REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 118 OF 2011

KENYA ORIENT INSURANCE CO. LTD ……..……. APPELLANT

AND

FARIDA HEMED ……..…….. RESPONDENT

(Being an appeal from the Judgment and Decree of Mombasa Principal Magistrate, Hon. J. Gandani (SPM) delivered on 27th May 2011 in Resident Magistrate Civil Case No. 2868 of 2011)

JUDGMENT

1. **KENYA ORIENT INSURANCE CO. LTD** (**the Appellant**) has filed this appeal against the Ruling of the lower Court of 27th may 2011 by which Ruling Appellant Defence was struck out and judgment was entered against Appellant. That Ruling that led to the striking out of the Appellant's Defence was the application filed by FARIDA HEMED, the Respondent. The Respondent by that application sought the striking out Appellant's Defence on ground that it was an abuse of the Court's process. Respondent moved the Court under the then Order VI Rule 13 (1) (d) now Order 2 Rule 15(1)(d) of the Civil Procedure Rules and Section 10 of the Insurance (Motor Vehicle Third Party Risk) Act Cap. 405.

BACKGROUND

2. Respondent filed Mombasa **RMCCC No. 2291 of 2009** (the primary suit) against MAST INVESTMENT COMPANY LIMITED as the first Defendant and SHABAL SAMEH ALI the second Defendant. By that action Respondent sought damages for injuries suffered by her when the 1st Defendant's motor vehicle driven by 2nd Defendant collided with a bicycle upon she was on. She obtained judgment against those Defendants for total of Kshs. 202,345/-.

3. She filed Mombasa **RMCCC No. 2868 of 2010** (secondary suit) against the Appellant, who as the name shows, is an Insurance Company. She sought by that action for declaratory judgment against the Appellant as provided under Cap. 405.

4. Appellant filed its Defence denying the claim and specifically denying that it issued the policy of insurance No. 201040142 for motor vehicle registration No. KAR 932R. Appellant pleaded that if there was such a policy of insurance bearing its name that the same was then a forgery. Appellant also denied receiving Mandatory Statutory Notice as required under Section 10(2) of Cap 405.

5. It is that Defence that was by the Ruling of the lower Court was struck out.

APPELLANT'S SUBMISSIONS ON APPEAL

6. Appellant submitted that the Learned Magistrate in the lower Court misdirected herself and in considering the application before her embarked on trial by affidavit evidence. Appellant submitted that the Learned Magistrate failed to consider the Defence raised issues to the effect that Respondent had failed to serve the Statutory Notice; and failed also to consider Appellant's Defence that the Insurance Policy was not issued by it. That the Learned Magistrate erred to have relied on a Police Abstract as evidence that the Policy was issued by Appellant.

7. Appellant also faulted the Learned Magistrate for failing to note that Respondent's alleged Statutory Notice referred to an accident that occurred on 21st July 2006 yet the judgment in the primary suit referred to the date of the accident as 31st July 2008.

RESPONDENT'S SUBMISSIONS TO THE APPEAL

8. Although Respondent's Learned Counsel began by submitting that Appellant's appeal must fail because it was filed out of the thirty days period provided under Section 79G of the Civil Procedure Act, he ought to have recalled that on 28th February 2012 by his consent with Appellant's Learned Counsel leave was granted for the appeal to be filed out of time and by virtue of that leave the Memorandum of Appeal already filed was deemed as though filed with leave.

9. Respondent submitted that the Learned Magistrate did not misdirect herself and that she was correct to find that Appellant's defence consisted of mere denials. That the Learned Magistrate was correct to find as was held in the case **SAMUEL MUKUNYA KAMUNGE –Vs- JOHN MWANGI KAMURU (2005)eKLR** that a Police Abstract was sufficient proof existence of Insurance Cover.

10. Further that the Statutory Notice was served on the Appellant and the fact that the date of the accident as stated in the Plaint differed from the one on Police Abstract and the Statutory Notice was a clerical error which could not mislead.

11. Respondent in reference to the Defence filed by the Appellant relied on the case of Justice Anyara Emukule in the case **DIAMOND TRUST BANK OF KENYA –Vs- PETER MAILANYI & 2 OTHERS (2006)eKLR** where the Learned Judge stated thus- "… it is an abuse of the process of the Court where its process is used, not in good faith and for proper purposes, but as a means of vexation or oppression or for ulterior purposes or more simply where the process is a defence which is an abuse of the process of the Court and equally the Court may strike out a sham defence as an abuse of the process."

ANALYSIS

12. Although Appellant presented some 10 grounds of appeal, I am of the view that all those grounds will be adequately dealt with by one single issue viz-

- **Was there sufficient ground for striking out Appellant's Defence**?

13. That issue will best be addressed by considering the issues raised by that Defence and by affidavits before Court.

14. Appellant denied it did not receive the Statutory Notice of the primary suit as required by Cap 405. The Respondent in respect of that pleading produced a letter of demand dated 23rd July 2009 – which letter in the typed font shows it was addressed to the Defendants of the primary suit and copied to the Respondent in very faint hand writing where one is able to make out Appellant's name on that letter. I repeat the handwriting of Appellant's name on that letter is indeed very faint. It is not clear when Appellant's name was appended by hand on that letter. That lack of

clarity and in view of the fact that the Appellant denied receiving that letter was sufficient reason not to grant the orders sought by Respondent.

15. On the annexed list of registered postal packets dated 24th July 2009 Appellant is listed as recipient of a letter or packet. Without wishing to delve too much on the same I find that the denial by Appellant that it did not receive the Statutory Notice could not adequately be addressed by affidavit evidence. There was need in my view for the Court to receive oral evidence, tested by cross examination, in order to determine whether indeed service was effected. The Learned Magistrate found that the Appellant was served with Statutory Notice, which in my view was in error, since it was on contested facts.

16. Appellant in its defence pleaded that it did not issue a Policy No. 201040142 and therefore denied liability. I am well guided by the authority of Appellant **KASEREKA –Vs- GATEWAY INSURANCE CO. LTD [2003]2EA** which held that the matters recorded in a Police Abstract is rebuttal evidence of the matter. It is however to note that even in that case the Court decided that the matter of whether there is a policy of Insurance had to be determined after oral evidence was adduced. The Court in that case stated-

> **"It follows that for the purpose of this application, on a balance of probability, the Court finds that the Gateway Insurance Company Limited appears to be the insurer of motor vehicle registration number KAB 405K. I say "appears" because the contents of a police abstract is rebuttable and is not conclusive. I refer to the reverse of this document. However, it suffices to say that having been unchallenged by the defendant, the balance tilts in favour of the plaintiff. This means the denial by the defendant that there was a contract of insurance between itself. Page 505 of [2003]2EA 502 (CCK) and Hoe Engineering Works Limited is strictly a triable issue. It is true that the policy document was not produce by the defendant, but this can be dealt with at the stage of discovery and inspection during preparation for the trial. The question of privity of contract is similarly disposed of. This can only be determined once the policy document is availed to the Court and the issue heard on merit at the trial."**

17. Again I do not wish, at this stage to interrogate this pleading in greater depth other than to state that although the Police Abstract recorded Appellant as the Insured, it is important to state that

Appellant did not participate in its recording and its content ought to, in the light of Appellant's denial, have been subjected to oral evidence. It is also pertinent to note that that Police Abstract was a photocopy and with a photocopy it is not always possible to ascertain whether any additional information is put.

18. I have examined the Respondent's Plaint, Appellant's Defence in the secondary suit and the affidavit evidence relied in support and in opposition of the application for striking out. In my view having those documents in mind Appellant's Defence cannot be said to have been frivolous, vexatious or abuse of the Court process. Appellant needed to be given opportunity to 'air' its defence. Striking it out was in error.

19. I am indebted to Appellant's Learned Counsel in supplying authorities which well set out the Law relating to striking out pleadings which I have considered.

20. I will consider one of those Appellant's authority of the Court of Appeal in the case **D. T. DOBIE & COMPANY (KENYA) LIMITED – Vs- JOSEPH MBARIA MUCHINA & ANOTHER (1980)eKLR**. The Court discussing striking of pleadings and entry of summary judgment had this to say-

> **"Per Denman, J. in Kellaway v. Bury (1892) 66 L.T. 599 at pp. 600 and 601.**

Upon appeal:-

"That is a very strong power, and should only be exercised in cases which are clear and beyond all doubt … the Court must see that the plaintiff has got no case at all, either as disclosed in the statement of claim, or in such affidavits as he may file with a view to amendments."

Per Lindley L.J. ibi,p. 602

"It has been said more than once that rule is only to be acted upon in plain and obvious cases and, in my opinion, the jurisdiction should be exercised with extreme caution."

Per Lord Justice Swinfen Eady in Moore v. Lawson and Another (supra) at p. 419.

"It cannot be doubted that the court has an inherent jurisdiction to dismiss an action which is an abuse of the process of the court. It is a jurisdiction which ought to be very sparingly exercised and only inexceptional cases. I do not think its exercise would be justified merely because the story told in the pleadings was high improbable, and one which it was difficult to believe could be proved …."

Per Salmon, L. J. ibi at p. 651.

"It is not the practice in Civil administration of our courts to have preliminary hearing as it is in crime … If it involves the parties in the trial of the action by affidavit's is not a plain and obvious case on its face."

"Per Sellers, L. J. in Wedlock Maloney and Others (1965)1 W.L.R. 1238 at pp. 1242.

"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 …."

If an action is explainable as a likely happening which is not plainly and obviously impossible the court ought not to overact by considering itself in a bind summarily to dismiss the action. A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it …. 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 a case before it …."

21. Having in mind the discussion above and that legal authority I respond in the negative to the issue identified above. There was no sufficient ground to find that Appellant's Defence was an abuse of the Court's process. Accordingly Appellant's appeal does succeed.

22. The Ruling of the Learned Magistrate of 27th May 2011 is hereby set aside and it is substituted with an order dismissing the Chamber Summons dated 25th November 2010 with costs to the Appellant. The Appellant is also awarded costs of this appeal. The lower Court file **CMCC NO. 2868 OF 2010** shall be returned to the Mombasa Chief Magistrate for determination.

DATED and DELIVERED at MOMBASA this 27TH day of NOVEMBER, 2014.

MARY KASANGO

JUDGE