



**Sanlam General Insurance Co. Limited Previously Known as Gateway Insurance Co. Limited v Mbugua & another (Suing as Administrators of the Estate of Simon Muthee Wanja - Deceased) (Civil Appeal E381 of 2021) [2024] KEHC 1117 (KLR) (Civ) (12 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1117 (KLR)

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

**CIVIL**

**CIVIL APPEAL E381 OF 2021**

**DAS MAJANJA, J**

**FEBRUARY 12, 2024**

**BETWEEN**

**SANLAM GENERAL INSURANCE CO. LIMITED PREVIOUSLY KNOWN AS  
GATEWAY INSURANCE CO. LIMITED ..... APPELLANT**

**AND**

**BENARD MUIRU MBUGUA ..... 1<sup>ST</sup> RESPONDENT**

**JULIA WANJA MBUGUA ..... 2<sup>ND</sup> RESPONDENT**

**SUING AS ADMINISTRATORS OF THE ESTATE OF SIMON MUTHEE WANJA  
- DECEASED**

*(Being an Appeal from the Ruling and Order of Hon. P. Muholi, PM dated 23rd June 2021 at the Magistrates Court at Nairobi, Milimani in CMCC No. 4510 of 2017)*

**JUDGMENT**

1. The Appellant is dissatisfied with the ruling of the Subordinate Court striking out its defence under Order 2 rule 15 of the *Civil Procedure Rules*.
2. The Respondents' suit against the Appellant as set out in the Amended Plaintiff dated 06.11.2018 is that the Respondents filed the primary suit Nairobi CMCC No. 4545 of 2012 on 09.08.2012 against John Mwangi Churu following a fatal road traffic accident involving motor vehicle KAR 461T and one Simon Muthee Wanja (Deceased) ("the Primary Suit"). The Primary Suit was heard and judgment given in favour of the Respondents for Kshs 559,800.00 as damages. After failing to enforce the judgment against the defendants, the Respondents filed Nairobi CMCC No. 4510 of 2017 seeking a



declaratory judgment against the Appellant as the insurer of motor vehicle registration number KAR 461T.

3. In its Statement of Defence dated 09.10.2017, the Appellant denied the Respondents' claim. In particular, it denied that it was the insurer of motor vehicle registration number KAR 461Y under Policy Number 1022/089/1/01565/08/07 or that the said policy existed.
4. The Respondents filed an application dated 29.01.2018 seeking to strike out the Appellant's defence and for judgment as prayed in the plaint. After considering the depositions and submissions, the trial court struck out the defence thus precipitating this appeal.
5. The thrust of the Appellant's appeal as set out in the Memorandum of Appeal dated 02.07.2021 is that its defence raised triable issues and that the trial court erred in striking it out on face value. This court is thus called upon to consider the trial court erred in holding that the defence did not raise any triable issues that would warrant scrutiny of evidence at a full trial. The parties filed written submissions which I have considered.
6. Since this is a first appeal, this court is enjoined by section 78 of the *Civil Procedure Act* to evaluate and examine the subordinate court record and the evidence presented before it in order to arrive at its own conclusion (see *Selle v Associated Motor Boat Co. Ltd* [1968]EA 123). I also proceed under caution as drawing from the sentiments of the court in *Mbogo v Shab* [1968] EA 93 and *United India Insurance Co. Ltd and others v. East African Underwriters (Kenya) Ltd* [1985] eKLR. Those cases underscore the principle that an appellate court will not interfere with the discretion of a trial court unless it is satisfied that there was misdirection on a matter by the judge leading to a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion resulting to an injustice.
7. The case before the trial court concerned section 10 of the *Insurance (Motor Vehicles Third Party Risks) Act (Chapter 405 of the Laws of Kenya)* ("the Act"). The purpose of the Act is to mandate motor vehicle owners to take out an insurance cover for third party risks in particular and in respect of any liability which may be incurred by the insured in respect of death of or bodily injury caused by or arising out of the use of the motor vehicle on a road. Section 10 of the *Act* imposes a duty on the insurer to satisfy a judgment against the third party and in the event of such failure, it permits the third party to seek a declaratory judgment against the insurer. In relation to this provision, the court in *UAP Insurance Co. Ltd v Patrick Charo Chiro* [2021] eKLR observed as follows:

The import of the above provision of the law is that for liability to accrue under section 10 of the Insurance (Motor Vehicle Third Party Risks) Act CAP 405, there is a 4-fold test to be met. Firstly, that the motor vehicle in question was insured by the appellant; Secondly, that the respondent has a judgement in his favour against the insured; Thirdly, that statutory notice was issued to the insurer either at least 14 days before the filing of the suit wherein judgement has been obtained or within 30 days of filing the suit where judgement has been obtained and finally the respondent was a person covered by the insurance policy.
8. In order to support its case and the application, the Respondents produced several documents. A police abstract showing that motor vehicle registration number KAR 461T was insured by Gateway Insurance (Policy No. 1022/089/01565/08/07), demand letter to the plaintiff in the primary suit dated 29.09.2009 copied to Gateway Insurance (022/089/01565/08/07) in respect of KAR 461Y and received on 29.09.2009, a decree dated 21.08.2016 and pleadings and documents in the primary suit and a demand letter addressed to the Appellant dated 09.11.2016 from their Advocates demanding



settlement of the judgment delivered on 21.08.2015 citing Policy Number 1022/089/01565/08/07 referring to motor vehicle registration number KAR 461T.

9. In the replying affidavit sworn on 23.02.2018 by Michael Mulupi, the Appellant contended that it had a defence that raised triable issues. It pointed out that the Respondents referred to three different vehicles KAR 461Y, KAW 364C and KAR 461T in the application and the affidavit in support of the application and in the Respondents' witness statement. That the supporting affidavit referred to John Mwangi as the insured who was sued in the primary suit while the plaint in the declaratory suit referred to Joseph Ndung'u Wambui as the insured. That it did not have any insurance policy with the said John Mwangi or Joseph Ndung'u Wambui in respect of motor vehicles KAR 461Y, KAW 364C and KAR 461T.
10. In order to succeed in the declaratory suit, a plaintiff must satisfy the three conditions outlined by the court in *UAP Insurance Co. Ltd v Patrick Charo Chiro* (Supra). In this case it was not in dispute that there was judgment entered in favour of the Respondents in the Primary Suit. The issue raised by the Appellant is whether the defendant in the Primary Suit was its insured. From the Amended Plaint John Mwangi Churu was the registered owner of motor vehicle registration number KAR 461T under Policy Number 1022/08/01565/07. However, the statutory notice dated 29.09.2009 refers for John Mwangi Churu as the owner/driver of motor vehicle registration number KAR 461Y under policy number 022/089/01565/08/07. While a pleading may be amended to reflect the proper party, the statutory notice provided cannot be amended hence it is a triable issue whether the motor vehicle insured is registration number KAR 461T or KAR 461Y. The identity of the insured motor vehicle goes to the root of the question as to whether there was a valid policy.
11. In *D T Dobie & Company (K) Ltd v Muchina* [1982] KLR 1, the Court of Appeal accepted the general principle that a court should not strike out a pleading summarily unless it appears so hopeless that it plainly and obviously does not disclose any reasonable cause of action or defence and is so weak as to be beyond redemption and incurable by amendment (see also *Co-operative Merchant Bank Ltd v George Fredrick Wekesa* Civil Appeal No. 54 of 1999). From the ruling, the Subordinate Court did not interrogate the fundamental issue raised by the Appellant as to the identity of the motor vehicle insured as set out in the amended plaint and in the statutory notice which is a condition precedent for seeking a declaratory judgment. The trial magistrate held that the Appellant ought to have responded to the statutory notice by informing the Respondents that it was not the insurer of the motor vehicle registration number KAR 461Y. A proper statutory notice is a condition precedent for liability of the insurer under section 10 of the Act. Whether the motor vehicle registration KAR 461Y or KAR 461T belongs to the Appellant's insured is a triable issue.
12. As the trial magistrate failed to consider a material fact, I allow the appeal and order as follows:
  - a. The ruling dated 29.06.2021 is set aside and substituted with an order dismissing the Respondents' application dated 29.01.2018 with costs to the Appellant.
  - b. The Respondents shall pay the Appellant's costs of this appeal assessed at Kshs. 20,000.00.

**DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF FEBRUARY 2024.**

**D. S. MAJANJA**

**JUDGE**

K. Itonga and Company Advocates for the Appellant

Mwaura Kamau and Company Advocates for the Respondents

