Gachiri v Geminia Insurance Company Limited (Civil Appeal E353 of 2024)
[2025] KEHC 462 (KLR) (Civ) (23 January 2025) (Judgment)

Neutral citation: [2025] KEHC 462 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E353 OF 2024

LP KASSAN, J

JANUARY 23, 2025

BETWEEN

BENSON MWITHIGA GACHIRI ..... APPELLANT

AND

GEMINIA INSURANCE COMPANY LIMITED ..... RESPONDENT

(Being an appeal from the ruling and order of Honourable V. K. Momanyi (Resident Magistrate/Adjudicator) delivered on 6th March, 2024 in SCCCOMM NO. E422 of 2024)

JUDGMENT

1. This appeal emanates from the ruling delivered on 6th March, 2024 by Hon. V. K. Momanyi (Resident Magistrate/Adjudicator) in SCCCOMM No. E422 of 2024 (hereafter the declaratory suit). The background facts leading up to the said ruling are that Benson Mwithiga Gachiri (hereafter the Appellant) filed the declaratory suit in the Small Claims Court against Geminia Insurance Company Limited (hereafter the Respondent) by way of the statement of claim dated 17th January, 2024 seeking a declaratory order to the effect that the Respondent be held liable to satisfy the judgment arising from the decree issued in SCCC No. E3036 of 2023 (hereafter the primary suit) to the tune of Kshs. 342,926/-.

2. The Appellant averred in the declaratory suit that the Respondent had insured the motor vehicle registration number KWS 458 (the subject motor vehicle) belonging to the Appellant, vide Policy Number CV/01/1666115/1 (hereafter the policy) upon payment of the requisite premiums for the period between 31st March, 2020 and 30th April, 2021. That resultantly, the Respondent was responsible for insuring him against any liabilities arising from the subject motor vehicle.

3. The Appellant further averred that the subject motor vehicle was involved in a road traffic accident with another motor vehicle registration number KBJ 193H on 6th July, 2020 along Thika Superhighway,

thereby resulting in commencement of the primary suit, against the Appellant. That in the end, judgment in the primary suit was entered against the Appellant, in the sum of Kshs. 342,926/- plus costs and interest thereon. That the Respondent was at all material times aware of the existence of the primary suit and even participated in the said proceedings. That pursuant to the policy subsisting between the parties at all material times, the Respondent was therefore duty bound to satisfy the decree resulting therefrom.

4. The Respondent entered appearance on being served with summons and filed its response to the claim dated 16th February, 2024 denying the key averments in the Appellant's claim.

5. The claim proceeded for hearing with the Appellant's case. The Appellant first called a police officer to testify, following which the lower court proceeded to take the Appellant's testimony.

6. Nevertheless, during the course of the Appellant's testimony, his counsel on record, Mr. Ndungo, made an oral application before the lower court, seeking leave to substitute his personal evidence with that of another witness or to instruct another advocate to take his evidence, as a co-witness in the said suit. For those reasons, the advocate sought an adjournment. The application for adjournment was naturally opposed by counsel for the Respondent, who argued that the Appellant's advocate had ample time to put his house in order.

7. Upon considering the rival sentiments, the Learned Adjudicator vide the ruling delivered on 6th March, 2024, declined to grant the adjournment sought, pursuant to Rule 8 of the Advocates (Practice) Rules and Section 34 of the *Small Claims Court Act*, Cap. 10A Laws of Kenya. Subsequently, the Appellant's advocate indicated that he would only close his client's case in the event that the client is allowed to produce as evidence the documents initially intended to be produced by the said advocate. He further indicated that he would be challenging the aforesaid ruling on appeal in any event. Those sentiments were similarly opposed by the Respondent's counsel. In the end, the Learned Adjudicator upon reasoning that the advocate for the Appellant was holding both the court and the parties at ransom despite having been granted an opportunity to elect how to progress with the matter, proceeded to strike out the Appellant's claim and awarded costs to the Respondent, in an all-inclusive sum of Kshs. 15,000/-.

8. Being dissatisfied with the aforementioned decision, the Appellant lodged this appeal against the Respondent vide the memorandum of appeal dated 11th March, 2024 and put forward the following grounds of appeal:

    i. That the Adjudicator misdirected herself by striking out the entire Appellant's claim on the sole basis that Rule 8 of the Advocates (Practice) Rules, 1966 bars/prevents an Advocate from giving evidence; whether verbally or by declaration or affidavit on formal or non-contentious matters of fact in any matter which he acts or appears.

    ii. That the Adjudicator erred in law by failing to apply Article 50 of *the Constitution* of Kenya as read with Article 25 of *the Constitution* of Kenya.

9. The orders consequently sought on appeal are an order setting aside the impugned ruling, paving way for reinstatement of the declaratory suit followed by a further order that the suit be heard before any Adjudicator other than Hon. V.K. Momanyi. The Appellant also sought costs of the appeal.

10. The parties were directed to file and exchange written submissions on the appeal.

11. The court has considered the original record, the record of appeal and the rival submissions plus the authorities cited in support thereof. Before proceeding to address the merits of the appeal, the court observed that counsel for the Respondent raised a preliminary issue touching on competency of the

appeal on the ground that it rides on an incomplete record of appeal. More specifically, counsel argues that the record of appeal does not include the memorandum of appeal and hence the appeal ought to be rejected as a whole.

12. Upon perusal of the record, the court observed that the record of appeal dated 3rd June, 2024 does not contain the memorandum of appeal. Nevertheless, upon further perusal of the record, the court noted that the memorandum of appeal had previously been filed sometime on or about 11th March, 2024 and therefore forms part of the court record.

13. It is the court's view therefore, that the mere omission on the part of the Appellant and/or his advocate, in attaching the memorandum of appeal as part of the record of appeal, would not in and of itself constitute a fatality of the appeal. Having determined so, the court will now proceed with the merits of the appeal.

14. As a first appellate court, the duty of this court is to re-evaluate the evidence and draw its own conclusions, but always bearing in mind that it did not have the opportunity to see or hear the witnesses testify. See Peters v Sunday Post Limited (1958) EA 424; Selle and Another v Associated Motor Boat Co. Limited and Others (1968) EA 123 and Williams Diamonds Limited v Brown (1970) EA 1. The Court of Appeal in Ephantus Mwangi and Another v Duncan Mwangi Wambugu (1982) – 88) 1 KAR 278 likewise stated that:

> " A court of appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did."

15. Upon review of the memorandum of appeal and submissions on record, it is apparent that the sole issue for determination on appeal is whether the Learned Adjudicator acted correctly by striking out the Appellant's claim. As such, the court will address the two (2) grounds of appeal contemporaneously under that head.

16. As earlier mentioned, the events leading up to delivery of the impugned ruling are as follows. The parties herein had attended the lower court for hearing of the Appellant's case on 6th March, 2024. However, during the course of the Appellant's testimony, his counsel sought an adjournment and leave of the court to enable him substitute his witness statement with that of another witness or advocate, which prayer for adjournment was opposed by counsel for the Respondent. Upon considering the opposing arguments, the Learned Adjudicator reasoned that no exceptional or reasonable circumstances had been established pursuant to Section 34 of the *Small Claims Court Act*, to warrant the adjournment sought. The Learned Adjudicator further reasoned that the issue pertaining to the Appellant's counsel playing the simultaneous role of a witness in the matter was previously raised but that no action was taken by the said counsel, in putting his house in order. Accordingly, the Learned Adjudicator by way of her ruling delivered on the aforesaid 6th March, 2024, declined to grant the adjournment.

17. Subsequently, counsel for the Respondent sought clarification as to whether the Appellant had elected to close his case, to which counsel for the Appellant indicated that he would be challenging the aforementioned ruling by way of an appeal. Ultimately, the Learned Adjudicator upon reasoning that the court cannot be called upon to dictate the manner in which a party should proceed with his or her case, struck out the Appellant's claim with costs.

18. Upon a re-examination of the record, it is apparent that the adjournment sought by the Appellant's counsel in the declaratory suit was premised on counsel's desire to act both as an advocate and a witness therein, pursuant to Rule 8 of the Advocates (Practice) Rules which stipulates that:

> No advocate may appear as such before any court or tribunal in any matter in which he has reason to believe that he may be required as a witness to give evidence, whether verbally or by declaration or affidavit; and if, while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration or affidavit, he shall not continue to appear:
>
> Provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non-contentious matter of fact in any matter in which he acts or appears.

19. The applicability of the just-cited provision was reaffirmed in the case of Ibrahim & another v Zumzum Investment Limited & another (Civil Application E058 of 2024) [2024] KECA 862 (KLR) with Odunga JA proceeding to explain the import of the Rule above as follows:

> " The general rule is that advocates should not swear affidavits in contested matters. Where the client is available to swear to the disputed facts, the depositions in the affidavit of the advocate, may amount to hearsay unless their sources and grounds for belief are disclosed. More importantly, an advocate who swears an affidavit in contested matters potentially exposes himself to playing the role of both advocate and witness should they be called upon to take the witness stand in order to be cross-examined on the said affidavits. That was the opinion in the case of Magnolia Pvt Limited Vs Synermed Pharmaceuticals (K) Ltd (2018) eKLR in which advocates were cautioned from swearing affidavits on their clients' behalf, the court stating that:
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> "Whereas there is nothing barring an advocate from swearing an affidavit in appropriate cases, where the matters deponed to are agreed or on purely legal positions, advocates should refrain from the temptation of being the avenue through which disputed facts are proclaimed. The rationale for the said principle is to insulate the advocate, an officer of the court, from the vagaries of litigation which, on occasions may be very unpleasant. By swearing an affidavit on such issues an advocate subjects himself to the process of cross-examination thus removing him from his role of legal counsel to that of a witness, a scenario which should be avoided like plague. In my view, however innocent an averment may be, counsel should desist from the temptation to be the pipe stem through which such an averment is transmitted."

20. From a perusal of the record, the court observed that Advocate Ndungo Gachiri's witness statement which found on page 43 of the record of appeal, is centered around the receipt of certain documents from the Appellant and which documents he purportedly compiled and served upon the Respondent. It is therefore apparent that the said advocate was at all material times aware of the likelihood that he may be called upon to participate in the proceedings additionally as a witness. It therefore follows that the advocate ought to have taken the necessary steps in putting his house in order at the earliest opportunity, rather than in waiting until the matter was at the hearing stage, to seek an adjournment on that basis. Upon being dissatisfied with the explanation given on the material date therefore, the Learned Adjudicator declined to grant the adjournment, being guided by Section 34 of the *Small Claims Court Act*.

21. The aforesaid Section 34 provides for the expeditious disposal of claims before the Small Claims Court, setting the timelines for determination thereof at 60 days from the date of filing. It is therefore clear that the Small Claims Court operates with strict and limited timelines for disposal of its claims. In that respect, Sub-section 4 of the Section sets out the principles for consideration by the Small Claims Court in determining whether or not to grant an adjournment, thus:

> When considering whether to allow an adjournment on the grounds of exceptional and unforeseen circumstances referred to in subsection (3), the court may in particular take into consideration where appropriate any of the following exceptional and unforeseen circumstances—
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> (a) the absence of the parties concerned or their advocate or other participants to the proceedings required to appear in court for justified personal reasons which may include sickness, death, accident or other calamities;
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> (b) an application by a party for the Adjudicator to withdraw from hearing the matter;
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> (c) a request by parties to settle the matter out of court;
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> (d) an appeal filed in the matter where orders of stay of proceedings have been granted;
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> (e) an application by a party to summon new witnesses to court, collect new evidence, new inspection or evaluation or supplementary investigation on the subject matter of the case; and
>
> (f) any other exceptional and unforeseen circumstances which in the opinion of the court justifies or warrants an adjournment.

22. Upon considering the reasoning by the Learned Adjudicator for declining to grant the adjournment sought by the Appellant's counsel, the court is satisfied that the Learned Adjudicator arrived at a reasonable finding in the circumstances, in the absence of any exceptional and unforeseen circumstances brought forth by the Appellant's advocate.

23. Suffice it to say that and as earlier mentioned, the Learned Adjudicator ultimately proceeded to strike out the Appellant's claim. It is trite law that the decision whether or not to strike out pleadings (or a suit) is discretionary and which discretion ought to be exercised judicially and only in plainly obvious cases. This position was echoed in the decision of The Co-Operative Merchant Bank Ltd v George Fredrick Wekesa (Civil Appeal No. 54 of 1999) where the Court of Appeal stated thus:

> "Striking out a pleading is a draconian act, which may only be resorted to, in plain cases....Whether or not a case is plain is a matter of fact....A Court may only strike out pleadings where they disclose no semblance of a cause of action or defence and are incurable by amendment."

24. Furthermore, in Yaya Towers Limited v Trade Bank Limited (In Liquidation) [2000] eKLR the Court of Appeal expressed itself in the following manner on the same subject:

> "A Plaintiff is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant can demonstrate shortly and conclusively that the Plaintiff's claim is bound to fail or is otherwise objectionable as an

> abuse of the process of the Court, it must be allowed to proceed to trial....It cannot be doubted that the Court has inherent jurisdiction to dismiss that, which is an abuse of the process of the Court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved."

25. Upon consideration of the cited authorities coupled with the circumstances of the matter at hand, it is the court's view that notwithstanding the fact that the Learned Adjudicator reasonably exercised her discretion in declining to grant an adjournment in the declaratory suit pursuant to Section 34 (supra), her decision to eventually strike out the Appellant's claim was a departure from the existing principles laid out in the respective cases cited hereinabove.

26. In view of all the foregoing circumstances, the court is satisfied that there is need to disturb the impugned decision, accordingly.

27. The upshot therefore is that the appeal succeeds. Consequently, the following orders be and are hereby made:

    a. The ruling and order made by Honourable V.K. Momanyi on 6th March, 2024 in SCCCOMM No. E422 of 2024 striking out the Appellant's claim with costs, is hereby set aside and is substituted with an order reinstating the Appellant's claim.

    b. The file relating to SCCCOMM No. E422 of 2024 shall be placed before any other Adjudicator other than Honourable V.K. Momanyi for disposal.

    In the circumstances of the appeal, parties shall each bear their own costs of the appeal.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 23RD DAY OF JANUARY 2025.

HON. L. KASSAN

JUDGE

In the presence of:

Ndungu for the Appellant

Ngala for Respondent

Guyo - Court Assistant