



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Appeal 214 of 2006

CORPORATE INSURANCE COMPANY LTD.APPELLANT

VERSUS

COLLINS OUMA OCHIAGORESPONDENT

J U D G M E N T

This is an Appeal dated 21st November 2006 against the decision of the Senior Resident Magistrate in Kilifi, Hon. Charles Obulutsa, delivered on 7th November 2006 in Kilifi Senior Resident Magistrate Court Civil Case No. 10 of 2006.

In the said suit, the plaintiff applied to have the defence struck out on the grounds that it may prejudice, embarrass or delay the fair trial of the suit or that it is otherwise an abuse of the process of court. The plaintiff prayed that judgment be entered for the plaintiff against the Defendant for Kshs.362,505/- plus costs and interest.

The application was supported by an elaborate affidavit sworn by the plaintiff. The plaintiff deponed inter alia that the Defendant in Kilifi SRMCC No. 501 of 2004 one Phylis A. Adula was an insured of the Respondent Insurance Company in respect of Motor vehicles Registration No. KAD 640F Toyota Saloon under Policy No. CO 1/070/1/000410/1999. That the plaintiff sued the said insured on the said suit for recovery of general and special damages, costs and interest in respect of injuries sustained by him in the subject road accident. That upon the trial of the suit the court entered final judgment on 17th November 2005 for Shs.300,000/- general damages, special damages for Kshs.21000 plus costs and interest making a total of Shs.362,565/-.

The Defendant and Respondent herein did not file a Replying Affidavit in response to the application to strike out the Defence. The application was presented on 3.10.2006 and appears to have proceeded unopposed. Ruling was delivered on 7.11.2006 in which the defence was struck out and judgment entered as prayed in the plant.

The Defendant then lodged this appeal on the following grounds:-

1. *That the Learned Magistrate erred in law and in fact by striking out the Defence.*
2. *That the Defence raised triable issues.*
3. *That the striking out of the Defence condemned the appellant unheard which was against the doctrine of natural justice.*

I have considered the appeal on submissions by Counsel. The Respondent did not file any Replying Affidavit to oppose the application. It was represented by Counsel on 7th November 2006

but who did not seem to have made any submissions or present any arguments.

I have seen an application dated 21.04.2008 to set aside the judgment and decree. It appears not to have been prosecuted. Counsel for the Respondent submitted that the Appellant did not attend the hearing.

It is my view that the appellant had the opportunity to be heard. It did not exercise its rights. It did not oppose the application to strike out. There was no application for adjournment.

The Ruling was deferred and reasons given. The plaint was not struck out merely for non-attendance. The trial Magistrate is deemed to have considered the defence on record. In his opinion and discretion the defence did not raise any triable issues.

Ours is an adversarial legal system. One is supposed to participate in legal proceedings and make a stand. It is not for the court to assist the indolent. This court will not just look at the Defence at this appellate stage. The court will consider the Ruling of the trial Magistrate and the conduct of the Respondent.

I see no reason to interfere with the decision of the trial magistrate. He used all the material presented to him. The appellant elected to be a by-stander instead of assisting the court in the Magistrate's Court.

I do hereby dismiss the appeal with costs to the Respondent. Orders accordingly.

Dated and delivered at Mombasa this 25th March 2010.

**M. K. IBRAHIM
J U D G E**

ORDER

The decretal sum secured at CFC BANK together with all accrued interest be released to the Respondent, through J.A. Abuodha & Company Advocates.

25/3/10

Ibrahim J

Court clerk – Kazungu

Mrs. Abuodha for the Respondent

No appearance for the Appellants

Judgment delivered.

IBRAHIM, J