



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
Civil Appeal 193 of 2002

(An appeal from the Civil Case No. 841 of 2002 of the Senior Resident Magistrate's Court at Nakuru – S. MUKETI (MRS))

GEMINIA INSURANCE CO. LTD.....APPELLANT

VERSUS

KENNEDY OTIENO ONYANGO.....RESPONDENT

JUDGMENT

The respondent was the plaintiff in Nakuru RMCC No. 2302 of 1995 where he had filed suit against a company known as Lomolo (1962) Limited. The said company had been insured by the appellant herein in respect of injuries sustained by its employees in the course of their duties with it. On 1st July 1995 the respondent was involved in an industrial accident in the course of his employment with Limolo (1962) Ltd. He filed the aforesaid suit and was awarded general and special damages plus costs, all totaling to Kshs.96,860/-. The said judgment was by consent which was entered into between the respondent's advocates and M/S Sheth & Wathigo Advocates who had been instructed to appear for Lomolo (1962) Ltd. by the insurance company, the appellant. The said defendant did not settle the decretal amount promptly and the respondent decided to file a suit against the appellant as the defendant's insurer, Nakuru CMCC No. 841 of 2002 and sought a declaration that the appellant was bound to satisfy the decree in Nakuru RMCC No. 2302 of 1995. Alternatively, it prayed for judgment against the appellant in the sum of Kshs.96,680/- plus costs and interest.

The appellant filed a defence to the said suit and stated that the suit was bad in law as there was no contractual relationship between it and the respondent. It further stated that the respondent had no *locus standi* to institute the proceedings. The appellant further stated that it had repudiated the Workmen Compensation Policy it had issued to Lomolo (1962) Ltd. due to the insured's breach of the policy conditions which included default in payment of the outstanding premiums on the policy and the appellant had notified the said insured that it was not going to settle the decretal sum on its behalf. The appellant therefore stated that it was not liable to satisfy the decree in Nakuru RMCC No. 2302 of 1995.

The respondent then filed an application under Order VI Rule 13(1)(a) and (d) seeking the striking out of the appellant's defence as disclosing no reasonable cause of defence, that it was meant to delay fair conclusion of the matter and that it was an abuse of the court process. The appellant opposed the said application and filed grounds of opposition.

The trial court held that the respondent's application was merited and struck out the appellant's defence and entered judgment for the respondent.

The appellant was aggrieved by the said orders and preferred the present appeal.

Counsel for both parties made their respective submissions before me and I have taken the same into consideration. It is trite law that striking out pleadings is a draconian step which ought to be employed in the clearest of cases and particularly where it is evident that the pleadings are beyond redemption. Where a reasonable cause of defence is disclosed, it would be improper to strike out a defence, see **D. T. DOBIE & COMPANY (KENYA) LTD VS MUCHINA** [1982] KLR 1.

The issues that were raised by the appellant were not the kind of issues which could be disposed of in a summary manner, in my view they required very serious consideration. I will restrain myself from expressing any strong views on the matter because I am persuaded that the said suit should be remitted to the subordinate court to be heard before a different magistrate and such views may prejudice a fair trial. I therefore allow the appeal, set aside the ruling of the trial court, reinstate the appellant's defence and order that Nakuru CMCC No. 841 of 2002 be remitted to the lower court for hearing. The costs of the appeal shall abide the outcome of the said case.

DATED, SIGNED AND DELIVERED at Nakurut this 9th day of December, 2005.

D. MUSINGA

JUDGE

9/12/2005

Judgment delivered in open court in the presence of Mr. Kisila for the appellant and Mr. Musembi for the respondent.

D. MUSINGA

JUDGE

9/12/2005