**No. 2819**

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**CIVIL APPEAL NO. 141 OF 2009**

KENINDIA ASSURANCE CO. LTD …….. APPELLANT

**-VERSUS-**

LABAN IDIAH NYAMACHE…..……. RESPONDENT

**JUDGMENT**

***(Being an Appeal from the Ruling and Order of the Senior Resident Magistrate's Court at Keroka, Hon. M. Were in Keroka SRMCC No. 84 of 2009 delivered on the 26th day of June, 2009***

This is an appeal against the ruling and order of **Hon. M. Were** in **Keroka SRMCCC No. 84 of 2009** delivered on 26th June, 2009. The ruling arose from an application dated 13th May, 2009 taken out by the respondent. In that application, the respondent sought that the defence filed by the appellant in the above suit be struck out and judgment be entered in favour of the respondent as prayed in the plaint and that costs of the application be provided. The grounds upon which the respondent premised the application were that the defence filed raised no triable issue, it was scandalous, calculated to embarrass and or delay the fair trial of the case, it was otherwise an abuse of the process of the court, it was calculated to delay the respondent from realizing the fruits of his judgment and the same was a sham. The respondent was on cover for motor vehicle registration number KAR 273Y at the material time of the accident.

The respondent for good measure also filed an affidavit in support of the application. The affidavit in a nutshell gave the history of the dispute leading to the application and it was this; on 7th May, 2007, the respondent was travelling as a fare paying passenger or as a turn boy in motor vehicle registration number KAR 273Y along Nairobi – Mombasa road. At Athi River the motor vehicle was involved in a road traffic accident and he was injured. According to him, the accident was as a result of negligent, reckless and careless driving of the said motor vehicle by its driver. He then filed a suit for compensatory damages at Keroka being **Keroka SRMCCC No. 207 of 2008**. Prior to that suit, he had issued and served on the respondent a Notice under Section 10 (2) of the **Insurance (Motor vehicles Third Party Risks) Act**, hereinafter ***"Cap 405".*** The case was subsequently heard and determined in his favour. By a judgment delivered on 16th January, 2009, he was awarded in total Kshs. 160,126/- in damages plus costs and interest. The appellant having failed to satisfy the decree, the respondent then filed a declaratory suit against it pursuant to which he subsequently filed an application to strike out the appellant's defence, the subject of this appeal. He took the view that since Notice under Section 10 (2) of Cap 405 was served on the appellant before the institution of the parent suit and upon institution there was evidence that the appellant had insured the subject motor vehicle and the absence of declaratory order absolving and or

discharging the appellant from satisfying the decree in the parent suit, the defence filed on 6th April, 2009 was clearly a sham and raised no triable issue and was only intended or calculated to delay and deny him the fruits of his judgment.

The application was opposed by the appellant through grounds of opposition dated 12th June, 2009 in which the appellant maintained that the application was incompetent, incurably defective for non-compliance with qualitative provisions of **Order VI Rule 13 of the Civil Procedure Rules**, the statement of defence raised triable issues which ought to be ventilated meritoriously, sought reliance on section 5 of Cap 405, the application did not demonstrate any merit to warrant the Issuance of the orders sought and that the application was a gross abuse of the due court process.

What defence did the appellant advance against the respondent in the suit? It was in terms that it did not insure the subject motor vehicle to cover a person in classes of or person specified in respect of any injuries or death caused by or arising out of use of the said motor vehicle and therefore the appellant was not obligated to satisfy the decree, the decretal amount of Kshs.160,126/- was denied, that if the statutory Notice was issued and served under section 10 of Cap 405, it was of no legal consequence and finally it averred that in any event, the respondent was a turn boy in the vehicle. Therefore, he was not entitled to compensation within the meaning of Cap 405.

The application was canvassed inter-partes and in a reserved ruling delivered on 26th June, 2009, the Learned Magistrate allowed the application. Essentially, the trial court struck out the defence filed by the appellant.

That action triggered this appeal. The grounds of appeal set out in the memorandum of appeal are as follows:

***"1. The Learned Trial Magistrate erred in both law and infact when he failed to appreciate the principles applicable in striking out pleadings and in holding that the Appellant's Defence did not raise any triable issue warranting trial of the suit.***

***2. The Learned Trial Magistrate erred in both law and infact when he disregarded the triable issues raised in the statement of Defence to the effect that the Plaintiff, traveling in the Appellants Insured's Motor vehicle as a passenger under a contract of service and or employment a pleaded was not a Third Party within the meaning of chapter 405 of the laws of Kenya.***

***3. The Learned Trial Magistrate erred in both law and infact when he failed to appreciate that the Respondent did not serve the Notice of Institution of the suit as envisaged under Section 10 of the Insured (Motor Vehicle Third Part Risks) Act cap 405 of the Law of Kenya, and in further holding that the non compliance with the provisions of Section 10(2) of Cap 405 was not relevant to a declaratory suit.***

***4. The Learned Trial Magistrate erred in both law and in fact when he disregarded the issue raised in the Statement of Defence that the Respondent herein being an employee of the alleged Insured a Third Party entitled to compensation within the meaning of Section 5 of the Insurance (Motor Vehicle Third Party Risks) Act cap 405.***

***5. The Learned Trial Magistrate erred in both law and in fact when he misled himself by not appreciating the fact that the Appellant had contested the validity of the primary suit and the Court to hear and determine the suit as was before him as there is no law requiring compulsory Insurance to cover passengers and or employees such the Respondent herein under section 5 of the Insurance Motor vehicles Third Party Risks Act.***

***6. The Learned Trial Magistrate erred in both law and in fact when he failed to appreciate that a party is bound by his pleading and the full import of Order VI Rule 6 of the Civil Procedure Rules.***

***7. The Learned Trial Magistrate erred in law and in fact when he failed to appreciate that the***

***Respondent's Application dated 13th May, 2009 was incompetent for non compliance with Order VI Rule 13 1(a) and 5 (2) of the Civil Procedure Rules.***

***8. The Learned Trial Magistrate erred in law and in fact when he turned a blind eye to the authorities cited at the trial which fortified the Appellant's case that even one triable issue ought to be ventilated meritoriously at a fully trial…".***

When the appeal came up for directions before me on 23rd March, 2011, it was agreed amongst other directions that the appeal be canvassed by way of written submissions. Subsequently, parties filed and exchanged written submissions which I have carefully read and considered alongside cited authorities.

It is trite law that striking out pleadings is such a drastic remedy which can only be resorted to sparingly and in the clearest of cases and appreciating that the right to a hearing is a constitutional right. It has also been stated, times without number that a court of law should aim at sustaining a suit and not striking it out. A pleading should only be struck out if it is so weak as to be incapable of redemption and incurable by an amendment. For instance in the case of **BlueShield Insurance Company Limited V Joseph Mboya Oguttu (2009) eKLR** the court of appeal stated that the right of a hearing should only be taken away by striking out pleadings sparingly in the most clear of cases and that the right to decide cases on merit after allowing the parties at hearing to adduce proper evidence and test it in cross-examination should be the desire of a court of justice. Again in the case of **Wachira Waruru and the Standard Limited V Francis Oyatsi C.A No. 111 of 2000 (UR)** the court of appeal observed ***"…striking out a defence is so drastic a remedy and it is incumbent upon a judge to give good reasons for doing so…".***

What were the reasons advanced by the learned Magistrate in striking out the defence? It was on the basis that the appellant had not filed a replying affidavit. He rendered himself thus ***"…I note that by not filing a replying affidavit, the respondent has not controverted the facts set out in the supporting affidavit…".*** This is not entirely correct. An application can be opposed by way of a replying affidavit, grounds of opposition and or on law. So that it does not necessarily follow that failure to file a replying affidavit to an application means that the facts set out in the affidavit in support of the application are uncontroverted. They can be controverted by way of grounds of opposition or on law. The grounds of opposition filed by the appellant raised issues of law and fact which sufficiently controverted what the respondent had said in his affidavit in support of the application. For instance the appellant stated that the defence as filed raised triable issues which ought to be ventilated at the trial. This is the cornerstone for the refusal of an application to strike out a defence. If a pleading raises triable issue (s) even if it is only one issue such pleading ought not to be struck out. The appellant too raised the issue of interpretation of sections 5 and 10 (2) of Cap 405. These were not frivolous issues not worthy of consideration at the plenary hearing.

The appellant had averred in his defence that the respondent was not a person contemplated by the insurance cover taken out by the appellant's insured. The respondent in his plaint was ambiguous as to his presence in the motor vehicle. He first claimed that he was a fare paying passenger but later described himself as a turn boy. If he was a turn boy, it is obvious that his compensation for the injuries sustained if at all, could only have been on account of **Workmen Compensation Act** if it was in existence at the time. He would have been an employee of the owner of the motor vehicle. On the other hand, if he was a passenger, then his presence in the motor vehicle had to be interrogated further since this was a commercial motor vehicle.

The appellant categorically denied that the respondent had insured the motor vehicle to cover the kind of liability alleged by the respondent. In dismissing this defence, the learned Magistrate turned to the certificate of insurance annexed to the supporting affidavit of the respondent. That certificate showed the registration number of the motor vehicle was KAR 273Y, the appellant was the insurer and the period of the cover was 6th November 2006 to 5th November, 2007 a period that covers the time of the accident. In so holding the learned Magistrate missed the essence of the defence. The appellant was not saying that it had not insured the motor vehicle. Instead it was saying that yes, it insured the vehicle. However the cover did not extend to the person or class of persons as the respondent. Surely this is a triable issue.

The appellant also raised in paragraph 10 of the defence, that the court had no jurisdiction to hear and determine the suit. It appears that the learned Magistrate did not quite understand the purport of that objection in his ruling. Nor did the respondent come to terms with it. Surely, a pleading touching on jurisdiction of a court to deal with a matter cannot be taken lightly. The way the learned Magistrate handled the issue in my opinion left a lot to be defined.

The appellant denied specifically having received the statutory Notice before or soon after the filing of the parent suit at Keroka. The respondent on the other hand claimed that such statutory Notice had been served. The trial Magistrate acting on the premises that since the respondent's assertion had not been controverted by a replying affidavit, then it meant that such statutory Notice had been served. That conclusion cannot possibly be correct in the light of categorical averment in the defence that such Notice, was never served. This was an issue which could only have been resolved at the plenary hearing of the suit and on evidence. The trial court was not in a position to determine in one way or another whether indeed the statutory Notice had been served or not. And considering that the parent suit had proceeded exparte by way of assessment of damages since the appellant's insured for reasons which are not apparent on the record never defended the suit, it is possible that no such Notice was actually served on the appellant. Had the respondent done so, I do not see why the appellant could not have come to the aid of its insured in terms of the insurance contract between them. That again was a triable issue.

To my mind therefore, there were outstanding issues in the suit which could only have been resolved at a full hearing and on evidence. Accordingly, the suit ought to have been allowed to proceed to full trial.

The appeal is allowed. The order by the trial court striking out the defence filed by the appellant is set aside and substituted with an order dismissing the application with costs. The appellant too shall have the costs of this appeal.

**Judgment dated, signed** and **delivered** at Kisii on this 30th day of May, 2011.

**ASIKE-MAKHANDIA**
**JUDGE**