REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL APPEAL NO. 195 OF 2011

INSURANCE CO. OF EAST AFRICA LTD.....APPEALLANT

VERSUS

CHAKA RASI MTUNDO.....RESPONDENT

J U D G M E N T

Outline of facts

1. Before the trial court was a suit by the Respondent, as plaintiff then, by which he sought a declaration that the Appellant, as 2nd defendant then, and another were obligated to pay a sum of Kshs.106,835/= being the decretal sum due on account of a decree issued in Kilifi CMCC NO. 281 of 2005. The suit, hereinafter referred to the primary suit, was filed against one JOYCE C. TONUS who was pleaded to be the owner of motor vehicle KAN 547J pleaded to have been insured by the Appellant. On account of the pleaded insurance cover allegedly by the Appellant to the said JOYCE C. TONUI the Appellant was to have become liable to settle the decretal sum pursuant to the provisions of Sections 5 and 10 of Insurance (Third Party Motor Vehicle Risks) Act for which reason the declaration was sought.

2. When served the Appellant, filed a statement of defence dated 15/11/2011 in which it was denied that the quoted policy no. P/NO. 020/970/1/014200/2001 was ever issued to JOYCE C. TONUI in respect of Motor Vehicle KAN 547T, the accident of 1/1/2004 was denied as well as any notice of the suit. It was equally denied at paragraphs 8 and 9 that any of its insureds was sued, nor was any judgment entered against such insured and therefore the liability to pay was also denied as no obligation had arisen.

3. That defence became the subject of an application dated 9/3/2010 seeking that it be struck out and judgment entered for the sum claimed. The said application was grounded on the allegation that the defence presented no clear or fair arguable case to entitle the defendant to unconditional leave to defend, was designed to prejudice, embarrass and delay the fair trial of the action and was thus inmeritorias and a sham because the defendant was statutorily bound to settle the judgment debt because they were insurers of KAN 547T.

4. That application was supported by the Affidavit sworn by CHAKA RASI MTUNDO, the Respondent herein which exhibited among other documents; a police abstract for the accident, demand letters, statutory noticeS, warrants of attachment, decree and copies of certificates of insurance. Based on those documents the respondent contended that it could not be true that the Appellant was not the insurer of the motor vehicle KAN 547T.

5. In opposition to that Application the Appellant filed a Replying Affidavit sworn by one FRANCIS NZWILI which essentially denied ensuing the policy to JOYCE C. TONUI, denied the knowledge of the suit or statutory notice having been served and bemoaned the prevalence of fraud with certificates of insurance thereby contending that only a policy document could prove that the Appellant had insured the motor vehicle. To that deponent, the defence on record raised the serious issues whether JOYCE C. TONUI was ever insured by the appellant in respect of KAN 547T and that it was not obligated to repudiate a policy it had not issued. It was contended that the matter be allowed to proceed to trial on merits by production of evidence.

6. The record reveal that the application was canvassed by written submissions. The submissions by the Appellant are dated 2/6/2011 while those by the respondent were dated 3/6/2011 (pages 10 -50 of the Record of Appeal). In a ruling dated 22/7/2011 the trial court allowed the application in the following words:-

> **"I have considered all the materials placed before me. I find that judgment was entered in favour of the Plaintiff in the primary suit. That from the police abstract annexed to the supporting affidavit, the 2 certificates of insurance also annexed and a copy of records annexed to the further affidavit, the 2 motor vehicles were insured by the 2 defendants respectively that as insurer proper statutory notices were issued to the defendants and being the insurer the defendants were statute bound to settle the claim under section 10 of (Cap 405). From all these I therefore find that the application has merit and allow the same as prayed".**

Issues

7. This appeal challenges the decision of the trial court striking out the defence and entering judgment as pleaded. This being a first appeal, the issue the court is to determine, under its mandate and obligation, to re-appraise, re-examine and re-evaluate the entire evidence and come to own conclusion[1] is whether the defence filed by the Appellant reveled any arguable point.

8. The suit having not been heard by oral evidence, I will be hesitant to comment on whether or not the Appellant was the insurer of the subject motor vehicle and limit my determination on whether or not the statement of defence raised any arguable point. In doing so however, it is important to point out that the plaint in the primary suit identified the motor vehicle as KAN 547J. That is the same registration mark in the certificate of insurance at page 66 and the notices at pages 61 & 62 of the record. However in the declaratory suit, decided by the trial court, the motor vehicle is described at paragraph 4 as KAN 547T while at paragraph 6 the number is KAN 547J. The defence at paragraph 4 specifically denies having issued a policy in respect KAN 547T to JOYCE C. TONUI the person against whom a judgment was obtained in the primary suit.

9. In my assessment of the defense filed, it denied insuring KAT 547T, denied that any judgment had been entered against its insured and therefore asserted that the operations of Section 10 of Cap 405 had not come into effect to obligate it to meet the judgment debt. That is the defence the trial court found to disclose no triable issue. The trial court was convinced that the documents showed to it, being the police abstract and the certificate of insurance showed that the Appellant was the insurer of the motor vehicle and that proper statutory notices were indeed served.

10. Having read the record myself, I am compelled to disagree with the trial court. The police abstract at page 59 of the record had nothing to do with the ownership and insurance of KAN 547T but KAL 276C. The certificate of insurance at page 66 however exhibited the certificate pleaded but the writings there clearly show that the owner of the motor vehicle and therefore the insurer was NAZ CAR HIRE SERVICES and not JOYCE C. TONUI.

11. For the trial court to have found that the Appellant was bound to settle the decree there ought to have been evidence that there had been an insurance cover issued to the judgment debtor in the primary suit. Section 10 Cap 405 provides:-

> "**Duty of insurer to satisfy judgments against persons insured**
>
> **(1) If, after a policy of insurance has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of section 5 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.**

12. But once again, which vehicle was it alleged to have been insured; KAN 547J or KAN 547T? From the plaint itself it was not clear which vehicle was the subject of insurance hence it was not a clear of the clearest cases to invite the remedy to struck out.

13. In ***CRECENT CONSTRUCTION CO. LTD VS DELPHIS BANK LTD [2001] eKLR*** the Court of Appeal set out the principles to be observed on striking out in the following words:-

> **"However one thing remains clear and that is that the power to strike out is a discretionary one. It is to be exercised with the greatest care and caution. This comes with the realization that the Rules of Natural Justice require that the court must not drive away any litigant, however week his case may be, from the seat of justice. This is the time honoured legal principle. At the same time, it is unfair to drug a person to the seat of justice when the case purportedly brought against him is a non-starter".**

14. In this case, the trial court did not move with the prescribed care ad caution. Had it done so, it would have noted the need for the plaintiff to clarify which motor vehicle it was alleged to have been insured and who was the disclosed insured even based on the plaint alone. That required evidence and was that a matter for trial.

15. As a consequence of failure to exercise that care and caution, the Appellant, as the defendant, was driven from the seat of justice before being heard. That is an error that entitles this court to interfere with the determination by the trial court.

16. I do find that in exercising its discretion to strike out the trial court was rush and injudicious. I set aside the ruling dated 22/7/2011 and in its pace substitute an order dismissing the application dated 9/3/2010 with costs. The effect is that parties shall go back to the trial court and have the suit heard on the merits.

17. The costs of this appeal are awarded to the Appellant.

Dated and delivered at Mombasa this 26th day of October 2018.

P.J.O. OTIENO

JUDGE

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[1] Selle vs Associated Motorboat [1968] EA 123