



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 48 OF 2015

AFRICA MERCHANT ASSURANCE COMPANY LIMITED.....APPELLANT

VERSUS

1 KIRINGOLI NGUKALAI KATITIA

**2 HELENA LANDISI NGUKULAI (Legal representatives of the
estate of DIDAL NGUKULAI – DECEASED).....RESPONDENTS**

J U D G M E N T

1. In this appeal the Appellant has challenged the decision and Ruling by the trial court dated 10.3.2015 by which the court found and held that:

“In this case, it was proved that the defendant here had insured the said motor vehicle so is statutorily obligated to satisfy the decree in the primary suit. The defence here is therefore weak and cannot succeed. It has no merit and does not raise any triable issue. There is no need for the matter to proceed for a full hearing. I therefore allow the application here with costs.”

2. That ruling concurred and was premised on the application by the Respondent dated 8.5.2012 in which the Respondent had sought for court orders that:

“The defendants defence filed herein be struck out and judgment entered for the plaintiff as prayed in the plaint.”

3. The application was founded on the grounds that; the defence is an abuse of the process of the court; that the defendant is by statute required to meet the judgment in Voi SRMCC NO. 108 OF 2010 and the defence dated 2.4.2012 does not disclosed a reasonable defence on the clear provisions of the statute.

4. The application was supported by an affidavit sworn by the 1st Respondent which disclosed that there was a judgment and decree issued in Voi SRMC NO. 108 of 2010 in the sum of kshs.910,250, plus costs and interests; that by dint of Section 10 Cap 405, the defendant was by statute obligated to settle the decree having issued the policy in respect of the offending motor vehicle which was then in force on the date of the accident sued upon and that notice of suit was issued prior to the filling of the primary suit.

5. In support of these fact, the Respondent did exhibit to court copies of the plaint, judgment, police abstract, certificate of insurance and an affidavit of service of the notice upon the Appellant and a

certificate of posting of the notice. Essentially the application sought to strike out the defence for not offering any triable issue to merit going to full trial.

6. When served the defendant did file a Replying affidavit in resistance to the application and among other things contended that the Notice was never served on it at its head office, that the notice to it had no address to which it was to be delivered and that the Notice was defective for having been for 7 days as opposed to the 14 days.

7. The Appellant equally contended that there was no evidence that the motor vehicle alleged to have caused the accident was owned by the insured one KIGALI AUTO and lastly but not least that the policy of insurance issued by the defendant did not cover passengers a fact well captured by the Certificate of insurance exhibited while the primary sit was grounded on the fact that the plaintiff was travelling in the motor vehicle as a passenger.

8. I understand the Replying Affidavit to assert and contend that there was a defence raising triable issues. I have equally taken time to peruse the statement of defence dated 3rd August 2012 at pages 66-68 of the Records of Appeal and the submission filed by the parties at the hearing of the application for striking out.

9. It is clear to me that the sole issue for determination before the trial court, and which this court must consider if it was ever dealt with appropriately, is whether the defence as filed raised any triable issue as to have entitled the defendant to defend the suit.

10 This being a first appeal, the courts mandate is to re evaluate and re-examine the entire evidence and to come to own conclusion without necessarily having to uphold or upset the decision by the trial court.

11. Having perused the defence that was struck out I have noted that it took issue with the motor vehicle on account of and in respective of which the policy was issued, it took issues with the user disclosed at the inspection of the policy and further that the notice shown to have been served upon the defendant was served at its branch office in Mombasa and not at the head office.

12. Those to this court were issues that when the matter was placed and argued before the trial court that court was bound to give due and adequate consideration and make a determination one way or the other.

13. My appreciation of the law is that a party who seeks to benefit from the provisions of section 10, cap 405, must of necessity establish that there is a judgment issued and respecting a liability covered by the provisions of the policy issued pursuant to section 5(b) of cap 405. Section 5(b) is enacted in the following words:

In order to comply with the requirements of section 4, the policy of insurance must be a policy which

a)

b) injures such person, person or class of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of, or bodily injury to, any person caused by or arising out of the use of a motor vehicle on a road”

14. Therefore when it was pleaded at paragraph 12(a) that the plaintiff was not a third party within the definition of cap 405, that to this court was an issue that was not available for determination by an affidavit evidence but needed to be proved properly by evidence based on documents. But then, how did the trial court treat that aspect of the case? The record reveals that the trial court said:-

“From the annexure SNOO-1, the Notice dated 30/7/10 was shown to have been sent via registered mail on 9/8/10 –see SNO-2 to their Mombasa office. The defendant did not deny that they have an office in Mombasa. I am satisfied they were served. Further, the primary

suit was filed on 10/8/2010. The Notice could still have been served 14 days after filing of the suit. The Notice was therefore served within time. The defence constituted mainly denials. I do not see any triable issues. The issue of the supporting affidavit being signed by a thumb print is a minor one. The court is not really concerned by minor technicalities but on the substantive issues raised by the affidavit. I will overlook this objection. The application here seeks the striking out of the defence

In this case, it was proved that the defendant here had insured the said Motor Vehicle so is statutorily obligated to satisfy the decree in the primary suit. The defence here is therefore weak and cannot succeed. It has no merit and does not raise any triable issue. There is no need for the matter to proceed for a full hearing. I therefore allow the application here with costs.

Hon. J. Gandani SPM”.

15. It is clear from the excerpt that the trial court fully ignored to consider any aspect of the defence filed beyond the issue of notice to the Appellant. To that extent it failed to consider a relevant issue it was bound to consider and thus this court is bound to correct that error by setting the judgment aside. That issue was whether the policy issued covered the plaintiff as a passenger in the motor vehicle.

16. Additionally in holding that the defence raised could not succeed, the trial court erred in its appreciation of the principles applicable. The principles applicable is that one only needs to raise a triable issue and a triable issue must not be a defence that must succeed.

17. Once that is established, a single triable issue, the court has no discretion in the matter, the defendant must be given his right to defend the suit and so defend unconditionally.

18. This one point, although I hold the view that there were other triable issues raised, is enough to dispose off the appeal. I find that the trial court was wrong in the decision it came to for failure to consider an important and relevant matter in the nature of the defence filed which raised substantial issues meriting being allowed to be tried by evidence.

19. I therefore set aside the decision and judgment entered by the trial court in the ruling dated 10.3.2015 and in its place substitute an order dismissing the plaintiff’s application dated 8th May 2012 with costs.

20. I further direct that the suit No. CMC NO.24 of 2012 be placed before the Chief Magistrate at the earliest opportunity for purposes of it being assigned to a Magistrate to hear and determine it on its merits. I award the costs of this Appeal to the appellant.

Dated and Delivered at Mombasa this 25th day of July, 2017.

P.J.O. OTIENO

JUDGE

25.7.2017