



Intra Africa Assurance Company Limited v Ouma (Suing as Personal Representative of the Estate of George Ouma Oloo - Deceased) (Civil Appeal E714 of 2022) [2024] KEHC 2498 (KLR) (Civ) (12 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2498 (KLR)

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

CIVIL

CIVIL APPEAL E714 OF 2022

DAS MAJANJA, J

MARCH 12, 2024

BETWEEN

INTRA AFRICA ASSURANCE COMPANY LIMITED APPELLANT

AND

PEREZ ATIENO OUMA (SUING AS PERSONAL REPRESENTATIVE OF THE ESTATE OF GEORGE OUMA OLOO - DECEASED) RESPONDENT

(Being an Appeal from the Ruling and Order of Hon. G. Sogomo, PM dated 25th August 2022 at the Magistrates Court at Nairobi, Milimani in CMCC No. E8697 of 2021)

JUDGMENT

1. This is an appeal from the ruling of the Subordinate Court dated 25.08.2022 striking out the Appellant's Statement of Defence on the ground that it did not disclose a reasonable defence in law.
2. Before I deal with the substance of the appeal, a background of the matter is necessary. The Respondent filed a declaratory suit under the *Insurance (Motor Vehicle Third Party Risks) Act* (Chapter 407 of the Laws of Kenya) ("the Act") seeking a declaration that the Appellant was bound to honour a decree issued against it in CMCC No. 954 of 2003. In its defence, the Appellant denied the claim and stated that it was not liable in respect of the death of any passenger who was not being carried as a result of or in pursuance of a contract of employment with the insured under the commercial vehicle policy it had issued to the insured. It contended that under section 5(b) of the *Act*, it was not mandatory to insure passengers being carried in the insured's vehicle such as the deceased.
3. In the application dated 28.10.2021, the Respondent urged the court to strike out the defence on the ground that the deceased was a third party within the meaning of the *Act* and that the Respondent had complied with all the pre-requisites for filing the declaratory suit. In its response, the Appellant



reiterated the contents of its defence and urged that the defence raised triable issues which entitled it to be heard in plenary.

4. In the ruling rendered on 26.8.2022 the trial magistrate held that the defence comprised of denials and did not present any triable issues hence struck out the defence.
5. I have considered the parties' submissions and I take the following view of the matter alongside the ruling appealed from. In the ruling the trial magistrate did consider the issues raised by the Appellant in the defence. The assertion that the defence comprised bare denials could not stand in view of the affirmative defence that the deceased was not a third party within the meaning of the *Act*. The trial magistrate failed to consider the application of the Act to the circumstances of the case.
6. Without belabouring the point, it is trite law that striking out a pleading is drastic action and the court should exercise great circumspection before doing so. The court should not strike out a claim unless it is hopeless and cannot be salvaged by any amendment (see *D T Dobie & Company (K) Ltd v Muchina* [1982] KLR 1 and *GBM Kariuki v Nation Media Group Limited and 3 others* [2012]eKLR). In this case, the trial magistrate failed to consider the facts of the case alongside the applicable law. I have no option but to allow the appeal.
7. The appeal is allowed on the following terms:
 - a. The Ruling dated 26.08.2022 is set aside and substituted with the order dismissing the Respondent's application dated 28.10.2021 with costs to the Appellant.
 - b. The Respondent shall pay costs of the appeal assessed at Kshs.20,000.00.

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

D. S. MAJANJA

JUDGE

Mr Kamau instructed by A. B. Shah, Advocate for the Appellant.

Mr Okao instructed by Okao and Company Advocates for the Respondent.

