



No.2982

THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

HCCA. NO.80 OF 2008

GEMINIA INSURANCE CO. LTD.APPELLANT

VERSUS

PATRICK KIVUVA MAKUMBI RESPONDENT

(Being an appeal from Original Ruling and order of Hon. Mr. S. Okato, Senior Resident Magistrate

delivered on 23rd April, 2008 in Machakos CMCC.630 of 2007)

JUDGMENT

The history leading to this appeal is that the appellant was allegedly the insurer of a motor vehicle belonging to a third party, **E.A. Millers Ltd**. The said third party had been sued by the respondent in this appeal, in **Machakos SPMCC No.154 of 2000** as the owner of motor vehicle registration number KAH 023C. On 22nd October, 1999, the said motor vehicle was involved in an accident with another motor vehicle registration KAG 031 in which the respondent was travelling as a fare paying passenger. As a result, the respondent suffered severe body injuries. On 14th February, 2000, he filed a Civil Suit in the Senior Principal Magistrate's court, Machakos being **SPMCC No.154 of 2000** against the owner of the motor vehicle he was travelling in, as aforesaid, seeking General and Special damages for the injuries sustained. Subsequently, the third party (**E.A. Millers Ltd**) was enjoined in the proceedings. The appellant was the insurer of this third party motor vehicle. On or about 20th February, 2006 judgment was entered for the respondent against the defendant and the third party in the ratio of 10:90 on liability and the third party was eventually found liable to pay the total sum of KShs.182,700/- interests and costs . The defendant duly met his portion of the claim but the third party refused, failed and or neglected to do so. The respondent was therefore compelled to file a declaratory suit against the appellant as the insurer of motor vehicle KAH 023C being Machakos **CMCC NO.630 of 2007**.

The appellant contested the suit denying that it was the insurer of the subject motor vehicle and therefore, was not entitled to settle any judgment arising out of the alleged accident. In the alternative, it averred that no notice was served on it as required under the provisions of section 10(1) and (2) of the Insurance (Motor Vehicles Third Party Risks) Act.

By a chamber summons application dated and filed in court on 25th February, 2008, the appellant sought

to have the suit struck out and or dismissed on the grounds that it did not disclose any cause of action. The application was based on the grounds that the respondent had not complied with the provisions of section 10 of the Act aforesaid, that there had been no service of a valid notice of intention to sue or Notice of commencement of proceedings and Notice of entry of judgment on the appellant.

As expected, the application was strenuously opposed by the respondent. He controverted each of the appellant's allegations.

Mr. S. A. Okato, SRM having considered the application carefully in a reserved ruling delivered on 23rd April, 2008 dismissed the application holding thus:

"...The grounds upon which the application is based are grounds which ought to be canvassed at the full hearing of the case and this is so because the defendant/applicant did not answer to the depositions in the replying affidavit. The issue of notice to the defendant/applicant is an issue of evidence particularly in view of the affidavit of service annexed to the replying affidavit and marked PKM 1 in which he deposes that he served the Claims Manager of the defendant who accepted service but refused to acknowledge the same. I therefore, find that the application lacks merit and I dismiss it with costs to the plaintiff/respondent".

That order of dismissal provoked this appeal. 4 grounds of appeal have been advanced to wit:

"1. The learned Magistrate misdirected himself and did not appreciate the provisions of Sec.10(2)(a) of the Insurance (Motor Vehicles Third Party Risks)Cap 405.

2. The learned Magistrate Mr. Okato failed to appreciate the fact that there was no notice served on the Defendant before the primary suit or within 14 days of filing the suit as required under section 10(2) of the Act.

3. The learned Magistrate Mr. Okato misdirected himself in stating that there was an issue for trial whereas it was manifestly clear from the Replying Affidavit that the Affidavit of Service was for the present suit not the primary suit.

4. The learned Magistrate Mr. Okato erred in finding that the Affidavit of Service annexed in the Replying Affidavit was uncontroverted whereas it was a matter of law which was to be pleaded and that clearly showed that the Respondent was not in compliance with the provisions of Cap 405."

When the appeal came for the plenary hearing, it was agreed between counsel for the appellant and respondent respectively that the same be canvassed by way of written submissions. Those submissions were subsequently filed and exchanged. I have carefully read and considered them alongside cited authorities.

Striking out a pleading is a jurisdiction which should be exercised sparingly and in the clearest of cases. Courts now must not be seen to automatically strike out a pleading but to first examine whether striking out a pleading will be in conformity with the overriding objective set out in the Civil Procedure Act. If a way or ways alternative to striking out are available, the courts must consider those alternatives and see if they are more consonant with the overriding objectives than striking out. But as stated by the Court of Appeal in the case of **City Chemist (NRB) and Others –vs- Oriental Commercial Bank Ltd. Civil Application No.NAI.302 of 2008(UR)** the new approach:

"...is not to say that the new thinking totally uproots well established principles or precedent in the exercise of the discretion of the court which is a judicial process devoid of whim and caprice. On the contrary the amendment enriches those principles and emboldens the court to be guided by a broad sense of justice and fairness as it applies the principles. The application of clear and unambiguous principles and precedents assist litigants and legal practitioners alike in determining with some measure of certainty the validity of claims long before they are insisted in court. It also guides the lower courts and maintains stability in the law and its application..."

This caution is well founded and in particular when it comes to striking out a pleading. Such drastic action can only be invoked where the pleading is so hopeless that no life can be breathed into it even by subsequent amendments.

I think that the application, that gave rise to this appeal was properly rejected by the trial court because it had no legal basis since the issues raised in the application called for viva voce evidence. The respondent was required to produce evidence as to the circumstances leading to the entry of judgment of the trial court and further, whether he had served on the appellant the statutory notice as required by section 10(2) (a) of the Insurance (Motor Vehicles Third Party Risks) Act. All these issues could only have been canvassed at the plenary hearing of the suit. It was therefore not a matter fit for determination by

summary procedure. It required evidence to be called. Such evidence could not have been by way of affidavits. Indeed, the mere fact that there were several contested issues, going by the Plaintiff and amended defence, on record the application to strike out the Plaintiff was totally misconceived and an abuse of the court process.

This appeal lacks merit. It is accordingly dismissed with costs to the Respondent.

Dated, signed and delivered at Machakos, this 15th day of November, 2011.

**ASIKE-MAKHANDIA
JUDGE**