

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 21 OF 2010

CO-OPERATIVE INSURANCE COMPANY

OF KENYA LTD.....APPELLANT

VERSUS

DAVID MBUGUA NGENE..... RESPONDENT

JUDGEMENT

The respondent filed a case against the appellant in the lower court. In his plaint he claimed indemnity from the appellant for damages he was awarded against a party who was said to have been covered by the appellant in a policy of insurance. The appellant filed a defence to the claim and denied that it was mandated to meet the judgment in favour of the plaintiff in the earlier suit.

The respondent then filed an application to strike out the defence of the appellant for not disclosing triable issues calling for a full trial. The lower court agreed with the respondent and struck out the appellant's defence. In doing so the lower court held as follows,

“I hold that the defence filed herein is a mere denial, frivolous and merely intended to delay the conclusion of litigation. The same is hereby struck off with consequent order that judgment shall be entered as prayed for in the plaint with costs to the plaintiff/applicant.”

Aggrieved by the said ruling the appellant filed this appeal. In the Memorandum of Appeal filed on 1st February, 2010 the appellant has faulted the lower court for striking out the defence before a trial on merit, and should have been allowed by a hearing through a full trial. The lower court was also accused of shifting the burden of proof to the appellant. Further, by its ruling, the lower court directed the appellant to indemnify a stranger contrary to Section 10 (1) of the Insurance (Motor Vehicles Third Party Risks) Act, Cap 405 Laws of Kenya.

There are other grounds set out in the said Memorandum of Appeal. The lower court was also faulted for not following decided cases on the subject, and further that the respondent who was a motor cyclist at the time of the accident was not entitled to claim from the insurance company, as such liability is not covered under Section 5(b) of the Act.

In that Section there is a list and class of persons who are allowed to recover in a declaratory suit which does not include the respondent. Both parties filed submissions to argue the appeal and cited some authorities. These authorities relate to issues that are substantially to be canvassed during a trial such as the one the appellant was denied.

My assessment of the defence filed by the appellant in the lower court alongside the grounds of appeal set out in the Memorandum of Appeal is that, serious triable issues stick out which should have been allowed to go for full trial. It is a cardinal principle of law that he who alleges must prove. That notwithstanding, the trial court stated as follows,

“In an application like the instant one, it behoves the party wishing to persuade the court in a particular direction, to be as candid as possible. In other words, it is not enough for the respondent to merely assert that the person sued in the mother suit is a stranger to it without going further to disclose who actually is the beneficiary of the policy stated.”

It was the respondent to take the stand first and persuade the court that he had a case against the appellant and not the other way round. He had the burden to establish his case against the appellant to compel the said appellant to make an answer there to. The appellant is therefore correct to say that, that opportunity was denied. With respect, the lower court shifted the burden of proof onto the appellant which led to a prejudicial consideration.

Consequently, this appeal is allowed by setting aside the ruling of the lower court and all consequential orders thereunder. The file shall be remitted to the lower court for full trial. Each party shall bear their own costs of this appeal.

Dated, signed and delivered at Nairobi this 9th Day of March, 2018.

A. MBOGHOLI MSAGHA

JUDGE