REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 323 OF 2017

APA INSURANCE LIMITED.....APPELLANT

VERSUS

JOSEPH NGUI KITHUKU.....RESPONDENT

JUDGEMENT

Background:

1. The Respondent sued the Appellant's insured in Milimani CMCC NO. 2148 of 2014**,** for recovery of general damages, special damages costs as a result of a traffic accident and was awarded a sum totaling to Kshs. 3, 158,080/- plus the costs of the suit and interest.

2. Following the judgment, the Respondent filed a declaratory suit compelling the appellant to satisfy the judgment against its insured. The Respondent attached police abstract in which the policy of the accident motor vehicle KAS 834T was issued by the appellant, that is policy No. P/AL800/0007899 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.

3. The respondent in its statement of defense denied the contents of the plaint. It particularly, denied that the judgment was not against its insured as alleged contending that there was no nexus established between them and the defendants therein and demanded strict proof thereof. Additionally, they alleged that there was a pending appeal in the High Court in respect to CMMCC No. 2148 of 2014.

4. The Respondent filed an application on 1st February, 2017seeking 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 16th June 2017. The appellant's statement of defence was struck out and judgment entered.

5. The above ruing prompted the appellant to file this instant appeal seeking that the ruling dated16th June 2017 be set aside, its defence dated 2nd December, 2016 be reinstated and the *Civil No. 7744 of 2016* be allowed to proceed on merit. The grounds of appeal in the appellants memorandum of appeal are as follows: -

1) The learned magistrate erred in both fact and in law by striking out the appellant's statement of defence which raised valid triable issues.

2) The learned magistrate erred in fact and in law completely ignoring the fact that the Respondent magistrate had failed to establish a nexus of insurance between the appellant and either of the two defendants against whom the Respondent herein had obtained judgment in the names primary suit (NBI CMCC NO. 2148 of 2014).

3) The learned magistrate erred in law by failing to appreciate that section 10 of the Insurance (Motor Vehicle Third Party Risks) Act could not be invoked against the appellants circumstances.

4) The learned magistrate erred in fact and in law by basing her ruling on irrelevant considerations.

5) Even if it were established that section 10 of the Insurance (Motor Vehicles Third Party Risks) Act (hereinafter referred to as the Act) was applicable, the learned magistrate erred in law by entering judgment against the appellant for a sum in excess of the statutory maximum recoverable from an insurer as prescribed in section 5(b)(iv) of the Insurance (Motor vehicle Third Party Risks) Act.

6)The learned magistrate erred in fact and in law by ignoring the appellant written submissions in arriving at her decision.

Submissions:

6. Both parties filed their submission, the appellants' submissions are dated 16th August, 2019 and filed on 19th August, 2019 and the Respondents submissions are dated 2nd September, 2019 and filed on 3rd September, 2019. The matter came up for hearing on3rd September, 2019 when parties highlighted their submission.

Appellant's Submissions:

7. The appellant submitted that the Respondent application lacked merit as they did not establish that their subject defence was vexatious frivolous and an otherwise abuse of the court process as alleged.

8. They submitted that section 10 of the Act provides that a claimant seeking declaratory orders against an insurer must among other things prove that the insurer had affected a policy of insurance required to be covered by a policy under section 5 of Cap 405 and that such claimant has obtained judgment against any person insured. They submitted that section 5 (b)(iv) of the Act provides that a policy ought not to cover liability in excess of Kshs. 3,000,00/=, in this case they submitted that the amount herein is contrary to the above provision.

9. In addition, they submitted that their statement of defence at paragraph 7 and 8 were justified as the said insurance policy though it identifies the appellant as the insurer it does not identify the policy holder and therefore the respondents did not establish a nexus between the appellant and the persons they sued. And therefore, the court ought to have allowed the matter to go for hearing for prove of this crucial fact.

10. They argued that the fact that one is a driver or owner of the motor vehicle does not automatically mean that they are the policy holders, and therefore this is an issue that is triable and the court ought to have allowed the same to go to trial in view of the case of ***Olimpic Escort Internation Co. Ltd & 2 Others vs Parminde Singh Sandhu & Another*** cited by the magistrate.

11. Further, they submitted that their defence met the provisions of Order 7 Rule 5 of the Civil Procedure Rules, arguing that they would have filed their witness statement prior to pre-trial directions. In sum they urged the court to find that the instant appeal is meritorious and allow the suit to be heard on merit. They rely in the case of ***Law Society vs Attorney General & 3 others (2016) eKLR.***

Respondents Submissions

12. They submitted that the trial court ruling was sound and based on the evidence presented, arguing that the appellants defence were mere denials. And that their suit at the trial court was a declaratory suit that had satisfied all the conditions provided for under section 10(1) and (2) of the Act Cap 405 Laws of Kenya.

13. In this respect they submitted that they had issued a statutory notice as required to the appellants, produced a police abstract detailing the appellants policy in respect to the motor vehicle herein which is prima facie evidence of cover, produced an admission by the appellant vide an affidavit of one Paul Kariba to be the insurers herein and the judgment in CMMC No. 2148 of 2014.

14. In addition, they submitted that there was no stay of the said judgment and there was no evidence that the appellant had cancelled the policy, arguing that the appellants failed to adduce evidence that their defence was triable warranting the matter to go to trial.

15. Further, they submitted that the appellant main defence was that the was a pending appeal in respect to the primary suit, which they argued had no stay and therefore not a bar as was held in ***Joseph Mwaura Njoroge vs Madison Insurance Co. Ltd (2015) eKLR.***

16. In regard to the appellant allegation that the amount awarded was in excess of Kshs. 3,000,000/= maximum provided for under the Act, the Respondent submitted that section 5(b) and section 10 of the Act does not limit an insurance policy cover as it does not bar parties from taking a cover in excess of Kshs. 3 Million. And that no evidence in the form of the subject policy cover confirming that the subject policy was limited to Kshs. 3Million has been adduced.

17. In sum they submitted that the appellant defence was mere denial and an attempt to avoid a policy and payment thereof contrary to section 5(b) of the Act.

ISSUES AND ANALYSIS:

18. 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 as was held in ***Selle vs Associated Motor Boat Co. [1968] EA 123)***. In ***Kiruga vs 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."***

19. 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 o**f 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."

20. The Court of Appeal in the case of ***Co-operative Merchant Bank Ltd. vs. George Fredrick Wekesa Civil Appeal No. 54 of 1999*** *in this regard noted 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".

21. Additionally, In ***Delphis Bank Limited vs 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."

22. In this instant case, the appellant is alleging that the lower court erred in dismissing his defence pursuant to the respondent's application therein. They allege that their defence raises triable issues and mainly that the evidence tendered does not establish a link between themselves as insures and the persons sued by the respondent's in **CMMC No. 2148 of 2014.**

23. Additionally, they allege that the amount awarded by the court of Kshs. 3,158,080/= in CMMC No. 2148 of 2014 is in excess of what is provided for under the law, as the maximum provided that can be paid out in a cover is Kshs. 3,000,00/=.

24. It is trite that the court ought to exercise caution before dismissing a party defense as rightly noted by the trial magistrate. This court in determining such an appeal ought not delve into the merits of the case but consider the grounds raised and whether the defence is worthy, though it ought not to be one that must succeed.

25. I also take note as argued by the appellant that the matter had not been set down for pretrial and therefore it would have been prejudicial to contemplate that the appellant may not have put further documents or sought leave to do so.

26. I have carefully considered the appellants' grounds, the Respondents response and authorities cited herein and the relevant sections of the law and the Constitution and it's my finding that the Appellant's defence contains *bona fide* triable issue and ought to have been allowed to defend the suit.

Conclusion:

27. In conclusion, I find the appeal meritorious. Thus makes the following orders;

i) The ruling and order of the lower court striking out the Appellant's statement of defence and entering judgment is set aside.

ii) The matter be heard on merit by the lower court where emanated from and /or where it was tried for hearing on merit.

iii) No orders as to costs

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER, 2019.

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C. KARIUKI

JUDGE