the judgment, the Respondent filed a declaratory suit compelling the appellant to satisfy the judgment against its insured. The Respondent attached a police abstract in which China National Electrical Company was the holder of the Appellant's policy number 100/800/1/003893/2008 issued under the *Insurance (Motor Vehicle Third Party Risks) Act (Chapter 405 of the Laws of Kenya)* (hereinafter "the Act"). The Respondents further averred that he issued the requisite notice under section 10 of the Act which is dated 14th May 2015 served upon the Appellant on 20th May 2018.

3. The respondent in its amended statement of defence denied the contents of the plaint. More particularly, it denied that there was no insurance policy in favour of China National Electrical Company and further denied being served with the requisite statutory notice under Section 10 of the Act.

4. The Respondent filed an application seeking to have the Appellant's defence struck out and summary judgment entered against the appellant. The application was opposed but was allowed by the trial court through its ruling delivered on 26th January 2018. The appellant's statement of defence was struck out and summary judgment entered.

5. It is that ruling which prompted the appellant to file this instant appeal and in which he is seeking that the ruling dated 26/01/2018 be set aside, its amended defence dated 30/09/2017 be reinstated and the *Civil Suit No. 325* be allowed to proceed on merit.

6. As this is the first appeal, this court is called upon to analyse and re-assess the evidence on record and reach its own conclusions bearing in mind that it neither saw nor heard the witnesses testify (see *Selle v Associated Motor Boat Co. [1968] EA 123*). In *Kiruga v Kiruga & Another [1988] KLR 348*, the Court of Appeal observed that;

An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but this is a jurisdiction which should be exercised with caution.

9. The appeal proceeded by written submissions from the parties. The Appellant submitted that their defence raised the issue of ownership of motor vehicle KAY 248H. They further submitted that their defence addressed each and every allegation of fact and that their defence did not merely outline vague denials. It relied on *Dev Surinder Kumar Bij v Agility Logistics Limited Civil Suit No. 311 of 2013 (2014) eKLR* and *Saudi Airlines Corporation v Petroleum Company Limited as in (Transcend Media Group Limited v Independent Electoral & Boundaries Commission (IEBC) 2015* to support its case.

10. The Respondent submitted that the Appellant provided the registration status of the motor vehicle as at 29/08/2017 instead on 02/01/2009 when the accident occurred. It was its case that the police abstract was conclusive proof that the appellant was insured and relied on the case of *APA Insurance Co. Ltd versus George Mases Nrb No. 170 of 2012 (2014) eKLR*. They also relied on the case of *Francis Kimani Kariuki*

11. The main issue for determination in this appeal is whether the order to strike out the appellant's defence was made against the established clear principles set out by Order 2 rule 15 of the Civil Procedure Rules which provides as follows:

“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.”

12. In the case of **The Co-Operative Merchant Bank Ltd. vs. George Fredrick Wekesa Civil Appeal No. 54 of 1999** the Court of Appeal stated as follows:

“The power of the Court to strike out a pleading under Order 6 rule 13(1)(b)(c) and (d) is discretionary and an appellate Court will not interfere with the exercise of the power unless it is clear that there was either an error on principle or that the trial Judge was plainly wrong...Striking out a pleading is a draconian act, which may only be resorted to, in plain cases...Whether or not a case is plain is a matter of fact...Since oral evidence would be necessary to disprove what either of the parties says, the appellant's defence cannot be said to present a plain case of a frivolous, scandalous, vexatious defence, or one likely to prejudice, embarrass or delay the expeditious disposal of the respondent's action or which is otherwise an abuse of the process of the court. The defence raises a fundamental issue, namely, whether there was any misrepresentation as alleged by the respondent, a question which, cannot possibly be answered at the stage of an application for striking out; nor will it be competent for the court of appeal to try to answer it as its jurisdiction only extends to identifying whether, if any, there are issues which are fit to go for trial. The court has no doubt whatsoever, that the above is a fundamental triable issue...A Court may only strike out pleadings where they disclose no semblance of a cause of action or defence and are incurable by amendment. The appellant's defence cannot be said to fall into that category and had the trial Judge considered fully all the matters alluded to, he would not have come to the same conclusion as he did”.

13. In **Delphis Bank Limited v Caneland Limited [2014] eKLR**, the Court outlined the cases dealing with applications for striking out and summary judgment as follows:-

“The leading local case on interpretation of Rule 13 of Order VI of the Civil Procedure Rules on which the application for striking out the defences was based is perhaps D.T. Dobie & company (Kenya) Ltd vs Muchina which counsel for the appellant referred to us. In the case, Madan JA, as he then was, opined in an obiter dictum that;

‘The power to strike out should be exercised only after the court has considered all the facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial judge. On an application to strike out pleadings, no opinions should be expressed as this would prejudice the fair trial and would restrict the freedom of the trial judge in disposing the case.’

14. Without going to the merits of the case, a look at the appellant's defence filed in the trial court reveals two issues which ought to have been determined after the hearing of the declaratory suit. The issues raised by the appellant's defence are in regard to the ownership of the motor vehicle and service of the requisite notice as stipulated by **Section 10 of the Act**, which issues can only be determined after the conduct of a full trial. All the defendant is supposed to show is that a defence on record raises triable issues which ought to go for trial and the triable issues raised does not mean a defence that must succeed (*see Kenya Trade Combine Ltd vs Shah CA 193/99*). The Appellant's defence contains *bona fide* triable issue and the Defendant should thus be allowed to defend the suit.

15. In conclusion, I find the appeal meritorious. The ruling and order of the lower court striking out the Appellant's statement of defence and entering judgment is set aside and I hereby reinstate the said defence. The lower court file shall be returned so that court can give directions as to how to proceed with other relevant processes towards the trial of the suit. Costs shall be in the cause.

Dated and Delivered at Kisii this 24th day of January 2019.

R. E. OUGO

JUDGE

In the presence of;

Mr. Nyagwencha h/b Miss Gogi For the Appellant

Mr. Kimaiyo For the Respondent

Rael Court Clerk