



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUSIA**

**CIVIL APPEAL NO. 19 OF 2016**

**FIRST INSURANCE CO. LTD.....1<sup>ST</sup> APPELLANT**

**NATIONAL INSURANCE CORPORATION.....2<sup>ND</sup> APPELLANT**

**KENYA RE-INSURANCE CORPORATION.....3<sup>RD</sup> APPELLANT**

**VERSUS**

**JOSEPH ODHIAMBO OMALLA.....RESPONDENT**

**(An appeal against the Ruling and Order of Honourable C.I. Agutu, Resident Magistrate delivered on 6<sup>th</sup> June, 2016 in BUSIA C.M.C.C. No. 360 of 2013 in respect of the application dated 23<sup>rd</sup> December, 2014)**

**JUDGEMENT**

1. The Respondent, Joseph Odhiambo Omalla sued Regional Coach Ltd the owner of Ugandan registered motor vehicle number UAE 806X in Busia P.M.C.C. No. 308 of 2009 for compensation as a result of injuries sustained in an accident, which occurred on 23<sup>rd</sup> October, 2006 in Kenya, involving the said motor vehicle. Judgement in the sum of Kshs.120,000/= plus costs and interest was entered in favour of the Respondent on 15<sup>th</sup> January, 2010. On 1<sup>st</sup> March, 2010 the Respondent extracted a decree for the sum of Kshs.149,580/=.
2. Attempts to execute the decree against Regional Coach Limited were not successful. The Respondent went ahead and instituted Busia P.M.C.C. No. 360 of 2013 against First Insurance Co. Ltd, National Insurance Corporation and Kenya Re-insurance Corporation who are the respective 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> appellants herein. The main prayer was for a declaratory order directing the appellants to satisfy the decree in Busia P.M.C.C. No. 308 of 2009 or an order for payment of Kshs.149,580/=. The Respondent also sought interest on the decretal amount from 1<sup>st</sup> March, 2010 until payment in full plus costs of the suit.
3. A perusal of the proceedings in Busia P.M.C.C. No. 360 of 2013 shows that on 5<sup>th</sup> May, 2014, judgement was entered against the 1<sup>st</sup> and 2<sup>nd</sup> appellants for failing to enter appearance. The 3<sup>rd</sup> Appellant had entered appearance and filed a defence earlier on.
4. Subsequently, the Respondent filed an application dated 23<sup>rd</sup> December, 2014 asking the trial Court to strike out the 3<sup>rd</sup> Appellant's statement of the defence and enter judgement in his favour in the terms of

the plaint. On 6<sup>th</sup> June, 2016 C. I. Agutu, Resident Magistrate delivered a ruling allowing the said application with costs to the Respondent.

5. That ruling is what has given rise to this appeal. Through the Memorandum of Appeal dated 28<sup>th</sup> June, 2016, the appellants ask this Court to set aside the said ruling on the grounds that: -

**“1. THAT the Learned Magistrate erred in law and fact in failing to consider the evidence and submissions before him thereby reaching a wrong conclusion.**

**2. THAT the Learned Magistrate erred in law and in fact in totally failing to consider the evidence adduced by the Appellants.**

**3. THAT the Learned Magistrate erred in law and in fact in wholly considering the Plaintiff’s evidence despite the lack of any evidence on the existence of a valid insurance cover at the time of the accident.**

**4. THAT the Learned Magistrate erred in law and in fact in totally failing to make a distinction between Kenya Re as Reinsurer and as the National Bureau.**

**5. THAT the Learned Magistrate misappreciated the evidence before him and reached a wrong conclusion of law.**

**6. THAT the Learned Magistrate erred in law and in fact in finding that the Respondent had proved its claim on special damages on a balance of probability.**

**7. THAT the Appellants were not served with any notice of entry of Ruling.”**

6. The appellants’ case is brief. They assert that the Respondent did not exhibit an insurance cover under the Common Market Yellow Card Scheme in order to warrant the institution of the claim against the 2<sup>nd</sup> Appellant as the National Bureau of Uganda and the 3<sup>rd</sup> Appellant as the National Bureau of Kenya.

7. The Respondent’s response is that the issues of liability and quantum were settled in favour of the Respondent in Busia P.M.C.C. No. 308 of 2009. This is indeed correct but the questions as to whether the accident motor vehicle was insured by the 1<sup>st</sup> Appellant and whether the cover was issued under the Common Market Yellow Card Scheme were matters that were the subject of litigation in Busia P.M.C.C. No. 360 of 2013. For the 1<sup>st</sup> and 2<sup>nd</sup> appellants those issues were settled after judgement was entered against them for failure to enter appearance or file defence. The 3<sup>rd</sup> Appellant had however filed a defence which was struck out leading to the filing of this appeal.

8. On the appellants’ assertion that the trial Magistrate failed to consider the evidence, the Respondent asserted that the matter proceeded by way of striking out a pleading and there was no evidence to be considered.

9. The Respondent also submitted that the 3<sup>rd</sup> Appellant has no triable defence because the issue of liability was settled once judgement was entered against the 1<sup>st</sup> and 2<sup>nd</sup> appellants. It is the Respondent’s assertion that it was upon the 3<sup>rd</sup> Appellant to show that the insurance cover for the accident motor vehicle was not issued under the Common Market Yellow Card Scheme. Further, that Section 112 of the Evidence Act shifted the burden of proof to the 3<sup>rd</sup> Appellant to provide any contrary information that would absolve it from the claim.

10. The Respondent contended that the 3<sup>rd</sup> Appellant did not file any reply to his application as required by Order 51 Rule 14 (1) of the CPR. The Rule provides: -

**“14 (1) Any respondent who wishes to oppose any application may file any one or a**

**combination of the following documents-**

**(a) a notice of preliminary objection, and/or;**

**(b) replying affidavit; and/or**

**(c) a statement of grounds of opposition;”**

11. The word here is a respondent may file documents in opposition to an application. Failure to file cannot deny a party a hearing.

12. A perusal of the record of appeal and the submissions filed herein shows that the question for the determination of the court in this matter is whether the trial Magistrate correctly exercised the mandate of striking out pleadings which is donated to courts by Order 2 Rule 15 (1) (b), (c) and (d) of the Civil Procedure Rules, 2010 (CPR).

13. The said rule provides that: -

**“15 (1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that –**

**(a) it discloses no reasonable cause of action or defence in law; or**

**(b) it is scandalous, frivolous or vexatious; or**

**(c) it may prejudice, embarrass or delay the fair trial of the action; or**

**(d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgement to be entered accordingly, as the case may be.”**

14. The principles governing the exercise of the powers granted to the courts by the said provision were discussed by the Court of Appeal in **Blue Shield Insurance Company Ltd v Joseph Mboya Oguttu [2009] eKLR** where Madan J.A. (as he then was) in the case of **D.T. Dobie and Company (Kenya) Ltd v Muchina** was quoted thus: -

**“The power to strike out should be exercised after the court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial Judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial Judge in disposing the case.”**

15. The Court went ahead and stated that:-

**“We may add that like Madan, J.A, said, the power to strike out a pleading which ends in driving a party from the judgement seat should be used very sparingly and only in cases where the pleading is shown to be clearly untenable.”**

16. In my view this is a tool that should only be applied to weed out pleadings that are so hopeless and are only meant to annoy the other party and waste precious judicial time. In the case of a defence, where there is a flicker of triable issue the matter should be allowed to proceed to full hearing. No party should be denied the opportunity of putting his foot forward through a trial.

17. In the ruling which is the subject of this appeal, the trial Court stated that:-

**“This court concurs with the Applicant that in view of the judgment already entered against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and the provisions of Article 2 and Article 3 (1) and (4) of the Protocol of Comesa, the 3<sup>rd</sup> defendant’s defence cannot stand and ought to be struck out as**

**prayed for in the application.”**

18. The Magistrate was correct that judgement had indeed been entered against the 1<sup>st</sup> and 2<sup>nd</sup> appellants. Whether the judgement entered against the 1<sup>st</sup> and 2<sup>nd</sup> appellants was binding upon the 3<sup>rd</sup> Appellant under the Protocol on the Establishment of a Third Party Motor Vehicle Insurance Scheme (COMESA) (“the Protocol”) was a question for trial as the 3<sup>rd</sup> Appellant had raised issue as to whether the insurance issued to the motor vehicle of Regional Coach Ltd by the 1<sup>st</sup> Appellant fell under the Common Market Yellow Card Scheme.

19. Although judgement had been entered against the 1<sup>st</sup> and 2<sup>nd</sup> appellants on the strength of the averments in the Respondent’s plaint that the cover for the accident motor vehicle was issued under the Common Market Yellow Card Scheme, it was not automatic that the 3<sup>rd</sup> Appellant would be held liable in view of Article 3 (4) of the Protocol. That provision states: -

**“Each National Bureau shall settle, on behalf of its member insurers, claims arising from accidents caused abroad by holders of the cards it has issued and shall also handle claims arising from accidents caused in its country by holders of cards issued by the National Bureaux of the Member States.”**

20. The accident in question involved a motor vehicle whose insurance was issued in Uganda. Assuming that the same was issued under the Common Market Yellow Card Scheme, the 2<sup>nd</sup> Appellant was to settle the claim and the 3<sup>rd</sup> Appellant was to handle the claim. Does the word “handle” mean “settle”? That was a matter for trial. The 3<sup>rd</sup> Appellant was indeed entitled to a trial. Its appeal should succeed.

21. What orders should issue? The Respondent’s counsel submitted that although the 1<sup>st</sup> and 2<sup>nd</sup> appellants are listed as appellants in this matter, the truth of the matter is that there is only one Appellant. I agree. The 3<sup>rd</sup> Appellant is the only defendant who entered appearance and filed a defence in the Magistrate’s Court. The ruling which is the subject of this appeal was specific to the 3<sup>rd</sup> Appellant as it struck out its defence. There was therefore no basis upon which the 1<sup>st</sup> and 2<sup>nd</sup> appellants could appeal to this Court. As it were, there is no appeal by the 1<sup>st</sup> and 2<sup>nd</sup> appellants before this Court and the judgement that was entered against them remains unchallenged and proper.

22. As already stated, the 3<sup>rd</sup> Appellant’s appeal succeeds. The ruling dated 6<sup>th</sup> June, 2016 is set aside. The matter is remitted back to Busia Chief Magistrate’s Court for hearing before any magistrate with jurisdiction other than C.I. Agutu, Resident Magistrate.

23. The 3<sup>rd</sup> Appellant’s costs for this appeal shall be met by the Respondent.

**Dated and signed at Malindi this 27<sup>th</sup> day of June, 2017.**

**W. KORIR,**

**JUDGE OF THE HIGH COURT**

**Dated, signed and delivered at Busia this 12<sup>th</sup> day of July, 2017.**

**K. W. KIARIE,**

**JUDGE OF THE HIGH COURT**