



Kenyan Alliance Insurance Company Limited v Chilango & another (Suing as the Legal Representatives of the Estate of Trevor Juma Jambo) (Civil Appeal E072 of 2021) [2024] KEHC 147 (KLR) (19 January 2024) (Judgment)

Neutral citation: [2024] KEHC 147 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL E072 OF 2021
M THANDE, J
JANUARY 19, 2024**

BETWEEN

KENYAN ALLIANCE INSURANCE COMPANY LIMITED APPELLANT

AND

JUMA JAMBO CHILANGO 1ST RESPONDENT

DZAME KAJONDO MWANGEMI 2ND RESPONDENT

**SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF TREVOR
JUMA JAMBO**

*(An Appeal from the Ruling of Hon. S. D. Sitati, Resident
Magistrate delivered on 12.7.21 in Kilifi PMCC NO. 199 of 2020)*

JUDGMENT

1. The Appellant herein is aggrieved by the ruling dated 12.7.21 of the subordinate court in Kilifi PMCC No. 199 of 2020. In that ruling, the trial Magistrate struck out the Appellant's defence and declared it liable to settle the decree entered against Dickson Musyoki Kivuva in Kilifi SPMCC No. 267 of 2019. The Respondents had instituted a declaratory suit against the Appellant seeking to compel it to satisfy the decree as insurer of motor vehicle registration number KCK 443A under policy number Mcv/Ms.Pol/107634 Comp. The said vehicle had been involved in accident where the Respondents' child sustained fatal injuries.
2. In its memorandum of appeal dated 10.8.21, the Appellant complained that the trial magistrate erred in failing to consider that it had raised substantial triable issues in its statement of defence that could only be adjudicated upon at a full hearing. Further that the trial Magistrate wrongly applied the principles of law regarding the striking out of pleadings, thereby arriving at a wrong decision.



3. The only issue for determination is whether a case was made out in the trial court, for the striking out of the Appellant’s defence. It is the Appellant’s case that it raised triable issues which ought to have been proved during trial. It was contended that the postal receipt of the intention to sue or demand letter produced in the trial court as proof of service, does not ex facie demonstrate that the same ever reached the Appellant’s offices. The Appellant further contends that it was not served with summons to enter appearance in the primary suit.
4. On their part, the Respondents submitted that the trial Magistrate considered the Appellant’s defence and found that the same consisted of mere denials of service of the statutory notice and having insured the motor vehicle in question.
5. Being a first appeal, this Court is called upon to re-assess and analyze the evidence on record being mindful that it neither saw nor heard the witnesses testify. (See *Selle v Associated Motor Boat Co.* [1968] EA 123).
6. In the impugned ruling, the trial Magistrate found that the defence filed by the Appellant “raises mere denials” and proceeded to strike out the same and enter judgment for the Respondents as prayed. The learned Magistrate further found that from the police abstract, the Appellant was the insurer of the vehicle at the time of the accident and that the judgment in the primary suit was regular. Additionally, the trial Magistrate also found that the statutory notice had duly been served upon the Appellant.
7. The power of a court to strike out pleadings is stipulated in Order 2 Rule 15 of the [Civil Procedure Rules](#) as follows:
 1. At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—
 - a. it discloses no reasonable cause of action or defence in law; or
 - b. it is scandalous, frivolous or vexatious; or
 - c. it may prejudice, embarrass or delay the fair trial of the action; or
 - d. it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.
 2. No evidence shall be admissible on an application under subrule (1)(a) but the application shall state concisely the grounds on which it is made.
 3. So far as applicable this rule shall apply to an originating summons and a petition.
8. The jurisdiction of a court to strike out pleadings may be exercised at any stage of the proceedings. Pleadings may be struck out for disclosing no reasonable cause of action or defence in law or for being scandalous, frivolous or vexatious. Pleadings that may prejudice, embarrass or delay the fair trial of the action or are otherwise an abuse of the process of the court, may also be struck out.
9. The jurisdiction of a court to strike out pleadings though provided in law, must be exercised with great caution, to avoid injustice. This has been stated in a long line of authorities, the most often cited, being the case of *D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another* [1980] eKLR where Madan, JA stated:

No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided



it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.

10. Flowing from the above authority and the law, it can be seen that a suit should not be summarily dismissed. Where however pleadings do not disclose a reasonable cause of action or defence, such pleading may be struck out at the discretion of the court.

11. And in the case of *Gupta v Continental Builders Ltd* (1976-80) 1 KLR 809, the same eminent Madan, JA. stated:

The first thing to say is that this was an application for summary judgment. If a defendant is able to raise a *prima facie* triable issue he is entitled in law to unconditional leave to defend. On the other hand if no *prima facie* triable issue is put forward to the claim of the plaintiff it is the duty of the court forthwith to enter summary judgment for it is as much against natural justices to shut out without proper cause a litigant from defending himself as it is to keep a plaintiff out of his dues in a proper case. *Prima facie* triable issues ought to be allowed to go to trial just as a sham or bogus defence ought to be rejected peremptorily.

12. I have looked at the Appellant's defence and note that the Appellant merely denied inter alia that the Respondents had locus standi to institute the suit; that the defendant therein insured the motor vehicle under the stated policy; that the Respondents instituted the primary suit against the defendant and that the same was heard and judgment delivered in favour of the Respondents; that it was not notified of intention to file suit and entry of judgment against the alleged insured. I find that no *prima facie* triable issue is put forward by the Appellant to the claim of the Respondents.

13. In the case of *Margaret Njeri Mbugua v Kirk Mweya Nyaga* [2016] eKLR, the Court of Appeal confronted with a similar scenario where a defence has been struck out stated:

(32) As regards the question whether the defence filed by the respondent ought to have been struck out, we wish to refer to *Magunga General Stores v Pepco Distributors Ltd* [1986-89] EA 334, where this court held as follows: -

"A mere denial is not a sufficient defence and a defendant has to show either by affidavit, oral evidence, or otherwise, that there is a good defence."

(36) Applying all the principles stated in the above quoted cases to this appeal we are of the view that the trial court was right in striking out the defence. The plaint contained details of the transaction that took place, however, the respondent rather than giving a fair and substantial answer gave a general denial of the facts.

14. The Respondents having produced the postal receipt to prove service of the statutory notice on the Appellant, the police abstract to show that the vehicle was insured by the Appellant, the judgment in the primary suit to show that it had indeed been filed, heard and determined, and the limited grant of representation to demonstrate locus standi, the Appellant ought to have given a fair and substantial answer rather than a general denial of the facts. What was contained in the statement of defence however, is a mere denial and not a sufficient defence.

15. The foregoing demonstrates a justification for the striking out of the Appellant's defence by the learned Magistrate. As such, there is no basis for interfering with the said decision. In the circumstances, I find the appeal to be without merit and the same is hereby dismissed with costs to the Respondents.

DATED AND DELIVERED IN MALINDI THIS 19TH DAY OF JANUARY 2024

M. THANDE



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JUDGE

