



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

(CORAM: CHERERE-J)

CIVIL APPEAL NO. 24 OF 2018

BETWEEN

XPLICO INSURANCE COMPANY LIMITED.....APPELLANT

AND

MARY NTHAMBI MUTUA.....RESPONDENT

JUDGMENT

(Being an Appeal from the Ruling and Order in Thika CMCC No. 773 of 2017 by Hon. A.M.Maina (SRM) on 05th December, 2017)

JUDGMENT

Background

1. **MARY NTHAMBI MUTUA (hereinafter referred to as respondent)** obtained judgement against the Defendants in **Thika CMCC 853 OF 2015 Mary Nthambi Mutua vs Agnes Mwangi & Eunice Wangechi Murigu** for and a decree in respect thereof was drawn for the sum of Kshs. 4,258,148/-.

2. Subsequently, the Respondent brought a claim against **XPLICO INSURANCE COMPANY LIMITED (hereinafter referred to as Appellant)** in **Thika CMCC No. 773 of 2017 Mary Nthambi Mutua vs Xplico Insurance Company Limited** seeking a declaration that the Appellant is liable to compensate the Respondent and an order compelling the Respondent to pay the decretal sum, costs and interest in **Thika CMCC 853 OF 2015 Mary Nthambi Mutua vs Agnes Mwangi & Eunice Wangechi Murigu**.

3. Judgement in default of defence was entered against the Appellant on 08th September, 2017.

4. By an application dated 21st September, 2017, the Appellant sought orders to stay execution, to set aside the default judgment and for leave to defend the suit. The application was opposed by the Respondent and in a ruling delivered on **05th December, 2017**, the trial court found the Appellant had not offered a plausible explanation for its failure to enter appearance and file its defence and disallowed the application with costs to the Respondent and entered judgment in favour of the Respondent for Kshs. 4,462,776/-.

The Appeal

5. The Appellant being dissatisfied with the lower court's decision preferred this appeal and on 14.02.18 filed the Memorandum of Appeal of even date which sets out 4 grounds of appeal that may be summarized into the following 2 grounds that: -

1) The Honourable Learned Magistrate erred in law and in fact by failing to appreciate that the Appellant's defence raised triable issues worthy to be determined

2) The Honourable Learned Magistrate erred in law and by figuring the express provision in law under Section 5 (b) (iv) of Chapter 405 Laws of Kenya on the statutory limit of liability to the Appellant as raised in the submissions and thereby erroneously held that Appellant should have expressly pleaded this aspect

SUBMISSIONS BY THE PARTIES

6. This appeal was argued by way of written submissions. In further exposition of the appeal, both parties cited various authorities

Appellant's submissions

7. Appellant faulted the Honourable Learned Magistrate for summarily dismissing its defence which raised triable issues among them that it had neither insured the motor vehicle KAU 558J (*hereinafter referred to as the accident motor vehicle*) nor issued it with an insurance policy; that it was not served with the statutory notice and under the provisions of Section 5 (b) (iv) of Insurance (Motor Vehicles Third Party Risks) Act Chapter 405 Laws of Kenya (*hereinafter referred to as the Act*), it was bound pay the judgment to the extent of only Kshs. 3,000,000/-.

8. Appellant placed reliance on Susan Oluoch Nyambane V Blueshield Insurance Co. Ltd [2012] eKLR where the court upheld that the trial court's decision that defendant's defence that it did not issue the cover in question was a triable issue. Appellant also relied on Mary Adhiambo Onyango V Jubilee Insurance Co. Ltd [2007] eKLR where the court declined to enter summary judgment and ruled that defendant's denial that it had insured the accident motor vehicle was a triable issue.

9. In support of its assertion that it is not obliged to pay any amount above Kshs. 3,000,000/-, the Appellant relied on Africa Merchant Assurance Company Limited v William Muriithi Kimaru [2016] eKLR and Justus Mutiga & 2 others v Law Society of Kenya & Another [2018] eKLR.

Respondent's submissions

10. It was submitted for the Respondent limiting of sum payable by an insurer was unjustifiable and in support thereof reliance was placed on Justus Mutiga & 2 others v Law Society of Kenya & another [2018] eKLR where the Court of Appeal held that:

limiting the compensation payable by the underwriter who has received premiums; particularly in the face of an innocent third party who is armed with a court judgment, is unjustifiable. It offends the very essence of insurance; which is to ensure mitigation against risks that result in loss. In particular, it defeats the very objective of compulsory third party insurance cover, if an innocent victim is left to recover the bulk of his claim against the insured personally.

11. Respondent asserted that the Appellant had notice of bringing of the primary suit since a statutory notice served on 05.05.14 was acknowledged by Kennedy Marete of the Appellant's legal department in a letter dated 11. 04.14. In support of admission of "*without prejudice*" communication, Respondent relied on Mumias Sugar Co. Ltd & Another v Beatrice Akinyi Omondi [2016] eKLR and submitted that the communication is not an admission of liability but confirms that the Appellant was aware of the filing of the primary and declaratory suits. Additionally, Respondent submitted that various correspondences exchanged between her counsel and the Appellant demonstrate that Appellant neither denied insuring the accident motor vehicle nor issuing it with an insurance policy and that the averments in the defence are therefore mere denials

12. Respondent urged the court to find that the defence did not raise any triable issues and that the defence did not meet the threshold in Patel Vs East Africa Cargo Handling Services Ltd (1974) EA 75. It was finally submitted that this appeal is meant to delay the cause of justice and in support thereof reliance was placed on Shah v Mbogo [1967] EA 116.

13. I have considered the draft defence that was presented before the trial court and it raised three main issues, the issues for determination are as follows:

- a) **Whether the Appellant had been served with the plaint and summons to enter appearance**
- b) **Whether Appellant issued policy number 070/0450611/12/08/040TPO to the accident motor vehicle**
- c) **Whether Appellant was served with statutory Notice in accordance with Section 10 of the Act**
- d) **Whether Appellant is obligated to satisfy a judgment that is more than 3 million**

14. By its ruling delivered on **05th December, 2017**, the trial court found as a fact that the Appellant had been served with the plaint and summons to enter appearance and dismissed the application to set aside the regular judgment on the ground that no credible explanation had been offered for Appellant's failure to enter appearance and file its defence.

15. (*Ringera J*) in Trust Bank v. Portway Stores (1993) Ltd & 4 others, HCCC No. 413 of 1997 stated as follows:

"I may state straight away that the principles applicable to the setting aside of default judgments which are regular on their face – as is the judgment in this case – are not in doubt. The Court has an unfettered discretion. Such discretion is exercised in order to do justice as between the parties. In weighing the interests of justice the Court has to consider, among other things, the reasons, if any, why the particular default was committed. The conduct of the parties and in particular such conduct as has a bearing on the course of justice in the case, whether the applicant has a defence on the merits, whether the respondent can be compensated by costs for any delay that may be occasioned by the setting aside of the judgment, and of course it should always be borne in mind that to deny a person a hearing should be the very last resort of a Court of justice."
(Emphasis added)

16. Having found that the default judgment was regular, the trial court with respect ought also to have made a finding concerning the pleadings in the draft defence to satisfy itself if it raised any triable issue.

17. The draft denied service of the statutory notice. The service of the statutory notice is however not a triable issue for the reason that Kennedy Marete of the Appellant's legal department had by a letter dated 11.04.14 acknowledged service of the said notice on the Appellant on 05.05.14.

18. Police were informed of the incident in issue. They prepared a Police Abstract report in which they stated that the accident motor vehicle was insured by the Appellant. Kennedy Marete of the Appellant's legal department by a letter dated 11.04.14 did not dispute that the Appellant had insured the accident motor vehicle. In the absence of any evidence to counter the police abstract, I find that there is *prima facie* evidence that Appellant was the insurer of the accident motor vehicle.

19. Appellant denied that it had an obligation to satisfy the judgment for more than Kshs. 3 million. From the decisions in **Africa Merchant Assurance Company Limited v William Muriithi Kimaru** (supra) and **Justus Mutiga & 2 others v Law Society of Kenya & Another** (supra), there is no doubt that the Appellant is not obligated to satisfy the judgment for more than 3 million.

20. From the foregoing, I am satisfied that the Appellant had demonstrated that its draft defence raised one triable issue. This court finds however that to direct that the Appellant be allowed to defend only that one issue will not achieve the overriding objective of the Civil Procedure Act which is to facilitate the just, expeditious, proportionate and affordable resolution of disputes but will increase costs to the parties unnecessarily.

DISPOSITION

21. Consequently, the appeal is allowed on the following terms:

1) The order made on 05th December, 2017 dismissing Appellant's application dated 21st September, 2017 to set aside the default judgment is set aside and substituted with an order allowing the application to the extent that the Appellant's obligation to satisfy the judgment is limited to the extent Kshs. 3 million.

2) The Appellant shall bear the costs of the trial in the lower court

3) Each party shall bear its own costs of the Appeal.

DELIVERED AND SIGNED AT KIAMBU THIS 25th DAY OF October 2019

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Nancy

For the Appellant - N/A

For the Respondent - Ms. Etole hb for Mr. Ngugi