REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 110 OF 2012

INSURANCE COMPANY OF EAST AFRICA LTD …APPEALLANT

VERSUS

1. ABDALLA HASSAN HAGA

2. ALI HASSAN MWAHAGA .....RESPONDENTS

J U D G M E N T

Introduction and historical background

1. By a plaint dated the 21/9/2011, the Respondent now, sued the Appellant in a declaratory suit seeking the recovery of Kshs.299,360/= being the decree awarded in Kwale SRMCC No. 181 of 2010.

2. To that plaint the defendant filed a statement of defence dated 4/01/2012 in which save for admission of the descriptive paragraphs of the plaint, the defendant denied, having issued any insurance policy in respect of motor vehicle Registration No. KBC 600F or that the said motor vehicle was ever involved in an accident, in which the deceased was fatally injured, that if any policy was ever issued, it was on conditions that the insured would issue prompt notice to the insurer of any occurrence of an accident and that no such notice was ever served and the defendant denied any entry of judgment as pleaded.

3. In addition, the defendant denied the sum claimed to be due to the Plaintiff, denied that the plaintiff was a competent party under Cap 405 and that even if there was any such sum the defendant was bound to liquidate the same.

4. The plaintiff deemed the defence filed to be an abuse of the process of the court and therefore filed a Notice of Motion dated 24/01/2012 premised on Order 2 Rule 15(s) and prayed that the statement of defence be struck out and the judgment entered for the plaintiff as prayed in the plaint on the grounds that the plaintiffs claim was crystal clear and that the defendant was incapable of raising any defence as the defence filed did not answer the plaintiffs claim and was thus a pure abuse of the court process. That application was supported by two Affidavits of the Respondent and his advocate, one Njoroge Mwangi. The two affidavit were out of their way to demonstrate the existence of an insurance cover by the Appellant, the occurrence of the accident and a judgment against the insured issued by a court of competent jurisdiction together with all the requisite notices having been duly issued.

5. The Appellant, as defendant in the lower court, opposed the Application by the Affidavit of Francis Nzwili. That affidavit asserted the fact that the policy issued by the Appellant was in favour of one priority Electrical Engineering Ltd to run between 19/09/2009 and 18/9/2010 but the same was cancelled on 14/1/2010. However despite cancellation the insured did not surrender the certificate back to the Appellant constraining the Appellant to demand surrender by more than one letter. In terms of clause 8 of the policy of insurance the Appellant, contended, it did refund to the insured Kshs.33,973/= and that the Appellant did receive several demand letters and stood its ground that it had not cover in place as at 26/3/2010 the policy having been cancelled. To the Appellant, the Respondent and counsel were all the time aware even prior to filing of the primary suit and that the suit herein was filed with knowledge of lack of any policy by the Appellant.

6. For those reasons, the Appellant contended before the trial court that there were several issues to be tried and therefore meriting production of evidence and unsuitable for the draconian procedure of striking out.

7. With those materials having been filed, the parties filed written submissions before the trial court to help the determination of the Applications to strike out the statement of defence.

8. In those submissions, the Respondent as the plaintiff then, pointed out that indeed it was not in dispute that the Appellant had issued a comprehensive cover in respect of the motor vehicle KBC 600K and that despite alleged cancellation the same certificate was displayed on

the motor vehicle as at the time of the accident sued upon. It was pointed out that no public advertisement was ever made to warn the public of the cancellation neither was the requirement of section 10 of Cap 405 complied with upon cancellation. It was equally and additionally highlighted that the defence was that no cover was ever issued as alleged wide in the Replying affidavit the insurance is admitted on oath. That the plaintiff decree holder was a third party to the contract of insurance was reiterated and that the Appellant had a duty to notify the Registrar of Motor Vehicles and Police Commissioner so as to have the certificate removed from the motor vehicle.

9. For the Applicant submissions were offered reiterating that there was infact issued an insurance cover in favour of Priority Electrical Engineering Ltd over motor vehicle KBC 660F which was cancelled on its terms and unused premiums refunded. On that basis the defendant submitted to court that there was no cover issued by the Appellant as at 26/3/2010.

10. Whether the defendant had complied with section 10, cap 405 when cancelling the policy, it was submitted that having cancelled the policy and demanded surrender by the insurer, it could not be blamed if the defendant defaulting blamed if the defendant defaulting in surrendering the certificate of insurance.

11. On issues raised by the defence the defendant submitted that there had been demonstrated lack of cover occasioned by cancellation in compliance with section 10 cap 405. The defendant cited to court the decision of the court of appeal in **CMC Holdings Ltd vs James Mumo Muoki** for the proposition of law that where in an application to set aside even one issue is raised, the trial court must overlook its default judgment and set it aside notwithstanding the reasons for failure to enter an appearance. It was then added that striking out is a draconian remedy only available in clear cut cases and not where the defendant had exhibited several triable issues.

12. On the forth and last issue whether it was fair, justifiable or reasonable to strike out the defence the defendant reiterated that it had a strong defence which would be shut for the sake of justice if struck out.

13. In its reserved ruling delivered on the 30/5/2012 the trial court held while making an order striking out the statement of defence.

> **"In considering whether the application to strike out the defence ought to be granted, the court is enjoined to look at the defence on record. In the case of CMC HOLDINGS Ltd vs JAMES MUMOR MUOKI CCA No. 324 of 2001), cited by Defendant's Counsel, it was asserted that a court to give regard to a sigh triable issue. It is appreciated by this court that striking out of a pleading is a drastic measure to be resorted to in the least of instances where circumstances dictate.**
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> **I have accordingly perused the defence filed herein. Paragraph 4 therein specifically denies that the Defendant had issued the Insurance Policy in question. There is no express averment that the policy, though issued was on the material day and period invalid, having been cancelled".**

14. That is the decision now challenged by the Appellants 7 grounds of Appeal. Even if so remunerated all the grounds challenge the trial courts finding that the defence did not raise a triable issue and that it had an obligations to seek a repudiation by a suit.

15. The Appeal was on 7/12/2016 directed to be canvassed by way of written submissions pursuant to which directions the Appellant filed submissions 6/3/2017 on the 19/3/2017 while the Respondent did so on the 18/4/2017.

16. Having read the memorandum of appeal, the proceeding at trial and the submissions filed as well as the law cited, and this being a first appeal, the courts mandate is to review, reappraise and re-examine the entire record of the file and to come to own conclusions. The court proceeds by way of a retrial and the central question one has to ask is whether the defence filed by the Appellant raised any triable issue to merit being allowed to proceed to trial by way of production of evidence. That question would revolve and rotate around the scrutiny and perusal of the statement of defence dated 4/01/2012. That defence as summarized above denied issuance of a policy in respect of KBC 600F, denied and accident to the motor vehicle involving the deceased, alleged that if any cover was ever issued it was breached by the insured and was automatically repudiated and that any policy if issued was not to the defendant in the primary suit, denied receipt of any statutory notices as to be liable and denied liability under Cap 405.

17. My perusal and study of the defence on record reveal that what the defendant opted for was a general traverse. It is now well settled in Kenya that parties are bound by their pleadings for the sake of certainty, finality and need to obviate ambush and therefore achieve the right to a fair hearing. Therefore, the Replying affidavit sworn and filed by one Francis Nzwili taking the opposite and totally opposite position that indeed there was a policy issued and later cancelled could not be admitted as evidence to prove the defence on record. It was a complete departure from the pleading filed, the defence, which was under scrutiny by the trial court. That court, as is this, was bound to ignore any evidence that is at variance with the pleading filed. It was not therefore open for the trial court to consider that affidavit to ascertain if there was a triable issue revealed. If he did that, he would as well have opened up to the possible accusation that he set out to conduct an investigation or examination on behalf of society at large[1].

18. As was well articulated by the Court of Appeal in ***I.E.B.C & Another vs Stephen Mutinda Mule & 3 Others [2014] eKLR*** any evidence by a party which runs at variance with its pleadings ought to and must be ignored. I do find on the examination of the facts and materials offered and after studying the defence that it totally failed to answer to the plaintiffs claim.

19. However even if the fact of cancellation had been pleaded, which was not, the law under section 10(i) of Cap 405, is that the insurer, is bound to settle the resultant decree even where it was entitled to avoid, cancel or even where it had indeed avoided or cancelled the policy and can only, be excused and protected if there is compliance with the provisions of section 10(2) of the same Act.

20. In this case, I do find that there was never compliance with section 10(2) of the act such that even if that had been pleaded, it would not have been a valid defence.

21. The foregoing being my findings on this appeal, the appeal lacks merit and the same is hereby dismissed with costs to the Respondent.

Dated and delivered at Mombasa this 19th day of March 2018.

P.J.O. OTIENO

JUDGE

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[1] Jones vs National Coal Board [1957] 2 QB 55