



**Directline Assurance Company Limited v Chira (Civil Appeal E384 of 2021)
[2024] KEHC 991 (KLR) (Civ) (9 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 991 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
CIVIL APPEAL E384 OF 2021
AN ONGERI, J
FEBRUARY 9, 2024**

BETWEEN

DIRECTLINE ASSURANCE COMPANY LIMITED APPELLANT

AND

JAMES KARIUKI CHIRA RESPONDENT

*(Being an appeal from the judgment and decree of Hon. D. O. Mbeja
(P.M) in Milimani CMCC NO 9078 of 2019 delivered on 4/6/2021)*

JUDGMENT

1. The respondent filed Milimani CMCC no. 9078 of 2019 seeking a declaration that the appellant is bound to fully satisfy the decree in Nairobi CMCC No. 7715 of 2014 in the sum of kshs.1,776,837.39.
2. The appellant filed a defence to the respondent's claim. The defence was struck out at the behest of the respondent who filed an application dated 16/11/2020 seeking to have the defence struck out for reasons that it contained mere denials.
3. The trial court struck out the defence in its ruling dated 4/6/2021.
4. The appellant has appealed against the said ruling on the following grounds;
 - i. That the learned magistrate erred in law and in fact by striking out the appellant's defence in Nairobi CMCC No. 9078 of 2019 despite the fact that it raised triable issues that ought to have been determined through a full trial.
 - ii. That the learned magistrate erred in law by failing to ground the court's decision to strike out the appellant's statement of defence on any of the basic principles for striking out a statement



of defence outlined in the hallowed case of *DT Dobie v Muchina* (1982) KLR I and thereby rendering a determination which was purely arbitrary.

- iii. That the learned magistrate erred in law and in fact by completely disregarding the replying affidavit filed by the appellant in response to the respondent's application dated 16th November 2020 and thereby rendering decision without consideration of material facts which effectively condemned the appellant unheard.
 - iv. That the learned magistrate erred in law and in fact by failing to consider the following issues raised in the appellant's replying affidavit dated 23rd February 2021 filed in response to the respondent's application which clearly indicated that the suit before the court warranted a full trial:
 - a. The suit before court was a declaratory suit which sought to enforce a judgment issued against the appellant's insured in Nairobi CMCC no. 7714 of 2014, which judgment the appellant settled in full on the 17th May 2018.
 - b. The total amount awarded in CMCC No. 7714 of 2014 was kshs.1,265,259 and the respondent tabulated his costs totaling to kshs.164,920 making a total of ksh.1,430,179 which the appellant paid on 17th May 2018.
 - c. The decree which was the basis of the suit was irregularly obtained on the 8th of July 2019 through misrepresentation and none disclosure of material facts after the claim was fully settled.
 - v. That the learned magistrate erred in law and in fact by finding that the appellant is liable to settle the decretal sum as per the decree dated 8th July 2019 despite the fact the appellant had fully settled the claim as agreed by the parties prior to obtaining of the said decree.
 - vi. That other grounds and reasons to be adduced at the hearing hereof.
5. The parties filed written submissions as follows; the appellant submitted that the principles which guide the court in exercising discretion to strike out pleadings are well settled. In the case of *Misort Africa Ltd v. Ps National Treasury and Planning & Another* [2020] eKLR the court held
- The key consideration in determining an application to strike out a Defense is the consideration as to whether the said Defense raises triable issues. In the case of *Job Kwach v Nation Media Group Ltd* it was held as follows: -
- “Before the grant of summary judgment the court must satisfy itself that there are no triable issues raised by the Defendant, either in his statement of defence or in the affidavit in opposition to the application for summary judgment or in any other manner. What then is a defence that raised no bonafide triable issue. A bona fide triable issue is any matter raised by the defendant that would require further interrogation by the court during a full trial. The *Black's Law Dictionary* defines the term “triable” as “subject to liable to judicial examination and trial.” It therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the court.”
6. The appellant indicated that from the statement of defence filed the trial court had a duty to also look at the replying affidavit filed by the appellant in the trial court. the appellant raised a number of issues in its defence and replying affidavit that warrant a trial for full determination. Chief among these issues is whether the appellant was required to pay any other sums above and beyond what was already paid.



7. The appellant submitted that it is trite that even one triable issue is sufficient to have the matter proceed to trial. The appellant herein availed a myriad of issues that warrant the trial suit to go to full trial. These issues could not have been determined summarily as sought by the respondent as there was need for evidence to be cross examined on the position of whether decretal amount was fully settled and or whether the appellant was required to pay any other sums.
8. The respondent alternatively submitted that the appellant's appeal states that the trial court disregarded the appellant's replying affidavit and struck out the appellants defence, after the appellant admitted to satisfying the judgment sum in 'full'. The appellant's defence was that it had made payment in full but without notice to the respondent. It was as a result of the non- disclosure of payment that caused the respondent to institute the secondary suit against the appellant to enforce payment.
9. The appellant's concealed a letter dated, 2/3/2020 from this court where the respondent is clearly seen notifying the appellant of payment without notice and the interim sum due. The appellant has remained mute on the contents of the said letter from the trial court proceedings to date and now, they choose to conceal that fact from this honorable court. The law is clear, he who asserts a fact must prove the existence of that fact, otherwise he would not be entitled to the judgment of the Court.
10. The respondent submitted further that the defence was struck out after the trial court held that the defence raised no triable issues. The *Insurance (Motor Vehicles Third Party Risks) Act* section 10 provides;-
 - “10(1) 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 liability covered by 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 person 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 that sum by virtue of any enactment relating to interest on judgments”.
11. The appellant not only admitted to liability as provided for under Section 10, but the statutory defences in such matters did not arise as the appellants had not raised them prior as required by law. The trial court analyzed the parties pleadings and entered judgment on admission.
12. This being a first appeal, the duty of the first appellate court is to re-evaluate the evidence adduced in the trial court and to arrive at my own conclusion whether to support the findings of the trial court.
13. The issues for determination in this appeal are as follows;
 - i. Whether the trial court was right in striking out the appellant's defence.
 - ii. Whether the appellant's defence raises triable issues.
14. On the issue as to whether the trial court was right in striking out the appellant's defence, I find that it is in the interest of justice to hear a party, no matter how hopeless their pleadings.



15. In the case of *Republic v the Honourable the Chief Justice of Kenya & Others Ex Parte Justice Moiwo Mataiya Ole Keiwua* Nairobi HCMCA No. 1298 of 2004, the Court held as follows;

“The right to be heard has two facts, intrinsic and instrumental. The intrinsic value of that right consists in the opportunity which it gives to the individuals or groups, against whom decisions taken by public authorities operate, to participate in the proceedings by which those decisions are made, an opportunity to express their dignity as persons. The ordinary rule which regulates all procedures is that persons who are likely to be affected by the proposed/likely action must be afforded an opportunity of being heard as to why that action should not be taken. The hearing may be given individually or collectively depending upon the facts of each situation. A departure from this fundamental rule of natural justice may be presumed to have been intended by the Legislature only in circumstances which warrant it and such circumstances must be shown to exist, when so required, the burden being upon those who affirm their existence.”

16. The right to a fair hearing is a fundamental right enshrined in the constitution and as such no party ought to be condemned unheard or be driven away from the seat of justice without being accorded a fair hearing.

17. I therefore find that the trial court was not right in striking out the appellant’s defence.

18. On the issue as to whether the defence raised triable issues, I find that the appellant stated that they already settled the decretal sum on 17/5/2018.

19. In the circumstances, I find that the appellant had a defence on merit which deserved to be canvassed during the hearing of the suit.

20. In the case of *Patel v Cargo Handling Services Ltd* [1974] EA 75, the Court of Appeal held that as follows;

“In this respect, defence on the merits does not mean in my view a defence that must succeed. It means, as Sherridan J put it, a ‘triable issue’.”

21. I allow this appeal and I set aside the trial court’s order striking out the defence and I reinstate the defence.

22. Since the appeal has succeeded, the decretal sum deposited in an interest earning account to be released to the appellant’s counsel.

23. Each party to bear its own costs of this appeal.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 9TH DAY OF FEBRUARY, 2024.

A. N. ONGERI

JUDGE

In the presence of:-

..... for the Appellant

..... for the Respondent

