



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 38 OF 2017

DIRECTLINE ASSURANCE COMPANY LIMITED....APPELLANT

VERSUS

ISAAC OKONDA MANG'ULA.....RESPONDENT

(Being an Appeal from the Order and Decree of the Senior Principal Magistrate's Court at Kilifi (Hon. R.K. Ondieki, Senior Principal Magistrate) in SPM Civil Case Number 70 of 2017 delivered on 12th July 2017)

JUDGEMENT

1. The history of the matter giving rise to this appeal is that the Appellant, Directline Assurance Company Limited is the defendant in Kilifi Principal Magistrate's Court Civil Case No. 70 of 2017 where it has been sued by the Respondent, Isaac Okonda Mang'ula. The Respondent's claim in that case is based upon a judgement entered in favour of the Respondent in Kilifi Principal Magistrate's Court Civil Case No. 18 of 2016 against Shehzad Ansar who is said to be the Appellant's insured. The Respondent's claim for declaration judgement against the Appellant was disputed by the Appellant through a statement of defence in which the Appellant denied all the allegations contained in the plaint.

2. Subsequent to the filing of the defence by the Appellant, the Respondent brought an application by way of notice of motion dated 26th May, 2017 seeking that the Appellant's defence be struck out for being unmeritorious, frivolous and intended to delay the fair trial of the case. The Respondent at the same time sought that judgement be entered in his favour as prayed in the plaint.

3. The Appellant opposed the application by filing a replying affidavit on 20th June, 2017. The Respondent filed a supplementary affidavit responding to the issues raised in the replying affidavit.

4. The matter was set down for hearing on 12th July, 2017 when the Appellant's counsel failed to attend court. The Respondent's application dated 26th May, 2017 was allowed.

5. The court record for the material day is as follows:

“12/7/17

Before Hon. R.K. Ondieki SPM

Amani: Court Assistant

Malombe: I appear for the applicant and the respondent is not represented today. The application is dated 26/5/17 and there is no attendance. I urge the court to grant the orders as prayed.

Court: The application dated 26/5/17 is granted as prayed.

Hon. R.K. Ondieki SPM

12/7/2017”

The Appellant being aggrieved by the said decision has appealed to this Court.

6. Although the Appellant has listed several grounds of appeal and extensively submitted on each of those grounds, my view is that the only issue is whether the decision dated 12th July, 2017 was erroneous.
7. Counsel for the Appellant submitted that the trial magistrate erred in law in failing to provide any reason whatsoever in support of his decision allowing the Respondent's notice of motion dated 26th May, 2017. According to counsel, failure to give reasons contravened Order 21 Rule 4 of the Civil Procedure Rules, 2010 (CPR). Reliance is placed on the decision of the Court of Appeal in **Godfrey Gatere Kamau v Peter Mwangi Njuguna [2008] eKLR** in support of the proposition that the said rule require that judgements and rulings should contain the reasons for the decision.
8. Moving to the second point, counsel for the Appellant submitted that no sufficient reasons had been given as to why its defence was struck out. Citing the decision of the Court of Appeal in **D.T. Dobie & Co. (K) Ltd v Muchina (1982) KLR 1**, the Appellant submitted that striking out a pleading is a draconian act which should only be resorted to in plain cases. It is the Appellant's position that its defence had raised triable issues.
9. The third point taken up by the Appellant's counsel is that the decision failed to comply with the rules of natural justice as the Appellant was not afforded an opportunity to be heard. It is submitted by the Appellant's counsel that before allowing the application to strike out the defence, the trial magistrate ought to have considered the application alongside the replying and supplementary affidavits. In his view, failure to do so amounted to failing to consider matters that ought to have been considered. The court is urged to rely on the decision of the Court of Appeal in **Margaret Njeri Mbugua v Kirk Mweya Nyaga [2016] eKLR** in which the court reached the conclusion that the judge had erred by failing to consider all the pleadings filed in respect to an application.
10. The Appellant has also extensively submitted on the issue that the trial magistrate erred by allowing an application that was supported by affidavits sworn by the Respondent's counsel. In my view, this issue goes to the merits of the application and it would be prejudicial for the parties were this court to state its opinion on the issue.
11. The Appellant also extensively submitted on the contents of its replying affidavit in opposition to the Respondent's application and urges this court to find that the application ought not to have been allowed. The Appellant urges this court to find that it had a meritorious response to the Respondent's application and proceed to dismiss the application dated 26th May, 2017. Again, I note that this submission goes towards determining the application itself and it is not proper for this Court to go in that direction.
12. The final issue submitted upon by the Appellant is that of alleged partiality on the part of the trial magistrate. Counsel for the Appellant cites various instances to demonstrate that the trial magistrate was biased. The decision of Ombija, J in **Barnaba Kipsongok Tenai v Republic [2014] eKLR** is cited in support of the principles governing transfer of matters from one subordinate court to another. The Appellant's counsel urges this court to find that the trial magistrate is biased and order the transfer of the Appellant's case to another magistrate for hearing and determination.
13. In opposition to the appeal, counsel for the Respondent identified a number of issues and submitted on the same. Two of the issues identified are whether the judgement in the primary suit is valid and whether the declaratory suit is properly filed. In my view, these are matters to be dealt with by the trial court if this appeal succeeds. I will therefore not address those issues.
14. In my view, one of the issues correctly identified by the Respondent is whether the trial court correctly exercised its discretion in allowing the application dated 26th May, 2017. According to counsel for the Respondent, the trial court correctly exercised its discretion in accordance with Order 12 Rule 2(a) CPR which allows the court to proceed *ex-parte* where a plaintiff satisfies the court that a notice of hearing was duly served on the defendant. According to the Respondent's counsel, it is clear from the court record that there was no attendance by the Appellant and counsel on the material day. To buttress this point counsel for the Respondent cited the decisions in **Intex Construction Co. Ltd v Flora Marigu & another [2016] eKLR** and **Josephat Muthui Muli v Ezeetec Ltd [2016] eKLR**.
15. Counsel urged the Court to find that the trial magistrate correctly exercised his discretion by proceeding to hear the matter on the material day. According to counsel the Appellant abandoned its right to be heard and this appeal is only intended to delay the determination of the matter. Citing the decision of the Court of Appeal in **Pithon Waweru Maina v Thuka Mugiria [1983] eKLR**, counsel urged this court to find that the Appellant has not demonstrated that the trial magistrate misdirected himself in the exercise of his discretion to justify the allowing of the appeal.
16. I have indicated that I will confine myself to the issue as to whether the trial magistrate acted erroneously in making his decision of 12th July, 2017.
17. This being a first appeal, this court has a duty to revisit the evidence on record and evaluate it in order to reach its own conclusion. Ordinarily, findings of facts by the trial court should not be interfered with unless they are based on no evidence at all or the trial court is shown demonstrably to have acted on wrong principles in reaching its findings – see **Mwanasokoni v Kenya Bus Services Ltd [1985] eKLR**.
18. The issues that arise in this matter can be broken into two. There is the aspect of the exercise of the court's discretion to proceed *ex-parte*. On this point the facts clearly show that the Appellant was not represented by counsel on the material day. No reason was given for failure by counsel to attend court. However, it is noted that on two previous occasions the application had not proceeded due to the absence of the trial magistrate. Essentially, the matter was therefore coming up for hearing for the first time on 12th July, 2017. I suspect that had the Appellant approached the trial court to set aside its orders of 12th July, 2017 such an application could have succeeded. Nevertheless, a perusal of the record will not disclose any unlawful act on the part of the trial magistrate. The law allowed him to proceed *ex-parte*. The Appellant has admitted that it was not represented on the hearing date.

19. The second aspect of the issue is whether the manner in which the trial court proceeded was proper. The order on record granted the Respondent's application dated 26th May, 2017. The Appellant's view is that it was entitled to a consideration of the pleadings it had filed in regard to that application. It also submits that the trial magistrate ought to have perused its defence with a view to establishing whether the same was vexatious and an abuse of the court process. In my view, the Appellant has a point.

20. In **Godfrey Gatere Kamau v Peter Mwangi Njuguna [2008] eKLR**, the Court of Appeal quoted with approval its decision in **Civil Appeal No. 179 of 1997, J.P. Machira t/a Machira & Co. Advocates v Wangethi Mwangi & another** wherein it was stated that:

“I think that as is required by Order XX rule 4 of the Civil Procedure Rules in respect of judgements, a ruling in an application which is opposed such as the one made by the Appellant and opposed by the Respondents, must be self contained and should contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision. This, I fear he did not endeavor to do. He therefore exercised his discretion improperly.”

Order XX rule 4 is now Order 21 Rule 4 which states that:

“Judgement in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision.”

21. It is not disputed that the Appellant had opposed the Respondent's application. It was therefore incumbent upon the trial court to consider the application, the affidavit in support of the application, the replying affidavit and the supplementary affidavit. At the same time the trial magistrate also needed to consider the Appellant's defence which the Respondent was seeking to strike out. He needed to make a detailed ruling giving reasons why he thought the defence was a sham or vexatious warranting a striking out.

22. It was not sufficient for the trial magistrate to allow the application for striking out the defence without explaining through a ruling why the application was allowed. There was material before him by way of the statement of defence and the replying affidavit to the application which he ought to have weighed vis-à-vis the application, notwithstanding the lack of representation of the Appellant on the hearing date.

23. In the circumstances, I agree with the Appellant that the trial magistrate wrongly exercised his discretion. The appeal succeeds and an order is issued setting aside the trial court's order of 12th July, 2017 allowing the Respondent's notice of motion dated 26th May, 2017.

24. Dismissing the application as urged by the Appellant amounts to condemning the Respondent unheard. The said application is remitted back for fresh hearing before the subordinate court at Kilifi.

25. A perusal of the trial court's record does not disclose any bias on the part of R.K. Ondieki, SPM as alleged by the Appellant. However, in keeping with tradition I direct that the matter be heard by any magistrate of competent jurisdiction other than R.K. Ondieki, SPM.

26. The Appellant will have the costs of the appeal from the Respondent.

Dated, signed and delivered at Malindi this 18th day of October, 2018.

W. KORIR,

JUDGE OF THE HIGH COURGT