REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CIVIL APPEAL NO.23 OF 2014

JUBILEE INSURANCE COMPANY LIMITED……..APPELLANT

VS

GRACE ANYONA MBINDA…...…….……RESPONDENT

(Appeal from the Ruling/Order of Hon. S. M. S. Soita, ChiefMagistrate, Kericho, delivered on 12th August, 2014 in Kericho CMCC No.314 of 2013)

JUDGMENT

1. This appeal arises out of a decision of the Chief Magistrate, Kericho, in a matter involving a claim by the respondent against the appellant.

2. The respondent had filed Kericho CMCC No 314 of 2014 claiming compensation for her motor vehicle registration No. KBJ 431K Mitsubishi FH which had been involved in an accident on 18th August 2012. The vehicle was insured by the appellant. The respondent had in her plaint claimed material damage for her vehicle assessed at Kshs 1,200,000. She had also claimed loss of use at Kshs 200,000 per month from the date of the accident to the date of judgment.

3. The appellant filed a statement of defence dated 6th September 2013. In its defence, the appellant while admitting the existence of the insurance policy, alleged breach of contract on the part of the respondent in that she had not reported the accident to the insurance at all or timeously; that she had failed to pay the policy excess; that she was not entitled to claim for loss of use as this was not provided for in the policy; and that she had, by failing to report the accident to the insurer, denied the insurer its right to investigate the accident and to be potentially indemnified by a third party.

4. The respondent then filed a Reply to Defence dated 3rd October 2013 in which she joined issue with the appellant/defendant on its defence. She also made various averments of fact, denied various assertions in the defence, and put the defendant to strict proof of its averments.

5. Thereafter, by her application dated 9th October 2013 brought under Order 2 rule 15 (1)(b)(c) and (d), Order 13 rule 2 of the Civil Procedure Rules and section 3A of the Civil Procedure Act, the respondent sought the following orders:

> ***1. That this Hon. Court be pleased to strike out of the record the defence dated 6/9/2013 filed in this suit by the defendant on 12/9/2013.***
>
> ***2. That this Hon. Court be pleased to enter final judgment in terms of prayer (a) of the plaint in favour of the plaintiff and against the defendant/respondent.***

3. That the Hon. Court be pleased to set down suit for formal proof in terms of prayer (b) of the plaint or alternatively do enter final judgment for the plaintiff in the sum of kshs.2,400,000/=.

4. That the costs of this application be provided for.

6. The application was based on the following grounds:

a. Statutory provisions of the Insurance Act Cap 487 impose a duty on insurance companies to compensate their insured in the event of loss.

b.The defence filed is therefore scandalous, frivolous, vexatious and a waste of precious judicial time as the defendant has admitted the existence of an insurance contractual relationship between both parties herein and the occurrence of the accident, the subject of this suit.

c. The defendant's defence will prejudice, embarrass or delay the fair trial of the action as the defendant has filed no witness statements, no list of witnesses nor list of documents to support their allegations.

d. The defendant truly has no defence to the plaintiff's claim but is merely engaging the plaintiff and the Hon. Court on a wild goose chase.

e. The defence is otherwise an abuse of the process of the court.

7. In his ruling dated 12th August 2014, the Hon. Magistrate struck out the appellant's defence and made an award of Kshs 2,400,000.00 to the respondent. The reasons given for striking out the defence as prayed by the respondent were that the defendant had admitted it had insured the respondent's motor vehicle, and had not denied that the vehicle was involved in an accident. The Court also noted that the defendant had not filed any documents with its statement of defence, nor had any documents been annexed to the defendant's replying affidavit to controvert the plaintiff's averments. The court therefore proceeded to strike out the defendant's defence and enter judgment for the plaintiff.

8. Aggrieved by that ruling, the appellant has filed the present appeal. The Memorandum of Appeal dated 20th August 2014 contains three grounds as follows:

1. That the learned trial magistrate erred in law in failing to consider the principles applicable in an application for striking out pleadings.

2. That the learned trial magistrate erred in finding that the statement of defence filed in Kericho CMCC No. 314 of 2013 did not raise any triable issues and consequently in striking out the same.

3. That the learned trial magistrate erred in failing to consider/in ignoring defence counsel's submissions on the application dated 9th October 2013.

9. The appellant prayed that the ruling of the court dated 12th August 2014 be set aside and the cost of the appeal be borne by the respondent. The appeal was canvassed before me on the 8th of June 2016.

The Case for the Appellant

10. The appellant filed submissions dated 16th March 2016 which were highlighted by its Counsel, Mr. Wahomba Learned Counsel submitted that the trial court's ruling was erroneous as the bare minimum in law is that if there is even a single triable issue, it does not matter if it has a probability of success: a party must be heard, an opportunity that was denied to the appellant by the court.

11. It was also the appellant's submission that its defence raise several triable issues. One of the issues that the appellant identified was the issue of the excess, which it submitted is provided for in the contract

as a precondition for the insurance to settle the respondent's claim, and which the respondent had not paid.

12. Another issue identified by the appellant as a triable issue is the question whether the respondent had reported the accident as required under the contract of insurance. Its contention is that there is no dispute that there was a contract of insurance. What was in issue is whether there was a breach of the terms of the contract, which the appellant had raised in its defence.

13. The appellant further noted that the court had observed that the appellant had not filed any documents or witness statements, and that this was the main reason why it struck out its defence. Its submission, however, was that section 107 of the Evidence Act places the burden of proof on the plaintiff to prove her case. In the appellant's view, to say that there is a defence that raises triable issues only when the defendant has filed statements is to shift the burden of proof to the defendant, which is erroneous as the defendant can choose to rely only on its defence. In any event, in its view, there was still time for it to comply with the requirements of Order 2 with respect to pretrial directions; and further, that by the time the application for striking out was made, the appellant had not been given time to put in its documents.

14. The appellant further argues that to strike out its defence for non-compliance with rules of procedure is to elevate such rules to a fetish, which would go against the provisions of Article 22 and 159 (2) (d) which are to the effect that the court, in administering justice, shall not be unduly restricted by procedural technicalities.

15. According to the appellant, the respondent's application was premised on Order 2 rule 15 (b) (c) and (d) on striking out of proceedings, and Order 13 rule 2 on admissions. In its view, placing reliance on Order 13 rule 2 because the appellant admitted the existence of a contract was something of a stretch. Yet, it appears to have opened the way for the court to say that the appellant was fully liable, without looking at other paragraphs of the defence.

16. The appellant further submitted that it is a constitutional right of any party to be heard and that under Article 25, the right to fair hearing cannot be limited. It was its case, however, that it was denied this right, and it prayed that it should be given a chance to be heard and the case determined on its merits.

17. The appellant further submitted that the submissions by the respondent supported its case, noting that it is only when there are mere denials that a court can strike out a case. It cited several authorities with respect to the exercise by a court of the power to strike out pleadings, which I shall revert to later in this judgment, and prayed that its appeal be allowed and the case heard on its merits.

Submissions in Response

18.Through her learned counsel, Mr. Musinde, the respondent opposed the appeal and prayed that it should be dismissed with costs. In her view, this was a case in which no trial was needed and the Chief Magistrate was right in striking out the defence.

19. It was further submitted on her behalf that the rules that she had relied on were the proper rules, counsel arguing that justice is not just meant to be achieved through a trial where it is not necessary, and in this case, the defence did not raise any triable issues.

20. According to the respondent, one of the issues the defence was raising was that the respondent did not notify the appellant of the occurrence of the accident. Counsel referred the Court to page 10-17 of the record of appeal which shows a stamp of the appellant which, according to the respondent, has never been disputed. She also referred the Court to photographs at page 16 of the record of appeal which showed the motor vehicle and carried the letter head of the appellant; as well as the log book and statement of the driver on how the accident occurred, all of which carried the appellant's stamp.

21. With respect to the second triable issue as alleged by the appellant, that the respondent did not pay the policy excess, her submission was that she had explained this in the reply to the defence. It was also her

contention that it was general practice for the insurer to go for the excess.

22. As for the appellant's allegation that there was no claimform, the respondent contended that she had provided the claim form number, 29317. Consequently, the burden had now shifted to the appellant to produce the claim form and produce the policy document. As the appellant had admitted the contract, it should have produced the policy document, but did not.

23. The respondent further argued that the appellant did not file any witness statements or list of documents. In her view, if the appellant had any defence to the claim, it would have shown it. It was her contention therefore that it was in order for her to make the application that she made.

24. With respect to her claim for loss of user, her submission was that it was duly prayed for and proved in the lower court. In her view, without the contract or policy document, the appellant's contention that the loss of use was not provided for was not sustainable. It was submitted on behalf of the respondent that the appellant should have produced the policy document, and in its absence, the lower court was right in awarding the claim for loss of use.

25. In her written submissions dated 4th April 2016, the respondent cited several authorities in support of the decision of the lower court to strike out the appellant's defence, which I shall revert to later in this judgment. It was also her submission that the trial court considered the authorities and submissions of the defence in arriving at the decision it did, and that it also relied on several other authorities. She asks the court to find that the trial magistrate considered the appellant's submissions in arriving at the decision appealed from.

Appellant's Submissions in Reply

26. In submissions made in reply to the respondent's submissions, the appellant's counsel observed that the respondent had argued that it is general insurance practice for an insurance company to come for the excess. In its view, this was a triable issue. So, too, was the claim form number which the respondent had referred to. The appellant's position was that the burden of proof was on the plaintiff, the respondent in this case, in respect of whatever allegations she made.

27. With regard to the question of the loss of use, which Counsel for the appellant noted goes to the merits of the case, it was submitted that the proof of loss of user was handwritten notes by the petitioner. Its submission was that these were triable issues which the court should have considered, and it should not have struck out its defence.

Determination

28. I have considered the record of appeal in this matter, and the oral and written submissions made by the parties. I have also read the ruling of the trial court on the matter.

29. In determining the present appeal, the question that I believe I should address myself to is whether the trial court properly addressed its mind to the principles applicable in determining whether to strike out a pleading. I must at the outset express some misgivings as to whether the court did indeed consider these principles, or the submissions of the parties with respect thereto, at all. I say this respectfully having read the ruling of the court, which runs to two pages, the first four paragraphs of which are a summary of the facts before the Court and the plaintiff/respondent's application for striking out the defence.

30. The court then states that it has considered the application, the affidavit in support, and the defence. It notes the plaintiff's claim, and the fact that the defendant had not denied insuring the vehicle or that there was an accident. It then notes that the defendant has not annexed documents to its defence. It then concludes as follows:

> ***" I agree with the plaintiff that defence filed contains mere denials and do not raise any issues to be determined by this court. I am minded to allow the application and strike out the statement of***

defence dated 6th September 2013 and consequently enter judgment for the plaintiff against the defendant as prayed in the plaint…"

31. What should the court have considered before reaching the decision to strike out the appellant's defence and enter summary judgment for the plaintiff? The applicable principles are, I believe, fairly well settled, and have been referred to in the submissions of the parties before me.

32. The appellant referred to the case of **Isaac Awuondo vs Surgipharm Limited & Another (2011) eKLR** in which the Court of Appeal stated as follows:

"In MOI UNIVERSITY VS. VISHVA BUILDERS LIMITED - Civil Appeal No. 296 of 2004 (unreported) this Court said:-

"The law is now settled that if the defence raises even one bona fide triable issue, then the defendant must be given leave to defend. In this appeal we traced the history from the commencement of relationship between the parties herein. The dispute arises out of a building contract. In the initial plaint the sum claimed was well over 300 million but this was scaled down by various amendments until the final figure claimed was Shs.185,305,011.30/- We have looked at the pleadings and the history of the matter and it would appear to us that the appellant had serious issues raised in its defence. As we know even one triable issue would be sufficient – see H.D Hasmani v. Banque Du Congo Belge (1938) 5 E.AC.A 89. We must however hasten to add that a triable issue does not mean one that will succeed. Indeed, in Patel vs. E.A. Cargo Handling Services Ltd. [1974] E.A. 75 at P. 76 Duffus P. said:-

"In this respect defence on the merits does not mean, in my view a defence that must succeed, it means as SHERIDAN , J put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication."

33. In **Saudi Arabia Airlines Corporation vs Premium Petroleum Company Limited,** the Court stated that:

I need not re-invent the wheel on the subject of striking out a defence. A great number of judicial decisions have now settled the legal principles which should guide the Court in determining whether to strike out a pleading. Except, I can state comfortably that these principles now draw, not only from judicial precedent, but from the principles of justice enshrined in the Constitution especially in Article 47, 50 and 159. The first guiding principle is that, every Court of law should pay homage to its core duty of serving substantive justice in any judicial proceeding before it, which explains the reasoning by Madan JA in the famous DT DOBIE case that the Court should aim at sustaining rather than terminating a suit. That position applies mutatis mutandis to a statement of defence and counter-claim. Secondly, and directly related to the foregoing constitutional principle and policy, courts should recognize the act of striking out a pleading (plaint or defence) completely divests a party of a hearing, thus, driving such party away from the judgment seat; which is a draconian act comparable only to the proverbial drawing of the ''Sword of the Damocles''. Therefore, the power to strike out a suit or defence should be used sparingly and only on the clearest of cases where the impugned pleading is 'demurer or something worse than a demurer' beyond redemption and not curable by even an amendment. Thirdly, in case of a defence, the court must be convinced upon looking at the defence, that it is a sham; it raises no bona fide triable issue worth a trial by the court."

34. In **Dev Surinder Kumar Bij v Agility Logistics Limited Civil Suit No. 311 of 2013 [2014] eKLR**, where the defendant sought to have a plaint stricken out, it was held, inter alia, that:

"For a pleading to be dismissed pursuant to the provisions of Order 2 rule 15(1),it should be made clear and obvious that the issues raised by the Plaintiff can neither be substantiated, nor disclose any reasonable or justifiable an action as against the Defendant."

35. In **Co-operative Merchant Bank Ltd. vs. George Fredrick Wekesa Civil Appeal No. 54 of 1999,** the Court of Appeal stated as follows:

> ***"The power of the Court to strike out a pleading under Order 6 rule 13(1)(b)(c) and (d) is discretionary and an appellate Court will not interfere with the exercise of the power unless it is clear that there was either an error on principle or that the trial Judge was plainly wrong.....Striking out a pleading is a draconian act, which may only be resorted to, in plain cases...Whether or not a case is plain is a matter of fact..."***

36. Finally, I bear in mind the words of the Court of Appeal in the case of **DT Dobie & Company (Kenya) Ltd vs. Muchina (1982) KLR** in which it enunciated the principles applicable in considering whether or not to strike out pleadings. In that case, Madan JA (as he then was) adopted the words of **Sellers LJ** in **Wenlock v Moloney (1965) 1 WLR 1238** as follows::

> ***"This summary jurisdiction of the court was never intended to be exercised by a minute and a protracted examination of documents and the facts of the case in order to see whether the plaintiff really has a cause of action. To do that is to usurp the position of the trial judge and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power."***

37. In the same decision, **Danckwerts LJ** observed:

> ***"The power to strike out any pleading or any part of a pleading under this rule is not mandatory; but permissive and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending pleading."***

38. Madan JA concluded as follows in the **DT Dobie** Case (supra):

> ***"No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward, for a court of justice ought not to act in darkness without the full facts of the case before it."***

39. It seems to me, from the decisions set out above, that the core principles that a court should bear in mind in determining whether or not to strike out pleadings is that the court should not strike out pleadings if there is even a semblance of a cause of action or defence. Such a cause of action or defence need not be one with a chance of success. Secondly, the power to strike out must be used sparingly, only in the most plain and obvious cases, and with extreme caution.

40. I close this analysis with the words of the Court of Appeal in **Crescent Construction Co. Ltd vs Delphis Bank Ltd Civil Appeal 146 of 2001 [2007] eKLR**:

> ***"However, one thing remains clear, and that is that the power to strike out a pleading is a discretionary one. It is to be exercised with the greatest care and caution. <u>This comes from the realization that the rules of natural justice require that the court must not drive away any litigant however weak his case may be from the seat of justice</u>. This is a 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 nonstarter."*** (Emphasis added)

41. Had the above principles been applied to the facts of the case before me, would the court have found that there was no triable issue and proceeded, as it did, to strike out the appellant's defence?

42. From the pleadings by the parties, it would appear that the question whether the respondent had reported the accident at all, or in time, to the appellant, was contested. The question of the payment of the

excess payment due under the contract was also at issue, the respondent's position being that the appellant had a duty to ask for it or to collect it, it is not clear which. In addition, the Court notes that the contract on the basis of which the respondent claimed and was awarded loss of use was not before the trial court. The position taken by the respondent, again, being that the duty to produce it lay with the appellant. These, in my view, are all matters which were at issue, that raised triable issues for determination by the court, and the trial court could not have properly entered summary judgment for the respondent or struck out the appellant's defence.

43. However, it is noteworthy that the reason why the court struck out the appellant's defence is that the appellant had not filed its documents alongside its defence. It did not address its mind to the question whether the appellant's defence raised any triable issues.

44. In my view, the trial court erred in striking out the defence in the circumstances. The fact that the appellant had not filed its documents did not mean that its defence did not raise a triable issue, for the rules of procedure do allow parties to produce documents in compliance with the requirements of Order 11 prior to the matter being set down for hearing. In accordance with the constitutional dictates that demand that all parties are accorded a hearing and that the Court does not pay undue regard to procedural technicalities, it appears that in this case the trial court was wrong in striking out the defence on the basis of a failure to file documents with the defence.

45. In the circumstances, it is my finding that the present appeal is meritorius and should be allowed. I therefore allow the same, set aside the ruling of the trial court dated 12th of August 2014 and remit the matter to the Chief Magistrate's Court for trial.

46. Each party shall bear its own costs of the appeal.

Dated, Delivered and Signed at Kericho this 28th day of July 2016

MUMBI NGUGI

JUDGE