



**Directline Assurance Company Limited v Omondi (Civil Appeal
E206 of 2024) [2025] KEHC 3019 (KLR) (Civ) (10 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3019 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E206 OF 2024

JM NANG'EA, J

MARCH 10, 2025

BETWEEN

DIRECTLINE ASSURANCE COMPANY LIMITED APPELLANT

AND

KELVIN OMONDI RESPONDENT

*(Being an Appeal from the Ruling of the Honourable Rawlings Liluma (SRM) delivered on
19th January, 2024 in Milimani Chief Magistrate's Court Civil Case No. E3556 of 2023)*

JUDGMENT

1. The background to this Appeal is that the Respondent filed suit before the lower being Nairobi Chief Magistrate's Civil Case No. E3556 of 2023 (hereinafter referred to "the declaratory suit") seeking satisfaction of Judgement delivered on 16th December, 2022 in Nairobi Chief Magistrate's Civil Case No. E10964 of 2021 (hereinafter referred to as "the primary suit") in his favour for the sum of Kshs. 200,720.68 together with the costs of the suit and interest. The Appellant company entered Appearance and filed its Statement of Defence dated 23rd August, 2023 denying all the material allegations in the suit.
2. The Respondent brought an Application dated 7th September, 2023 praying that the Statement of Defence be Struck out for being frivolous, vexatious, aimed at delaying the finalization of the suit and is otherwise an abuse of the Court process. The Respondent also prayed for the Court to enter judgment as prayed in the declaratory suit.
3. The trial Court in the Ruling subject of this Appeal allowed the Respondent's application; struck out the Appellant's Statement of Defence and entered judgement in favour of the Respondent as prayed in the suit.



4. The Appellant, aggrieved by the finding of the trial Court, filed this Appeal through Memorandum of Appeal dated 13th February, 2024 on the following grounds:-
- i. That the Learned Trial Magistrate erred in law and in fact by striking out the Appellant's Statement of Defence and thus denying the Appellant a chance to canvass their Defence which raised triable issues on full trial (sic).
 - ii. That the Learned Trial Magistrate erred in law and in fact by striking out the Appellant's statement of Defence when the same was not vexatious, scandalous and raised triable issues in law.
 - iii. That the Learned Trial Magistrate erred in finding and holding that the Replying Affidavit was not paid for and that in essence no reply has been duly filed in opposition to the application when the same was paid for and a receipt issued on 17th November, 2023.
 - iv. That the Learned Trial Magistrate erred in law and in fact in failing to consider and appreciate the Grounds as highlighted in the Appellant's Replying Affidavit sworn on 11th November, 2023 in response to the Respondent's Application to strike out the Defence.
 - v. That the Learned Trial Magistrate erred in law and in fact erred in law and in fact in taking draconian measures by striking out the Appellant's Statement of Defence when the circumstances did not call for such a measure.
 - vi. That the Learned Trial Magistrate overlooked the Appellant's Replying Affidavit and misconstrued the legal principles for striking out pleadings thereby taking an improper course of striking out the Appellant's Statements of Defence in the presence of triable issues and analyzing the merits of the case without first hearing the parties and taking the parties evidence thereto.
 - vii. That the Learned Trial Magistrate erred in law and in fact in entering judgment in favour of the Applicant against the Defendant and as such condemning the Defendant to settle the Plaintiff's claim when neither the Appellant herein nor its insured was a party to the Primary suit as filed by the Respondent herein.
 - viii. That the Learned Trial Magistrate erred in law and in fact by failing to consider and take judicial notice that under Section 10 (1) of the Insurance (Motor Vehicle Third Party Risks) Act Cap 405 of the Laws of Kenya for an insurance Company to be under Statutory Obligation to satisfy a decree one of the conditions to be met is that the judgement must have been obtained against a person insured by the policy.
 - ix. That the Learned Trial Magistrate erred in law and in fact in wholly disregarding the evidence adduced on behalf of the Appellant and failing to specifically appreciate that there was no judgment entered in the primary suit against its insured Caroline Kanini Kimeu.
 - x. That the Learned Trial Magistrate erred in law and in fact in failing to appreciate or take into consideration the Appellant's submissions and therefore striking out the Defence.
 - xi. That the Learned Trial Magistrate consequently erred in law and in fact in awarding costs and interests thereto.
5. The Appellant pleads that:-
- i. The Appeal be allowed with costs.



- ii. That the Replying Affidavit sworn on 11th November, 2023 be deemed as properly filed and on record and the same be considered as opposing the Respondent's Application.
 - iii. The Ruling and order dated 19th January, 2024 and consequent orders made be set aside.
 - iv. That the Appellant's Statement of Defence dated 23rd August, 2023 be reinstated and the Defendant allowed to defend the suit.
 - v. That the lower Court file be placed before a different Magistrate vested with jurisdiction for further directions and disposal of the suit at the earliest opportunity.
6. The Appeal was heard by way of written submissions.

Appellant's Submissions

7. It is submitted that it was erroneous for the trial Court to hold that court fees chargeable on the Appellant's Replying Affidavit were not paid whereas a payment receipt was issued in proof of payment.
8. The Appellant further submitted inter alia that bonafide triable issues were raised in the statement of Defence which ought to have gone to trial.
9. Learned Counsel for the Appellant make reference to the famous Court of Appeal's decision in DT Dobie & Company (Kenya) Limited vs Joseph Mbaria Muchina & Another [1982] KLR regarding the principles that ought to be taken into account before exercising judicial discretion to strike out pleadings.
10. It was also argued that the Trial Magistrate failed to consider the import of Section 10 (1) and (2) of the Insurance (Motor Vehicle Third Party Risk) Act which provides that an insurance company is only obliged to settle a decree if it is against its insured under the policy of insurance as was reiterated in Madison Insurance Company Limited vs Augustine Kamanda Gitau [2020] eKLR. The Appellant contended that the judgement in the primary suit was against a party who was not in a contractual relationship with them.
11. The Appellant further opines that liability of the Appellant to settle a claim via a declaratory suit such as the subject of this appeal only arises where there is a valid judgement against its insured under the terms of the policy executed.
12. Counsel reiterated the established legal position that courts cannot rewrite contracts entered into between parties and that parties to a contract are bound by the terms and conditions of the agreement voluntarily entered into (see case law in Revital Healthcare (EPX) Ltd Barclays Bank of Kenya Ltd. [2020] eKLR cited in the advocates' submissions).
13. As regards costs of the application in the lower court, the Appellant is of the view that the Respondent was not entitled thereto.

Respondent's Submissions

14. The Respondent in opposing the appeal, submits that trial Court was justified in striking out the Appellant's Statement of Defence. The Respondent contends that the Statement of Defence did not raise any triable issues to warrant hearing on merits. He also places reliance on the case of DT Dobie & Company (Kenya) Limited supra where the Court held inter alia that a suit can only be summarily dismissed if it is hopeless and does not disclose a reasonable cause of action.



15. The Respondent claims to have fully complied with the provisions of Section 10 (4) of the Insurance (Motor Vehicle Third Party Risk) Act as he has inter alia tendered the statutory notice of institution of the primary suit it served on the Appellant; the relevant police abstract showing the Appellant as the Appellant's insurer, the decree in the primary suit and a valid insurance policy entered into by the Appellant and the defendant in the primary suit.
16. Citing the judicial determinations in Thomas Muoka Muthoka & another v Insurance Company of East Africa [2008] eKLR and Gerald Njuguna Mwaura v Africa Merchant Assurance Co. Ltd [2020] eKLR Counsel for the Respondent observe that Appellant cannot disown the policy having not repudiated the same.

Analysis and determination.

17. It is trite that the appellate court has the duty of re-assessing the evidence and reaching its own conclusions on matters of fact and law. The court will only interfere with the trial court's findings if relevant factors were not taken into account or irrelevant factors were considered or the trial court otherwise misdirected itself. (see case law in *Selle vs. Associated Boat Company* [1968] EA 123 and *Ocean Freight Shipping Co. Ltd vs. Oakdale Commodities Ltd* (1997) eKLR. The Court of Appeal for East Africa in *Peters vs Sunday Post Limited* [1958] EA 424 underscored the same principles delivering itself thus:-

- i. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
- ii. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and
- iii. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time."

18. I have considered the record, the grounds of appeal, the rival submissions by the parties' Counsel and the impugned Ruling of the trial court. Madan J.A. (as he then was) in his judgment in the case of *D.T. Dobie and Company (Kenya) Limited* supra discussed the principles to be considered in dealing with such an application that seeks striking out of pleadings thus:-

"The power to strike out should be exercised after the Court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial Judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial Judge in disposing the case."

19. The celebrated judge further observed that as a general rule courts should aim at sustaining a suit or any other pleading for that matter, rather than terminating it unless it is beyond redemption even by amendment.

Issues for determination

20. The following points arise for determination in the appeal;
 - a. Whether the Respondent's application dated 7th September 2023 before the lower court was opposed.



- b. Whether the Appellant’s defence in the suit was properly struck out and judgement consequently entered in favour of the Respondent.
- and
- (c) The orders commending themselves to the court on the appeal.
21. The Trial Magistrate’s finding that filing fees in respect of the Appellant’s Affidavit in reply to the application in issue was not paid for is factually erroneous. The Appellant has annexed in the Supplementary Record of Appeal a payment receipt issued on 17th November, 2023 at 08.55 am “CTS Invoiced Ref E2M39CMN” for the sum of Kshs.500. The application was therefore opposed vide the Appellant’s affidavit in reply.
22. On the question of whether the Respondent has made out a satisfactory case to warrant striking out of the Appellant’s Statement of Defence, the court’s decision turns on whether the Defence raises triable issues. The Trial Magistrate felt that it did not and instead consisted of mere denials. The court noted that the Appellant was not complaining of non-service of statutory notice of institution of suit and found that the notice was served. The lower court further observed that the Appellant has not moved to obtain a decree or order entitling it to avoid liability under the policy and so there is no reasonable defence to the claim. A police abstract report of the accident subject of the primary suit was tendered and purported to show the Appellant as the accident vehicle insurer.
23. In the case of *Postal Corporation of Kenya v I.T. Inamdar & 2 others* [2004] KECA 139 (KLR) the Court was of the view that:
- “...The law is now well settled that if the defence filed by a defendant raises even one bona fide triable issue, then the defendant must be given leave to defend. There are several authorities in support of this proposition. One of them is this Court’s decision in the case of *Continental Butchery Limited vs. Samson Musila Ndura*, Civil Appeal No 35 of 1997 where this Court stated:
- “With a view to eliminate delay in the administration of justice which would keep litigants out of their just dues or enjoyment of their property, the court is empowered in an appropriate suit to enter judgment for the claim from the plaintiff under summary procedure provided by order 35 subject to there being no triable issues which would entitle a defendant to leave to defend.
- If a bona fide triable issue is raised the defendant must be given unconditional leave to defend but not so in a case in which the Court feels justified in thinking that the defences raised are a sham.”
24. A bona fide triable issue is any issue that has been raised by the Defendant which would essentially necessitate further interrogation by the Court during a trial. It need not be an issue that would succeed in trial but a matter that warrants further interrogation and which a party would be called to adduce evidence or cross examine thereon.
25. Looking at the record it appears that the motor vehicle registration number, KBG 678 K found to have caused the accident subject of the primary suit was insured by the Appellant. The Appellant nonetheless traverses the claim in its Statement of Defence and the Replying Affidavit sworn on 11th November, 2023 and denies liability to settle the claim contending that the vehicle owner was not its insured . The Appellant exhibited an insurance policy showing its insured client as one Caroline Kanini Kimeu.



26. Further, the Appellant contends that the Summons to enter appearance in the primary suit was never served upon it. This contention is not borne out by the evidence since there is on record a letter dated 3/6/2022 from the Appellant to the Respondent's advocates (M/S Waiganjo Wachira & Company Advocates) advising that the Summons be served upon the correct party.
27. Section 10 (1) of the *Insurance (Motor Vehicles Third Party Risks) Act* provides that the duty of the insurers is to satisfy judgements against persons insured. It is enacted as follows:

“ 10. Duty of insurer to satisfy judgments against persons insured

- a. If, after a policy of insurance has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of Section 5 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.

Provided that the sum payable under a judgment for a liability pursuant to this section shall not exceed the maximum percentage of the sum specified in Section 5 (b) prescribed in respect thereof in the Schedule”.

28. The upshot is that the lower court rightly struck out the Appellant's defence to the declaratory suit and entered judgement in favour of the Respondent. No triable issues are discernible for the reasons given.
29. In the premises, the appeal is dismissed in its entirety with costs.

Orders accordingly.

JUDGEMENT DELIVERED VIRTUALLY ON THIS 10TH DAY OF MARCH 2025 IN THE PRESENCE OF;

J. M. NANG'EA, JUDGE.

The Appellant's Advocate, Ms Omollo for Ms Kahiti

The Respondent's Advocate, Ms Kisiangani

J. M. NANG'EA, JUDGE.

