REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

APPEAL NO. 31 OF 2018

BRITAM GENERAL INSURANCE LIMITED.....APPELLANT

VERSUS

UKWALE AGNES NDUNGU.....RESPONDENT

(Being an appeal arising from the Decree emanating from the Ruling & Judgment of Hon. S. SHITUBII, Chief Magistrate, which was delivered on 13th September 2018 in C.M.C.C No. 18 of 2018 Kajiado)

BETWEEN

UKWALE AGNES NDUKU.....PLAINTIFF

VERSUS

BRITAM GENERAL INSURANCE LIMITED.....DEFENDANT

JUDGMENT

1. This is an appeal from the ruling and order of **Hon. S. SHITUBI**, Chief Magistrate, dated 6th September 2018 and delivered on 13th September 2018 in CMCC NO.18 of 2018. In that ruling, the learned Chief Magistrate allowed an application to strike out defence, struck out the Appellant's defence and entered judgment as prayed in the plaint with costs. Aggrieved, the Appellant filed a memorandum of Appeal dated 17th September 2018 and raised rounds of appeal as follows:

> ***a. That the learned trial Magistrate erred in law and in fact in applying the provisions of the Insurance (Motor Vehicle Third Party Risks) Act to the suit yet the suit raised contractual issues, duties and obligations under a contract of insurance between an insurer and its insured.***
>
> ***b. That the learned trial Magistrate erred in law and in fact by making a finding that the appellant's defence failed to disclose triable issues yet the same raised serious contractual, factual and legal issues that could only be determined by way of a trial.***
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> ***c. That the learned trial Magistrate erred in law and in failing(sic) to make a distinction between a statutory claim by a third Party under the Insurance (Motor Vehicle Third Party Risks) Act and a claim by a policy holder of an insurance contract.***
>
> ***d. That the learned trial Magistrate erred in law and fact by applying Section 8 of the Insurance (Motor Vehicle Third Party Risks) Act to the suit yet the claim before the court was for enforcement of a contract by a policy holder and not a statutory claim by a third Party.***
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> ***e. That the learned trial Magistrate erred in law and in fact by failing to take note of the fact that the Respondent had made allegations of deceit, fraud and false representations which could only be determined by a trial as they touch on or relate to mental elements of parties.***
>
> ***f. That the learned trial Magistrate erred in law and in fact by failing to take note of the fact that the Respondent had based part of the claim on alleged oral agreement and or representations which had been denied by the Appellant and clearly required a trial.***
>
> ***g. That the learned trial Magistrate erred in law and fact by making a finding that the Appellant was aware of suits that had been instituted against the Respondent which finding rewrote the obligations and duties that were cast on the Respondent under insurance contract by placing the said obligations and duties to third parties who are strangers to the insurance contract.***

h. That the learned trial Magistrate erred in law and in fact by giving a blanket order allowing the Respondent's application as prayed without considering that the prayers that had been sought by the Respondent were in the alternative and in so doing the trial Magistrate created room for speculation and uncertainty as to the combination of the resultant judgment.

i. That the learned trial Magistrate erred in law and fact in failing to consider adequately or at all, the submissions that had been tendered by the Appellant and the authorities therein submitted.

j.

2. On the basis of the above grounds, the Appellant prayed that the impugned ruling be set aside the defence be reinstated and suit be heard and determination by way of a trial. The Appellant also prayed for costs of the appeal.

3. During the hearing of the appeal, Miss Otieno, learned counsel for the Appellant faulted the trial Magistrate erred for holding that the defence did not raise triable issues. According to counsel, the defence raises trial issues and referred to paragraphs 6-7 of their defence at Page 31of the Record of Appeal to demonstrate this fact.

4. Counsel submitted that the Respondent had made allegations of fraud in the Plaint which were denied by the Appellant in its defence thus raising triable issues which could only be determined after a full trial. She relied on the decision in ***Irene Wangui Gichinga V Samwel Ndungu Gitau*** [2010] e KLR to support this submission.

5. Regarding grounds of appeal 2, 3 and 4, counsel submitted that the learned trial Magistrate erred by applying the provisions section 8 of the Insurance (Motor Vehicle Insurance Third Party Risks) Act (CAP 405). She contended that the relationship between the Appellant and the Respondent was contractual and therefore section 8 was inapplicable. Counsel relied on ***Arera T & D Ihacha Ltd V Priority Electrical Engineers & Another*** [2012] eKLR and ***Lalji Kasman Pabadia & 2 Others*** [2015] eKLR. Learned counsel argued that parties are bound by their contract, in this case the insurance policy.

6. On ground 6, learned counsel submitted that the learned Chief Magistrate relied on oral agreements that were never before the court and that it was unfair to deny the Appellant a chance to respond to the same through a hearing. Counsel argued that since parties are bound by the terms of their contract the court cannot rewrite a contract for them. Miss Atieno urged the court to find that the defence raises trial issues, set aside the ruling and order and reinstate the defence for hearing.

7. Mr. Makumi, learned counsel for the Respondent submitted highlighting their written submissions filed on 21st February 2019 that where an insurance policy contains a protector clause, it means that in the event of an accident, the insured is not required to pay excess. Counsel referred to the Risk Note at page 69 of the Record of Appeal to this effect. He submitted that the record (page 68) shows less excess and that Kshs. 106,500/= was not supposed to be recovered because excess was protected. In the view of the counsel, Kshs. 106, 500/= was retained deceitfully and fraudulently

8. Mr. Makumi further submitted that the suit in the lower court was for Ksh. 106,500/= retained as excess and orders compelling the Appellant to settle the decree passed against the Respondent. Counsel argued that the Respondent's motor vehicle had been insured by the Appellant; that the insured motor vehicle was involved in a road accident and as a result the insured was sued by victims of that accident.

9. According to counsel, the Respondent was informed about the accident; notice was served as required under Cap 405 and received on 21st September 2015; summons were served with suit papers and received; the suit was heard and later notice of entry of judgment served and was received on 8th July 2017, all of which show that the Appellant was aware of the suit.

10. Mr. Makumi Counsel submitted that the Appellant's obligation to pay third party claims is both statutory and contractual. He argued that section 5(b) (ii) of the Act imposes a legal obligation on the insurer to pay third party claims. In counsel's view, by disputing service, the Appellant is seeking to avoid liability on claims by a third Party. He relied on ***ICEA Lion General Insurance Co. Ltd v the Board of Governors Rioma Mixed Secondary School & 24 others*** [2016] e KLR for the submissions that section 8 should be read hand in hand with section 16 to gain the maxim effect of the meaning of the section According to counsel the effect of section 8 of the Act is that an insurer cannot raise it as a defence to payment of claims.

11. Counsel also relied on ***Pacis Insurance Co. Ltd V Mohammed Hussein*** [2017] e KLR for the submission that failure to issue notice on the occurrence of an accident from which a claim arises would not serve as a sufficient ground for the Insurer to avoid its obligation as it does not go to the root of the contract of insurance.

12. Learned Counsel contended that the Appellant did not obtain a declaration that it was not bound to pay the claims and it cannot do so now. In counsel's view, the Appellant's defence did not raise triable issues and, therefore, there was no need for the suit to proceed to hearing.

Determination

13. I have considered the appeal; submissions by counsel for the parties and the authorities relied on. The basis of this appeal is the ruling of the trial court dated 6th September 2018 and delivered on 13th September 2018. In that ruling the learned Chief Magistrate struck out the Appellant's defence and entered judgment as had been prayed in the plaint.

14. This being a fist appeal, this is the appellate court has a duty to re- evaluate re- analyse and reconsider the evidence on record and draw its own conclusion on the matter. In ***Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates*** [2013] e KLR the Court of Appeal stated with regard to the duty of the first appellate court;

"This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way"

15. In ***Kenya Ports Authority versus Kusthon (Kenya) Limited*** (2009) 2EA 212 the Court of Appeal held, inter alia, that:-

"On a first appeal…the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence"

16. Guided by the above principles, I turn to re consider the evidence as can be deciphered from the record and re-analyse it . The Respondent had sued the Appellant in the lower court by Plaint dated 22nd January 2018 and filed in court on 23rd January 2018. The Respondent sought a declaration that the Appellant was lawfully and contractually bound to settle third party claims against the Respondent; an order compelling the Appellant to settle decretal amount plus interest in Kajiado ***CMCC No. 623 of 2016, Desert Runners Services Ltd & Stephen Lakere Manisa v Ukwale Agnes Nduku*** as well as the auctioneer's charges of Kshs. 80,000/=. The Respondent further sought judgment for the sum of Kshs. 106,500/= wrongly retained by the Appellant as policy excess plus interest from 8th September 2018.

17. The foundation of that suit was an insurance policy **No. 552/084/1/000113/2009/01** taken by the Respondent from the Appellant for motor vehicle **Registration No. KCA 809J.** The insurance Policy is said to have had an excess protector an express term in the policy. The insured motor vehicle was involved in a road traffic accident with another motor, vehicle **Registration No. KBC 734G,** along Loitokitok-Emali Road. Motor vehicle **KBC 734G** was extensively damaged while the driver of motor vehicle **KCA 809J** died as a result of that accident.

18. The proprietor of motor vehicle **KBC 734G** sued the Respondent in **Kajiado CMCC No. 623 of 2016**. The suit documents were said to have been served on the Appellant but no appearance was entered or defence filed. The case was heard and judgment entered against the Respondent. An attempt by the Respondent to have the default judgment set aside was unsuccessful when her application dated 10th October 2017 was dismissed on 17th October 2017. Execution proceedings were commenced leading to attachment of the Respondent's moveable properties to satisfy the decree in the sum of **Kshs. 699,500/=**.According to the Respondent, the Appellant was notified of the Judgment and asked to settle the decretal sum under the policy which it did not do.

19. At the same time, the Respondent stated that she discovered that the Appellant had fraudulently retained Kshs. 106,500/= when paying for the loss of the insured motor vehicle. That amount of Kshs. 106, 500 formed part of the claim in the suit giving rise to this appeal.

20. To that plaint, the Appellant filed a defence dated 13th February 2018 and filed on 14th February 2018. The Appellant denied that it had been aware of **CMCC No. 623 of 2016**; that the Respondent notified it of that suit or that it was served with summons to enter Appearance. The Appellant further stated that it could only act on a claim once a formal report had been made by the Respondent and upon the Respondent confirming that service of summons had been effected.

21. The Appellant further contended that a claim under the policy could only be admitted upon the Respondent fulfilling her obligations under the policy, including payment of excess and that failure to forward summons to it, the Respondent extinguished her rights under the policy in relation to third party claims.

22. The Appellant denied allegations for fraud, deceit or unjust enrichment and contended that the policy had an excess of 5% of total loss claim; that settlement of claims was subject to the terms and conditions of the policy; that the Respondent accepted full settlement; that on 6th July 2015 the Appellant notified the Respondent that the claim of Indemnity was inadmissible as her driver had no PSV license but that after negotiations, an agreement was reached for additional excess of Ksh. 80,000/= making a total excess of Ksh. 116,500/=. The Appellant maintained that it never agreed either orally or otherwise to settle the decree in **CMCC No. 623 of 2016.**

23. On being served with the above defence, the Respondent took out a Motion on Notice dated 26th February 2018 seeking to strike out the Appellant's statements of Defence and entry of judgment in her favour as prayed in the Plaint. That application was supported by an affidavit by the Respondent sworn on same day. The application was premised on the grounds that the defence was scandalous, frivolous and vexatious; that it was prejudicial; embarrassing and was intended to delay the fair trial or the action. It was also contended that the defence had no merit and was an abuse of the court process; that despite the Appellant being aware of **CMCC No. 623 of 2016,** it did not seek to avoid liability as required by section 10(4) of the Act.

24. In her supporting affidavit, the Respondent deposed that she was informed by her advocate, on record that the Appellant received documents from the said advocate relating to the suit including: *Copy of demand letter dated 15th September 2015 and statutory notice under Cap 405 on 24th September 2015l; Summons to enter appearance dated 15th September 2015; a letter dated 9th March 2017 advising the Appellant to file defence; Hearing Notice dated 9th June 2017and Letter dated 3rd July 2017 advising the Appellant about entry of judgment and received on 8th July 2017.*

25. The Respondent deposed that as such, the Appellant was aware of the suit and had decided not to take part in that suit; that the Appellant should have called into action the provisions of section 10(4) of the Act and failure to do so, it Appellant had no good defence to the suit.

26. The Appellant filed a replying affidavit to the motion by Caroline Kimeto, the Appellant's legal manager sworn on 11th April 2018. Ms Kimeto deposed that the defence raised triable issues, including whether counsel for the Respondent was conflicted; whether the Respondent notified the Appellant of the existence of **CMCC No. 623 of 2016**; whether an insurer could act on a claim where summons had not been

served on the insured and whether the insurer could be liable where the insured had failed to pay excess. The deponent further contended that the issue of fraud and deceit could not be determined without a formal hearing.

27. The motion was heard and in the ruling dated 6th September 2018 and delivered on 13th September 2018, the learned Chief Magistrate agreed with the Respondent, allowed the motion and struck out the defence stating;

> ***"The plaintiff had demonstrated that the defendant was sternly (sic) aware of the claims even before the suits were instituted. The documents were properly served and affidavit of service drawn and filed, copies of which are annexed to the plaintiff's affidavit in support of the application. Section 16 of the Act further reinforces this. The authority cited by the Plaintiff's Counsel, ICEA Lion General Insurance Co. Ltd V Board of Governors RiomaMixed Secondary School & 24 Others [2016] e KLR is relevant here. In view of the provisions of Cap 405 it would be against public policy and the purpose of insurance to allow conditions as set by the Defendant to be the basis of avoiding legally binding insurance contracts. I have not been persuaded that there are any issues to go on full trial. The issue of the plaintiff is advocate having participated in the primary suit could have arisen if he could have been in the suit representing the defendant. In any case the defendant did not enter appearance file any documents that can be said to have been used against it unethically."***

28. The application was allowed on the basis that the Appellant had been aware of the suit and that in any case the advocate was not conflicted since he had not acted for the defendant. The learned Chief Magistrate concluded that there was no defence to the suit.

29. I have already set out the substance of the Respondent's case in the lower court and the Appellant's defence to that case. The Appellant was the insurer and the Respondent the insured. The insured motor vehicle was involved in a road accident resulting into loss to a third party. The third party filed suit **CMCC No. 623 of 2016** against the Respondent and obtained default judgment after the Respondent, failed to enter appearance or file a defence.

30. The Respondent then filed the suit seeking to have the Appellant compelled to settle the decree in the earlier suit and also recover some money from the Appellant alleged to have been wrongly retained as excess. The Appellant filed a defence denying the claims including service of summons. It also contended that the advocate on record for the plaintiff (Respondent herein) was conflicted as had acted against the Appellant in the primary suit and was now acting for her in the suit against the Appellant

31. I have carefully perused the pleadings and the record of appeal. The Appellant contended in its defence that there was no service of summons on the Respondent and the Respondent did not forward the plaint or summons to it for action. The Appellant also contended in the defence that the advocate was conflicted in the suit.

32. I note that from the record, the Respondent's affidavit in support of the application to strike out the defence is silent on whether she was served with summons to enter appearance and plaint. She only referred to advice from her advocate regarding service of summons on the Appellant. I have also seen the documents the Respondent says were served on the Appellant. It is not clear how the documents were served whether they were served by post or hand delivery. A copy of plaint said to have been served was not exhibited either. These are factual issues which required proof.

33. On whether the advocate was conflicted, the learned Chief Magistrate dismissed the issue as of no substance. Whether an advocate is conflicted is also a question of fact which cannot be dismissed without giving parties an opportunity to address the court on it to enable the court make an informed decision.

34. The record further shows that on 12th April 2018, counsel for the Appellant applied for an adjournment to enable them file an application to challenge the plaintiff/Respondent's counsel's right to act for the Respondent in the matter but that application was disallowed. This confirms that the issue of conflict of interest had been on the cards right from the very beginning and the trial court should have given parties an opportunity to converse it for proper adjudication.

35. It is a principle of law that striking out of pleadings is an exercise of discretion which should be done sparingly and only in the clearest of cases. Where there is doubt the court should allow parties have their day in court. The settled legal principle on striking out of pleadings was stated in ***D.T. Dobie & Company Kenya Ltd v. Joseph Mbaria Muchina,*** [1982] 1KLR that:-

> ***"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 has shown 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.***

36. In ***Co-operative Merchant Bank Ltd. v George Fredrick Wekesa*** (Civil Appeal No. 54 of 1999), the Court again stated that; "***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...A Court may only strike out pleadings where they disclose no semblance of a cause of action or defence and are incurable by amendment".***

37. The same expression found favour far afield in ***S & T Distributors Limited and S & T Limited v. CIBC Jamaica Limited and Royal & Sun Alliance*** SCCA 112/04, with the Court of Appeal of Jamaica stating that:

> ***"The striking out of a claim is a severe measure. The discretionary power to strike must be exercised with extreme caution. A court when considering an application to strike out, is obliged to take into consideration the probable implication of striking out and balance them carefully against the principles as prescribed by the particular cause of action which sought to be struck out. Judicial authorities have shown that the striking out of an action should only be done in plain and obvious cases."***

38. And in ***Drummond Jackson v British Medical Association and others*** [1970] 1 WLR 688, **Lord Pearson** observed that:

> ***"Over a long period of years it has been firmly established by many authorities that the power to strike out a statement of claim as disclosing no reasonable cause of action is a summary power which should be exercised only in plain and obvious cases."***

39. Where it is alleged that the defence does not disclose triable issues, the court should exercise caution and only accede to the request to strike out if it is really satisfied that there is no reasonable defence. This is because a reasonable defence does not mean one that must succeed. The defendant need only raise some doubt to the claim to justify a trial.

40. In this regard, the court of Appeal stated in ***Kenya Trade Combine Ltd vs M Shah*** (Civil Appeal No.193 of 1999) that;

> ***"In a matter of this nature, all a defendant is supposed to show is that a defence on record raises triable issues which ought to go for trial. We should hasten to add that in this respect a defence which raises triable issues does not mean a defence that must succeed.'***

41. I would venture to state that Article 50(1) of the Constitution guarantees every person the right to have disputes decided in a fair and impartial manner, while Article 159(2) behooves courts to administer substantive justice. In this regard, the Court of Appeal stated in ***WZO Konjit Tedla & Another v Osborne Ashiono Mutumira*** [2017] e KLR that;

> ***a. "[it] is the overarching principles in the administration of justice as enunciated under Article 50 and 159 of the Constitution that courts should aim to dispense substantive justice by allowing parties to ventilate their cases and when faced with applications to strike out pleadings it is done only in plain and obvious cases."***

42. In ***Kavinga Estates Limited vs. National Bank Of Kenya Limited*** [2017] eKLR the court of Appeal was emphatic that;

> ***"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"***

43. The above decisions underscore the principle that striking out of pleadings should rarely be resorted to unless in very obvious and clear cut cases, and that as much as possible, parties should have their day in court. Sections 1A and 1B of the Civil Procedure Act and the Rules made thereunder declare that their overriding objective is to empower the court to save time and costs by dealing with matters expeditiously. If there are no reasonable grounds for bringing an action, the court ought to strike it out pursuant to the rules. However if there is a way the court can save the suit or pleadings, it should allow it to go to full hearing so that parties can have their day in court.

44. The Respondent's allegation of fraud in the plaint has been sufficiently responded to by the Appellant for purposes of a hearing. This is not a claim for damages for fraud and the defendant is raising a denial of the claimant's case which is in this context is a defence. Both sides, in my view, have raised triable issues which require a hearing. The application for striking out ought not to have been allowed. The Appellant should have been allowed to have its day in court rather than drive it from the seat of justice.

45. I find it appropriate to conclude with the words of the Supreme Court of India in ***Sangram Singh v Electio Tribunal Koteh*** 1955 AIR 425 that;

> ***"[T]here must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them. Of course, there must be exceptions and where they are clearly defined they must be given effect to. But taken by and large, and subject to that proviso, our laws of procedure should be construed, wherever that is reasonably possible, in the light of that principle."***

46. With these principles in mind, and having considered the appeal submissions the law and precedents, I am persuaded that the Appellant's appeal has merit and should be allowed.

47. Consequently the Appeal is allowed, the Ruling dated 6th September 2018 and delivered on 13th September 2018 and all consequential orders set aside. The Appellant's defence is reinstated. The suit in the lower court should proceed for hearing before any other magistrate other than Hon. S. SHITUBI. Costs of the Appeal to the appellant.

Dated, Signed and Delivered at Kajiado this 28th day of June 2019.

E C MWITA

JUDGE