



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL NO. 3 OF 2015**

**INVESCO ASSURANCE CO. LIMITED .....APPELLANT**

**VERSUS**

**JAPHET MUTHAMA MUTUKU.....RESPONDENT**

**J U D G M E N T**

1. The appellant impugnes the decision of the trial court, Hon. Mr. P.K. Mutai, Resident Magistrate, KWALE dated 7/01/2015 in the original KWALE RMCC No. 146 of 2014 by which the court struck out the appellants statement of defence and entered judgement for the Respondent in the sum of Kshs.91,276/- plus costs and interests.

2. That ruling was made pursuant to the Respondents application dated 2/09/2014 which prayed as follows:-

**1.a) THAT the Defendant herein be required to meet its statutory obligations under Chapter 405 Laws of Kenya to wit, to make good judgement for Kshs.91,276/- plus interest in KWALE SRMCC NO. 9 OF 2012 and as such, the defence filed herein be struck out and judgement be entered accordingly; the Plaintiff AND OR IN THE ALTERNATIVE;**

**(b) THAT the Defence filed by struck out and judgement for the sum of Kshs.91,276.00 plus interest thereon be entered in favour of the Plaintiff.**

**2. THAT the costs of this Application and the main suit be Awarded to the Plaintiff.**

The application was essentially brought under Order 2 Rule 15(1) C of the Civil Procedure Rules.

3. In this appeal the trial court has been faulted for striking out a defence which raised triable issues; that the trial court erred in failing to find that the Appellant had issued a third party only insurance policy which did not cover employees of the insured hence the provisions of Cap 405 did not apply to the case; that the trial court was wrong in falling to allow the suit be heard on the merits and lastly that the court failed to consider the Appellants written submissions.

4. This being a first appeal, it proceeds by way of a retrial and the court is therefore bound to reassess and re-examine the entire evidence with a view coming for own conclusions. In doing so the court must always remember that it lacks the benefit of hearing and seeing the witness testify unlike the trial court. *See Selle vs Associated Motor Boat Co. Ltd [1968] EA 123.*

5. The suit before the trial court was a declaratory suit by which the Respondent had sought a declaration that the Appellant was bound under the provisions of the Insurance, (Motor Vehicle Thirty Party Risk) Act to settle the decree in SRMCC No. 9 of 2012, KWALE in the sum of Kshs.91,276 with interests and costs.

6. The defence filed by the defendant and dated 24/7/2014 addressed the plaintiffs claim at paragraphs 3,4,5 & 6 as follows:-

**3. The Defendant refers to paragraphs 3 of the Plaintiff and denies that it issued a policy of insurance No.080/084/1/001136/2011/02 to one WILHEMUS OUMA OKOTH in respect of motor Reg. No. KBL 791Y as alleged or at all and puts the Plaintiff to the strict proof thereof. The Defendant specifically denies that it was the insurer of motor vehicle Reg. No. KBL 791Y or at all.**

**4. The Defendant is a stranger to the allegations contained in paragraphs 4, 5, 6, 7, 8, 9, 10 and 11 of the Plaintiff and puts the Plaintiff to the strict proof thereof.**

**5. Further and in the alternative and without prejudice to the foregoing the Defendant further specifically denies that it is statutorily bound to pay the Plaintiff the sum of Kshs.91,276/- or any amount as alleged in paragraph 11 of the Plaintiff and puts the Plaintiff to the strict proof thereof.**

**6. Further and in the alternative and without prejudice to the foregoing the Defendant denies that it is liable to the Plaintiff as it was not served with the following:-**

**i) A statutory notice Pursuant to Section 10(2) of the Insurance (Motor Vehicles Third Party Risks) Act, cap 405.**

**ii) A demand for payment before this suit.**

7. From that defence it is clear that the question of whether or not the Respondent as plaintiff in primary suit in the lower court was an employee of the insured did not arise. It equally did not come up for a consideration by the trial court. To this court, it is trite learning that a court of law is bound to make a determination on the parties disputes based on the facts pleaded before it. To that extent the question of the class the Respondent fell into having not been an issue before the court, the court cannot be faulted for not considering and determining it. To do otherwise to me would be a fault and error.

Consequently grounds No. 2 & 3 of the Memorandum of Appeal lack basis, they fail and are thus dismissed.

8. Equally the charge against the trial court that it failed to consider and give due regard to the appellants submissions must equally fail. What is called submissions by the appellants at page 93 of the Record of Appeal is to this court no submissions. The document reads:-

**“The dependant wholly relies on the grounds of opposition dated 6.10.2014 and filed in this Honourable court on the same day (copy attached for ease of reference)”.**

9. With respect what was before court for determination was the merits or *bonafides* of the defence filed. It was not enough to throw the grounds of opposition at the court and seek for say no more.

10. Grounds No. 1, 4 & 5 can be considered as one. In the opinion of the court those grounds interrogate whether the Respondents application for striking out met the challenge as to disentitle the Respondent in this appeal to the remedy of striking out. In coming to the determination that it did, the trial court delivered itself and said:-

**“...I have analyzed the pleadings the police abstract also indicates the plaintiff as a**

**passenger. The defendant opted to raise the issue on the grounds of opposition. The same was not even given under oath”**

11. The court was in effect saying that whether or not the respondent was a passenger or a turnboy need to have been pleaded in the defence sought to be struck out.

The court then sought guidance in the decisions of *Magunga General Stores vs Pepco Distributors Ltd [1987] 2 KLR 89* and *LUKA MUSYIMI MUSAU* on when a court may exercise the discretion to strike out a defence. In that decision the court said:-

**“First of all a mere denial is not sufficient defence**

**In this type of case. There must be some reason why**

**The defendant does not owe money. Either there was**

**No contract or it was not carried out and failed. It is**

**Not sufficient to therefore simply to deny liability**

**Without some reason given”**

12. Indeed the only question for determination before the trial court was whether or not the defence on record raised any triable issue. To this court, the capacity and presence of the plaintiff in the motor vehicle as a passenger or not had not been raised by the defence filed. I hold the view and find that it was not a triable issue raised in the statement of defence. It may only be necessary to add that in the grounds and the submissions before the trial court, the appellant seems to have abandoned its line of defence on record and opted to advance a totally new and unpleaded fact. That to this court was not acceptable nor available to the defendant. Not available to it because in law the defendant was bound by its pleadings. At paragraph 6 of the defence the defendant mounted the defence that it was not bound to satisfy the decree in the primary suit because it had not been served with a statutory notice under section 10(2) of Cap 405 as well as a demand for payment before suit. This line of defence was not pursued before the trial court. It is however of note that at pages 35 -45 of the Record of Appeal the Respondent exhibited not only notice of intention to sue, but also notice of judgement, notice of motion to file a declaratory suit and evidence of payment of related cases by the Appellant to the court, that defence was not honest nor bonafide.

13. When served with the application to struck out, the defendant instead of offering evidence by an affidavit preferred to file grounds of opposition. Those grounds to be found at pages 71-72 of the Record of Appeal attacked the application for lacking *bona fides* and for the first time raised the question of the plaintiff having been a turnboy and added that the pleadings on record which in this case was its defence raised triable issues. To allow it to advance a new defence which was not pleaded and to expect the court to have based its finding or such new and unpleaded fact would be unacceptable. If that were to happen this court as a first appellate court would fault the trial court and find that it erred in basing its decision on new and unpleaded facts and therefore permitted trial by ambush. Fortunately the trial court choose to follow the law that parties are bound by the pleading and ignored the new fact advance terming it “not even under oath”. In *Vivo Energy Ltd vs George Murunji, [2014] eKLR*, F. Gikunjo J, had this to say while conceding to an application to strike out:-

**“To allow this suit to proceed to trial will only**

**prolong the journey of the plaintiff towards**

**realizing the fruits of his remedy”.**

14. There are several authorities in support of this proposition. One of them is the decision by the court

of Appeal in the case of CONTINENTAL BUTCHERY vs SAMSON MUSILA where the Court stated:-

**“If a bonafide triable issue is raised the defendant  
must be given unconditional leave to defend but  
not so in a case in which the court fees justified  
in thinking that the defences raised are a show”.**

I can only add that had I sat as the trial court I would have found, as it did find, that there was no triable issue at all in the defence filed.

15. I therefore find that the trial court did not err in striking out the defence and the thresholds set for interfering with a trial courts findings on matter of fact and appreciation of the law have not been met.

16. The upshot is that the appeal fails its entirety and it is dismissed with costs.

Dated, signed and delivered at Mombasa this **2nd** day of **August 2016**.

**HON P.J.O. OTIENO**

**JUDGE**