



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 83 OF 2013

FIDELITY SHIELD INSURANCE COMPANY

LIMITED.....APPELLANT

VERSUS

ALFRED MULWA KILONZO.....RESPONDENT

(An appeal from the ruling and order of Hon. Gacheru, Principal Magistrate delivered on 11th July, 2013 in Mombasa Chief Magistrate's Court Civil Case No. 267 of 2012)

JUDGMENT

1. The ruling and order the subject of this appeal arises from an application dated 26th February, 2013 that was filed by the plaintiff (respondent), Alfred Mulwa Kilonzo, in the lower court. He sought orders for the defence to be struck out and for Judgment to be entered in his favour as prayed in the plaint. He also sought costs of the application and the main suit.
2. In a ruling dated 11th July, 2013, the Hon. Magistrate found that the defence filed by the defendant (appellant) did not raise any triable issue and proceeded to strike it out.
3. The appellant, Fidelity Shield Insurance Company Limited, being aggrieved by the said decision filed a memorandum of appeal on 17th July, 2013 raising the following grounds of appeal:-
 - (i) That the Learned Magistrate erred in law and fact in striking out the appellant's defence and entering Judgment for the respondent as prayed in the application dated 26th February, 2013 without taking into consideration the nature of the claim, the summary nature of the procedure and the submissions made therein;
 - (ii) That the Learned Magistrate erred in law and in fact in finding that the appellant had not presented a defence with triable issues;
 - (iii) That the Learned Magistrate erred in law and in fact in failing to make any or any proper findings on the facts placed before him in light of the submissions;
 - (iv) That the Learned Magistrate erred in law and in fact in finding that the appellant had been served with a statutory notice by the respondent in compliance with Section 10 of the Motor Vehicle Third Party Risk Act;
 - (v) That the Learned Magistrate erred in law and in fact in finding that Tibbet and Britten Ltd were insured by the appellant without adequate evidence pointing to the same;
 - (vi) That the Learned Magistrate erred in law and in fact in finding that motor vehicle registration No. ZB 4306 was insured by the appellant;
 - (vii) That the Learned Magistrate erred in law and in fact in failing to find that the appellant had presented a credible defence with not one but several triable issues for determination; and
 - (viii) That the Learned Magistrate erred in law and in fact in granting the respondent's application as prayed.

4. The appellant prays for:-

(a) The appeal to be allowed with costs;

(b) The Learned Magistrate's orders to be set aside and/or varied as this Honourable court may deem fit;

(c) That the damages awarded to the respondent herein in the lower court be set aside; and

(d) That the matter be sent back for retrial before another court other than the court that heard the application dated 26th February, 2013.

5. The appellant filed its written submissions on 23rd June, 2016. The respondent filed his on 3rd October, 2016. Ms Okata, Learned Counsel for the appellant highlighted their submissions by stating that the matter that gave rise to this appeal arose from a declaratory suit in Mombasa CMCC No. 267 of 2012, that was the subject of a primary suit in Mombasa CMCC No. 1974 of 2005, where the respondent had filed a suit against Tibbet and Britten (K) Ltd as the 3rd defendant and as the owner of trailer registration No. ZB 4306 purportedly insured by the appellant. Counsel contended that Tibbet and Britten (K) Ltd were not insured by the appellant at the time of the accident as the insurance companies appearing on the police abstract on page 13 of the record of appeal are Phoenix of East Africa Assurance and Invesco Insurance, but not Fidelity Insurance.

6. It was argued that no statutory notice was served on the appellant in the declaratory suit which is evident from page 8 of the record of appeal and that their submissions in the lower court were that Tibbet and Britten (K) Ltd was not insured by the appellant herein under policy No. MC035118248TPO on 20th August, 2004 when the accident occurred. Other issues raised are if the appellant was reflected on the police abstract as the insurer of motor vehicle registration No. ZB 4306 and if a statutory notice or even a demand notice was served on the appellant as required. It was further submitted that although the respondent's Counsel stated in their written submissions that Kshs. 439,664/- had been paid to the respondent and Kshs. 659,496/= is outstanding, they did not indicate who paid the said amount.

7. The appellant's Counsel relied on her written submissions to show that striking out of pleadings is a draconian move, more so since they had a reasonable defence. As such, it was improper for the court to strike out the appellant's defence.

8. In his submission, Mr. Maundu, Learned Counsel for the respondent invited the court to re-evaluate the evidence on record and arrive at its own conclusions as was held in the case of **Mwangi Kiunjuri and Wangethi Mwangi and 2 Others** [2016] eKLR.

9. He submitted that a defence that contains a mere denial or one that volunteers no information is for striking out. In making reference to the defence at page 102 of the record of appeal, he stated that it contains mere denials and that the evidence they tendered at the primary suit shows that they fulfilled the requirement under Section 10 of Cap 405, Laws of Kenya.

10. He stated that in showing that the respondent was insured by the appellant, they relied on the police abstract which is incomplete, as reflected on page 57 of the record of appeal. He urged this court to look at the lower court record to get the original police abstract that has all the information. He referred to page 144 of the record of appeal which has an affidavit of service and a demand letter attached thereto which was duly stamped by the appellant. Mr. Maundu prayed for the appeal to be dismissed.

11. In response to the submissions by the respondent's Counsel, Ms. Okata referred to page 103 of the record of appeal which contains the appellant's statement of defence. She indicated that in paragraph 5 thereof, the appellant avers that it was not served with a statutory notice and in paragraph 7 of the said defence, it states that the police abstract did not show that the appellant had insured the respondent. With regard to the annexure attached to the affidavit of service filed by the respondent, it was submitted that it comprised a demand letter addressed to the appellant and not a statutory notice. She prayed for the appeal to be allowed, with costs to the appellant.

ANALYSIS AND DETERMINATION

The issue for determination is if the Hon. Magistrate, exercised his discretion judiciously by striking out the defence filed by the appellant.

12. The duty of the first appellant court in an appeal of this nature is to determine if in striking out the defence, the Hon. Magistrate exercised his powers judiciously. In **Mbogo v Shah** [1968] EA 93, Sir Charles Newbold stated as follows:-

"A court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself in the matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been injustice."

13. There is no dearth of decided cases on the issue of considerations to be borne in mind by a court that exercises the power to strike out pleadings, be it a defence or a plaintiff. In her written submissions, Ms Okata cited the decision in **BlueShield Insurance Co. Ltd. vs Caroline Andisa**, HCCA No. 795 of 2001 and **D.T. Dobie and Company (Kenya) Ltd vs Joseph Mbaria Muchina and Another**, CAA No. 37 of 1978 to demonstrate that a defence that has triable issues, such as the one filed by the appellant, should not be struck out. She also relied on **Kenindia Assurance Co. Ltd. vs Laban Ideah Nyamache**, HCCA No. 141 of 2009, where Makhandia J (as he then was), stated as follows:-

"It is trite law that striking out pleadings is such a drastic remedy which can only be resorted to sparingly and in the clearest of cases and appreciating that the right to a hearing is a constitutional right. If a pleading raises a triable issue even if it is only one

issue, such pleadings ought not to be struck out.”

14. Counsel for the respondent in advancing his arguments relied on several authorities, which I have considered. The most applicable to his submissions is that of **Blue Sky EPZ Limited vs Natalia Polyakova and Another** [2007] eKLR where the court held as follows:-

“The power to strike out pleadings is draconian, and the court will exercise it only in clear cases where, upon looking at the pleading concerned, there is no reasonable cause of action or defence disclosed. In the case of a defence, a mere denial or a general traverse will not amount to a defence. A defence must raise a triable issue.”

15. The appellant filed its statement of defence in the lower court on 22nd June, 2012. In paragraph 2 thereof, it denied that Tibbet and Britten Limited was registered under policy No. MC035118248TPO or at all and was the owner of motor vehicle registration No. ZB 4306 and put the respondent to strict proof thereof.

16. In paragraph 3 of the said defence, the appellant denied that the policy provided that it would indemnify Tibbet and Britten Limited of any decree that may be passed in favour of the claimant. The appellant put the respondent to strict proof thereof. The appellant in paragraph 5 of its statement of defence denied having been served with a statutory notice and put the respondent to strict proof thereof.

17. In reference to the police abstract, the appellant in paragraph 7 of its defence averred that it was not the insurer of motor vehicle registration No. ZB 4306 owned by Tibbet and Britten Limited and put the respondent to strict proof thereof.

18. Having perused the statement of defence in totality, the above issues in my considered opinion were subject to confirmation or being dispelled by the parties herein upon being given an opportunity to argue their respective cases in the lower court.

19. This court notes that an interlocutory Judgment was entered against Tibbet and Britten (K) Limited for failure to enter appearance and file a defence as required in the primary suit. Some issues but not all were resolved in the primary suit. Issues of whether or not Tibbet and Britten (K) Limited was insured by the appellant was an issue in the declaratory suit. Once the appellant denied having insured Tibbet and Britten (K) Limited which according to the appellant, was not reflected in the police abstract, the court should have given the appellant an opportunity to prove that allegation.

20. On whether the demand notice written by the respondent’s Counsel dated 8th February, 2005 and copied to the appellant, with the remarks made thereon, constituted a statutory notice under Section 10 of Cap. 405 Laws of Kenya, was a triable issue that was subject to resolution by the lower court. In my considered view, there were triable issues disclosed in the statement of defence.

21. In the case of **Blue Sky EPZ Limited vs Natalia Polyakova and Another** (supra), the court in addressing the issue of striking out pleadings went on to state:-

“The general principle is that if the defence shows bona fide triable issues, the defendant should be allowed to defend”

22. The respondent’s Counsel in his detailed written submissions delved into issues and some authorities that were not applicable to the appeal at the hand but matters that are best reserved for submission and determination by the lower court. The said Counsel urged me to peruse the original police abstract in the lower court file that contains all the details, I have done so and noted that the said document is worse for wear due to the long duration of time it has been in the court file and it will be up to the respondent’s Counsel to avail a complete copy to the trial court. Having found that the statement of defence raises some triable, I will not descend into the arena of the trial court to establish whether or not the appellant was the insurer of Tibbet & Britten (K) Limited.

23. Consequently, I hereby make the following orders:-

(i) The appeal is hereby allowed. The costs of the appeal are awarded to the appellant. Interest is also awarded to the appellant, at court rates;

(ii) Mombasa Chief Magistrate’s Court Civil Case No. 267 of 2012 is hereby remitted to the Chief Magistrate’s Court, Mombasa for full hearing and determination of the suit on merit, before any other Magistrate save for Hon. S.K. Gacheru; and

(iii) Due to the age of the case, it shall be given priority hearing dates.

It is so ordered.

DELIVERED, DATED and SIGNED at MOMBASA on this 27th day of July, 2018.

NJOKI MWANGI

JUDGE

In the presence of:-

No appearance for the appellant

No appearance for the respondent

Ms Caren Otene - Court Assistant