



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CIVIL APPEAL NO 702 OF 2016

GATEWAY INSURANCE CO LTD.....APPELLANT

VERSUS

DAVID NYAGA MUTURI.....RESPONDENT

(Being an appeal from the Ruling of Honourable M. Obura (Mrs) Principal Magistrate delivered on 24th November 2015 in Nairobi Chief Magistrate's Court at Milimani Commercial Courts No CMCC No 6476 of 2012)

JUDGMENT

INTRODUCTION

1. In her Ruling delivered on 24th November 2015, the Learned Magistrate, Hon N. Obura (Mrs) Principal Magistrate allowed the Respondent's Notice of Motion application dated 30th May 2015 in which he had sought to strike out the Appellant's Statement of Defence dated 21st May 2013 for containing mere denials and failing to raise triable issues.
2. Being dissatisfied with the said decision, the Appellant filed a Memorandum of Appeal dated 17th November 2016 on 22nd November 2016. It relied on four (4) grounds of appeal.
3. The Record of Appeal was undated but filed on 12th September 2017. This did not contain a certified copy of the Ruling that was being appealed from. Its Supplementary Record of Appeal that was filed on 15th November 2017 was also undated. Its undated Amended Record of Appeal annexing the Ruling to be appealed from was filed on 19th October, 2018.
4. Its Written Submissions were dated 11th February 2019 and filed on 14th February 2019. Its Supplementary Written Submissions were dated 22nd February 2019 and filed on 28th February 2019. The Respondent's Written Submissions were dated 19th February 2019 and filed on 21st February, 2019.
5. Parties asked this court to deliver its decision based on the Written Submissions which they relied upon in their entirety. The Judgment herein is therefore based on the said Written Submissions.

LEGAL ANALYSIS

6. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its

own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand.

7. This was aptly stated in the cases of **Selle vs Associated Motor Boat Company Ltd[1968] EA 123** and **Peters vs Sunday Post Limited [1985] EA 424** where in the latter case, the court therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

8. Having looked at the Appellant’s Memorandum of Appeal and its Written Submissions as well as the Respondent’s Submissions, this court found the following issues to have been placed before it for determination:-

1. Whether or not the Respondent’s claim, being a material damage claim fell under Cap 405 of the Laws of Kenya.

2. Whether or not the Appellant’s Statement of Defence raised triable issues.

9. The court dealt with the aforesaid issues together as they were closely intertwined.

10. The Appellant argued that the Respondent’s claim was for material damage as was evidenced in Paragraph 5 of his Complaint and that it specifically stated in Paragraph 8 of its Statement of Defence that it was **“not obligated by the provisions of Cap 405 (Laws of Kenya) and/or any other law to satisfy a judgment or decree arising from a suit in the nature of the one alluded to in the complaint, that is to say a material damage/loss claim.”**

11. It submitted that Section 5(b) of the Insurance (Motor Vehicle Third Party Risks) Act Cap 405 (Laws of Kenya) excluded material damage claims as it only related to personal injury claims. It relied on the case of **Blue Shield Insurance Co Ltd vs Joseph Mboya Oguttu [2009] eKLR** where a similar conclusion was arrived at by the Court of Appeal.

12. On his part, the Respondent submitted that Motor Vehicle Registration Number KAH 778U (hereinafter referred to as “the subject motor vehicle”) was covered for **“Liability to Third Parties”** which was Kshs 5,000,000/= in respect of any one claim or a series of claims arising out of one (1) event. He pointed out that the Appellant had submitted that it was not obligated to satisfy the judgment entered against it as its insured was using the subject motor vehicle for purposes other than what it was covered for.

13. He averred that the Appellant did not oppose his application to strike out its Defence in any of the ways envisaged in Order 51 Rule 14 of Civil Procedure Rules and consequently, his application was unopposed and was thus allowed.

14. He further contended that the Appellant did not raise the issue of Cap 405 in the lower court and hence, he could not raise a new issue on appeal. In this regard, he placed reliance on the case of **Saggaf vs Algeredi [1961] EA 767** where it was held that a new point which had not been pleaded or canvassed, should not be taken on appeal. He also relied on other cases to buttress his submissions on this issue.

15. In addition, he also submitted that Cap 405 did not limit or bar parties from entering into a contract of insurance other than liabilities not covered under Section 5(b) of Cap 405, a fact that he stated, was recognised by Section 10 of Cap 405. He argued that under Section 10(1) of Cap 405, the liability of an insured arose once the liability was covered by the terms of the policy.

16. He was emphatic that the Appellant’s assertion in its Statement of Defence that he had breached the

conditions and requirements of the policy thereby entitling it to repudiate the policy was not a triable issue.

17. He placed reliance on the several cases amongst them **Phoenix of East Africa Assurance Co Ltd vs Alfred Onyango Obondo [2011] eKLR** where it was held that:-

“It may be well that the policy had a clause extending to material damage claim and in the circumstances the insurance company was liable.”

18. This court looked at the Respondent’s Notice of Motion application dated 30th May 2013 and filed on 3rd June 2013 and noted that it sought the following orders:-

1. That the defendant’s defence dated 21st May 2013 be struck out for failing to disclose any reasonable defence in law, for being scandalous, frivolous or vexatious and may prejudice, embarrass or delay the fair trial of the action and for being an abuse of the process of the court.

2. That judgment to be entered for the plaintiff as per the plaint.

3. That costs of the application to be provided for.

19. In response to the said application, Lilian Munyiri, the Appellant’s Legal Officer swore a Replying Affidavit on 5th July 2013. The same was filed on even date. This was contrary to the Respondent’s assertions that his said application was unopposed.

20. In Paragraphs (3) and (4) of the said Replying Affidavit, the deponent stated as follows:-

1. That the Defendant did not take up the matter arising from the primary suit because its insured was using the motor vehicle for purposes other than for what the cover was issued.

2. That in any case the primary suit on which this declaration suit is based does not fall within the ambit of Section 10(1) of Cap 405 of the Laws of Kenya as it was not a claim for damages for personal injuries.

21. The Appellant reiterated the same averments in its Written Submissions that were dated and filed on 5th October 2015 and made reference to the said Replying Affidavit.

22. The Learned Magistrate stated in her ruling that she did not see any Replying Affidavit or grounds of opposition and that there was no receipt to satisfy her that the same had been filed. She therefore held that the Respondent’s application had been unopposed.

23. This court combed through the original lower court file but did not also see the Appellant’s said Replying Affidavit or receipt confirming payment of filing fees for the same. However, the Replying Affidavit bore the stamp of Cash Office Milimani Commercial Courts. Indeed, this court noted that the Appellant alluded to the said Replying Affidavit in its Written Submissions.

24. Since there was no inference or suggestion that the said stamp was forged, this court gave the Appellant the benefit of doubt that it had indeed filed its Replying Affidavit and the same may not have got its way to the court file by the time the Learned Magistrate reserved her Ruling herein. The court took judicial notice that receipts in acknowledgment of court fees were ordinarily attached to the pleadings and if the pleading was misplaced, the receipt would also get misplaced along with it. It also took judicial notice that there were many times that documents did not get their way into the court files hence why it was a good practice for courts to always confirm that all documentation to be relied upon by the parties before they reserve their decisions to be delivered later.

25. The Appellant also referred the lower court to its Statement of Defence which it averred had raised serious triable issues. A perusal of the said Statement of Defence showed that the Appellant had raised the following defences:-

1. Without prejudice to the contents of paragraph 4 and 5 above the Defendant further states that a statutory notice under Cap 405 of the Laws of Kenya or under any other Law is not required and/or does not apply in the circumstances of this case.

2. The Defendant states that it is a stranger to the averments contained in paragraph 8 of the plaint and puts the defendant to strict proof of his allegations.

3. Without prejudice to the foregoing, the Defendant states that if a policy was in place in respect of motor vehicle registration number KAH 788U, the Plaintiff breached the conditions and requirements of the said policy in a material way and/or concealed material facts at the time when taking the policy.

26. The Statement of Defence could not be said to have contained mere denials. Those were issues that ought to have been ventilated during a full trial. If the respective parties' Written Submissions on the question of whether the Appellant was obligated to satisfy the Respondent's material damage claim were anything to go by, the issues that were raised by the Appellant were weighty and could only be canvassed during trial. They were not issues that this court could deal with as they went to the merits of the case that was not considered by the Learned Magistrate. Indeed, the issues were not of the nature to be wished away by a trial court.

27. This court therefore associated itself fully with the holdings of **D.T. Dobie & Co (Kenya) Ltd vs Joseph Mbaria Muchina & Another [1980] eKLR** where it was held that:-

"...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."

28. Indeed, striking out of pleadings is a draconian step that should be used sparingly and as a last resort. As was correctly pointed out by the Appellant, **"Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body"** as provided in Article 50(1) of the Constitution of Kenya, 2010. The striking out of its defence no matter how hopeless the Learned Magistrate viewed it, denied the Appellant an opportunity to be heard and to ventilate its case on merit.

29. Having considered the parties' Written Submissions and the case law they each relied upon, court came to the firm conclusion that the Learned Magistrate misapplied the law to the facts that were presented before her and thus arrived at an erroneous conclusion. She concluded the Appellant had no case and shut it out yet it had raised triable issues. Although this case did not go through trial, this court found and held that this was a suitable case for it to exercise its discretion and interfere with the decision of the Learned Magistrate.

DISPOSITION

30. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal dated 17th November 2016 and filed on 22nd November 2016 was merited and the same is hereby allowed. The effect of this decision is that the Ruling of the Learned Magistrate that was delivered on 24th November 2015 is hereby set aside and/or varied and/or vacated.

31. Instead it is hereby ordered and directed that **CMCC No 6476 of 2012** at the Nairobi Chief Magistrate's Court Milimani Commercial Court proceed for full hearing and determination be made on all issues at hand on merit.

32. The Respondent will bear the Appellant's costs of the Appeal herein.

33. It is so ordered.

DATED and DELIVERED at NAIROBI this 31st day of July 2019

J.KAMAU

JUDGE