REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CIVIL APPEAL NO. 6 OF 2019

BEATRICE WANJIKU KAMAU .....APPELLANT

VERUS

KENYA ORENT INSURANCE LTD .....RESPONDENT

***(Appeal from the Ruling and Order of Chief Magistrate** (Hon. Ithuku C.M.) dated 17th January 2019 in CMCC No145 of 2018)*

JUDGMENT

1. This is an appeal from the ruling and order of **(Hon. Ithuku C.M.)** dated 17th January, 2019. By that ruling, the trial magistrate dismissed the appellant's application dated 3rd September, 2018 seeking to strike out the respondent's statement of defence dated 13th August, 2018; and entry of judgment in favour of the appellant against the respondent as prayed in their plaint. In its plaint dated 20th July 2018, the appellant had sought a declaration that the respondent was liable to satisfy the judgment and decree in **Ngong CMCC No. 121 of 2017** in full.

2. The appellant was aggrieved by that ruling and order and filed a memorandum of appeal dated 31st January, 2019 and filed in court on 14th January, 2019 raising the following grounds of appeal, namely:

> ***1. That the learned trial magistrate erred in law and fact by not striking out the respondent's defence.***
>
> ***2. That the learned trial magistrate erred in law and fact by not holding that the respondent was under statutory duty to satisfy judgment and decree in Ngong/Ngong CMMC No. 121 of 2017.***
>
> ***3. That the learned trial magistrate erred in law and fact by dismissing the appellant's notice of motion dated 3rd September, 2018.***

3. The appellant prayed that his appeal be allowed, the ruling and order delivered on 17th January, 2019 be set aside and judgment be entered in his favour as prayed in the plaint in the lower court. He prayed that the court declares that the respondent is liable to satisfy the judgment in Ngong CMCC No. 121 of 2017 in the sum of Kshs. 170,000/= costs and interest from 18th July, 2018.

4. During the hearing of this appeal, Mr. Orenge, learned counsel for the appellant highlighted their written submissions dated 11th July, 2019 and filed in court on 19th July 2019. Relying on those written

submissions, counsel argued that the trial court was in error when it dismissed their application for striking out the respondent's defence. According to counsel the court was wrong to hold that there was a dispute on the service of the notice under Section 10 of Motor Vehicle (Third Party Risks) Act, Cap. 405.

5. In their written submissions, the appellant submitted that the respondent's defence contained mere denials and therefore ought to have been struck out. Reliance was placed on ***D.T Dobie & Co. Ltd v Muchina & another*** [1982] KLR 1 for the submission that if the pleadings do not disclose any reasonable cause of action or defence; may prejudice, embarrass or delay the fair hearing of the suit or is an abuse of the process of the court, it ought to be dismissed.

6. It was submitted that the respondent's defence did not raise triable issues worth of a full trial as the respondent merely denied averments in the plaint. The appellant also relied on ***Peevaj General Trading and Contracting Company Ltd & Another v Mumias Sugar Company Ltd*** Civil Case No 192 of 2015 which cited ***Mugunga General Stores v Pepco Distributors Ltd*** [1987] KLR 150 for the holding that a mere denial is not sufficient defence in this type of case; that it is not sufficient therefore to simply deny liability without giving some reason and that a mere denial was not sufficient defence, in this type of cause of action.

7. The appellant again relied on ***Equatorial Commercial Bank Ltd v Jodam Engineering Works Ltd & 2 Others*** [2014] eKLR for the submission that a statement of defence is said to raise a reasonable defence if that defence raises prima facie triable issue.

8. The appellant further relied on Order 2 rule 15(a), (b), (c) and (d) of the Civil Procedure Rules which mandates the court to strike any pleading for not raising triable issues, among other reasons. He argued that the respondent's defence did not raise triable issues.

9. Regarding the second ground of appeal, the appellant submitted that there was sufficient proof that the respondent was the insurer of the defendant in Ngong CMCC No. 121 of 2017 and referred to page 19 of the record of appeal, a letter from the respondent on negotiations. He also referred to the police abstract which indicated that the respondent was the insurer of motor vehicle KAS 957S. He relied on the decision in ***Martin Onyango v Invesco Assurance Co. Ltd*** [2015] eKLR for the proposition that a police abstract is sufficient proof of the insurer.

10. The appellant submitted that the respondent was served with a demand letter which served as notice under section 10(2) of Cap. 405. Reliance was placed on ***Philip Kimani Gikonyo v Gateway Insurance Co. Ltd*** [2007] eKLR for the proposition that it does not matter what form a statutory notice should take since the main purposes of a notice is to alert the insurer of a potential claim. The appellant therefore argued that the respondent's denial that it was not served with a notice was not a triable issue since it never denied that the letter was served.

11. On grounds 3 of the appeal, it was submitted that the trial magistrate ignored the issue at hand. In the appellant's view, the respondent was bound to settle the claim by virtue of being the insurer but the trial court ignored the evidence before him.

12. Miss Muguku, learned counsel for the respondent, opposed the appeal and also relied on their written submissions dated 23rd August, 2019 and filed in court on 4th September, 2019. Counsel submitted that the application before the trial court to strike out their defence had no merit and, therefore, the appeal has no merit too. According to counsel, no notice was served on the respondent. In their view, a demand letter written to the insured and copied to the insurer is not a statutory notice in that respect, hence there was a triable issue raised in the defence.

13. It was argued that the decision of ***Philip Kimani Gikonyo v Gateway Insurance Co. Ltd*** (supra) being a decision in a court of concurrent jurisdiction is not binding on this court. On their part, they relied on the decision of the Court Of Appeal in ***Gateway Insurance Co. Ltd v Paul Kamau Waithaka*** [1993] eKLR on what a statutory notice ought to be.

14. The respondent further argued that its letter referred to **Kikuyu CMCC Nos. 84, 121 and 149 of 2017** and is undated and therefore did not amount to admission. On whether the defence should be struck out, it was submitted that it should not and reliance placed on ***Eco Bank Kenya Ltd v Robbin Limited & 2 Others*** [2014] EKLR on the principles for striking out of pleadings as set in ***D.T. Dobie & Company Ltd v Muchina & Another*** (supra) In essence, it was argued, no suit ought to be dismissed summarily unless it is plainly hopeless and obviously discloses no cause of action.

15. The respondent further relied on ***Geminia Insurance Co. Ltd v Patrick Kivuva Ntakumbi*** [2011] eKLR on service of notice under section 10(2) of Cap. 405 and for the submission that whether a notice was served or not was an issue to be determined at a full hearing. Reliance was also placed on ***Kenindia Assurance Co. Ltd v Laban Idiah Nyamache*** [2011] eKLR for the proposition that where there is a specific denial of service of notice that issue can only be decided in a full trial.

Determination

16. I have considered this appeal, submissions by counsel for the parties and the authorities relied on. This being a first appeal, it is the duty of this court to reanalyze, reevaluate and reconsider the evidence on record and come to its own conclusion on that evidence.

17. In ***Gitobu Imanyara & 2 others v Attorney General*** [2016] eKLR, the Court of Appeal stated that;

> ***"This being a first appeal, it is trite law, that this Court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must 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 allowances in this respect. See Selle and Another v Associated Motor Boat Company Limited and others [1968] EA 123 and Williamson Diamonds Ltd. V. Brown [1970] E.A.L"***

18. The appellant was the plaintiff in CMCC No 145 of 2018 at the Chief Magistrate's Court Ngong. He had filed a declaratory suit against the respondent as the insurer for Kshs. 170,000. That amount had been decreed in CMCC No. 121 of 2017 at Ngong against Michael Kiragu Kamau. The respondent, the defendant in CMCC No. 145 of 2018, filed a statement of defence dated 13th August, 2018.

19. At paragraph 3 of the defence, the respondent denied that the plaint disclosed a reasonable cause of action against it. At paragraph 4, the respondent denied being the insurer of the motor vehicle KAS 957S under Policy **No. RNG/0700/00207491/2016** for the period 9th May, 2016 and 24th October, 2017. It also denied that the motor vehicle was involved in a road traffic accident on 23rd October, 2017 and put the appellant to strict proof. At paragraph 5, the respondent stated clearly that it was not made aware of Ngong CMCC No. 121 of 2017 and once again put the plaintiff to strict proof.

20. The respondent pleaded at paragraph 7 of its defence that the appellant was put to strict proof of service of the notice of filing of **Ngong CMCC No 121 of 2017**. It therefore stated that for those reasons it was not liable to settle the decree in CMCC No. 121 of 2017. With these averments the respondent took out a motion on notice dated 3rd September, 2018 seeking to strike out that defence. The application was opposed and after hearing arguments from counsel for the parties, the trial court dismissed it in a ruling dated 17th January, 2019 prompting this appeal.

21. In the impugned ruling, the trial magistrate found at paragraph 6 of the ruling that the respondent had specifically denied service of the notice of institution of the suit, **Ngong CMCC No. 121 of 2017**. The learned trial magistrate found that the issue in that suit would be determined by the fact of whether or not the notice was served on the respondent and was satisfied that this was a triable issue.

22. I have myself gone through the pleadings and in particular, the respondent's defence in that suit

CMCC No. 145 of 2018. I have no doubt that the trial court was satisfied, as I am, that the defence put forward by the respondent raised a triable issue regarding service of the statutory notice under section 10(2) of Cap 405. Whether or not a notice had been served was a question of fact that that needed to be determined after a full trial.

23. I also note that the respondent further denied that it was the insurer of the offending motor vehicle during the period the accident is said to have occurred. Again this was not a mere denial since the respondent was not a party in CMCC No. 121 of 2017 and therefore had not been given an opportunity to respond to that issue since it was not even an issue in that suit in the first place.

24. I have carefully considered this appeal and the defence filed before the trial court and the ruling of the trial court. I am satisfied that the trial court took into account relevant legal principles on striking out laid down in ***D.T. Dobie & Company Ltd v Muchina & Another*** (supra) and other decisions. He also considered the defence and was of the view that it raised triable issues and properly exercised his discretions in declining to strike out the plaint. An appellate court will not normally interfere with the trial court's exercise of discretion unless it is not properly exercised. I do not find this to be the case here.

25. For my part, I am not persuaded that the trial court was in anyway in error. The respondent's defence raised triable issues and deserved to have its day in court. Moreover, Article 50(1) of the Constitution guarantees every person the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing.

26. In the circumstances, I find no merit in this appeal. It is declined and dismissed with costs to the respondent.

Dated, Signed and Delivered at Kajiado this 29th day of November 2019.

E C MWITA

JUDGE