



**Kenya Alliance Insurance Co Ltd v AAR Insurance Kenya Limited (Civil Appeal 578 of 2017) [2024] KEHC 5660 (KLR) (Civ) (8 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 5660 (KLR)

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

**CIVIL**

**CIVIL APPEAL 578 OF 2017**

**JN MULWA, J**

**MARCH 8, 2024**

**BETWEEN**

**KENYA ALLIANCE INSURANCE CO LTD ..... APPELLANT**

**AND**

**AAR INSURANCE KENYA LIMITED ..... RESPONDENT**

*(Being an Appeal arising out of the Decree emanating from the Ruling and Judgment of Hon. P. Muholi (R.M) delivered on 12th October 2017 in Milimani CMCC NO.2741 of 2017)*

**JUDGMENT**

1. At all material times, the Respondent's motor vehicle registration no. KAK 006C was registered under the name of Angela Ng'ang'a and the Appellant and insured under the Respondent's name. It was involved in a road traffic accident with another motor vehicle KAL 963Y. The owner of motor vehicle KAK 006C instituted legal proceedings against the registered owners of KAL 963Y in Milimani Chief Magistrate's Court Case No.587 of 2003 where the court entered Judgment in favour of the Plaintiff and directed the Respondent herein to pay the sum of Kshs. 623,077/= together with costs and interest. The Plaintiff in a bid to execute the Court's Decree for the sum of Kshs. 1,738,184.09/= being the decretal sum commissioned auctioneers to attach the Respondent's properties. To avoid loss of its properties to the auctioneers by attachment, it paid the same to the decree holder as the insurer, the Appellant herein, had failed, refused and/ or neglected to fulfill its obligation owed to the Respondent under the insurance policy.
2. The Respondent in this appeal AAR Insurance Limited aggrieved by the Appellant's failure to honour its obligation under the policy of insurance instituted Milimani CMCC Civil No.2741 of 2017 in the trial court seeking orders to compel the Appellant to pay back the sum of Kshs. 1,866,784/- and interest at commercial rates from 2nd December 2016 until payment in full. Upon service of the plaint, the



Appellant filed a statement of defence dated 30/5/2017 denying all allegations and asserting that the policy of insurance that was in place was between AAR Health Services and Angela Nganga and that the plaintiff was a stranger to the allegations in the plaint.

3. By an application dated 16/6/2017 the Respondent sought to have the Appellant's statement of defence struck out and Judgment entered in favour of the Respondent. The trial court in its Ruling dated 12/10/2017 allowed the application, struck out the defence and entered Judgment as claimed in the plaint. In effect the Appellant was condemned to pay to the Respondent the sum of Kshs. 1,866,784/= plus interest and costs of the suit.
4. Dissatisfied with the ruling the Appellant lodged this appeal vide a Memorandum of Appeal dated 24/10/2017 raising six grounds as follows:
  - i. THAT the learned trial magistrate erred in law and in fact in making a finding that the Appellant's Defence did not raise triable issues and in proceeding to striking out the said Defence.
  - ii. THAT the learned trial magistrate erred in law in holding that the Defence raised facts that ought to have been raised in CMCC No.587 of 2003.
  - iii. THAT the learned trial magistrate erred in law and in fact in holding that the defence raised issues which were material.
  - iv. THAT the learned trial magistrate erred in law and misinterpreted and solely applying the provisions of Order 2 Rule 15(1)(a) to the application and in failing to note that the application was also anchored in inter alia Order 2 Rule 15(1)(b)(c) and (d) which gave the Appellant a right to lead evidence by way of affidavit to demonstrate the triable issues as raised in the Defence.
  - v. THAT the learned trial magistrate erred in law and in fact in striking out the Appellant's defence when it clearly raised triable issues that merited consideration by way of trial.
  - vi. THAT the learned trial magistrate erred in law and in fact in failing to consider adequately or at all the submissions that had been made by the Appellant, the authorities that were tendered and in so doing he arrived at an erroneous decision.

The Appellant prays that the Appeal be allowed and the Ruling of the trial magistrate together with the Judgment entered in favour of the Respondent be set aside. It also sought that the court makes a finding that the Appellant's Defence raised triable issues that merited consideration by way of trial.

5. Respondent's case before the trial court was adduced by way of Affidavits and written submissions in support of the application to strike out the Appellant's defence. The Respondent's case is that the Respondent and AAR Health Services are one and the same as evidenced by the Certificate of Change of Name issued on 24/04/2024 by the registrar of companies. It was also stated that the Appellant was aware that the vehicle in question was owned by AAR Health Services Limited and Angela Ng'ang'a as per the log book availed to it, and hence the reason why it instructed one advocate to represent both defendants.
6. Appellant's case urged by written submissions. The Appellant's case was that a defence cannot be struck out by the court if it raises issues that merit determination by way of trial. The defence filed by the Appellant is said to have raised triable issues which included whether the party who had taken out the insurance policy was AAR Health Services or AAR Insurance Kenya Limited and whether there was a breach of the claims control clause in the contract of insurance.



## Analysis And Determination

7. I have considered the Memorandum of Appeal filed before this Court, the written submissions in support and against the appeal. Three issues fall for determination in my view:
  - i. Whether the Trial Magistrate erred in striking out the Appellant's defence.
  - ii. Whether the trial Magistrate erred in applying the provisions of Order 2 Rule 15 (1) (a) only yet the application was also anchored on Order 2 Rule 15 (1) (b) (c) and (d).
  - iii. Whether the Appeal is merited?

8. The trial court in the impugned ruling made a finding that the defence filed by the Appellant did not raise trial issues and struck it out, entered judgment in favour of the Respondent and also denied the Appellant stay of execution. It is on that basis that the Appellant moved to pay the decretal sum pending hearing and determination of this appeal. In my view, payment of the decretal sum does not bar a party from pursuing its appeal to conclusion. The Respondent's submission that the Appeal is an afterthought is not anchored on any legal principles.

The power of a court to strike out pleadings is discretionary and must be upon very clear incidences. Order 2 Rule 15(1) of the Civil Procedure Rules provides the conditions thus:

- a. It discloses no reasonable cause of action or defence in law
- b. It is scandalous, frivolous or vexatious; or
- c. It may prejudice, embarrass or delay the fair trial of the action or

It is the respondent's submissions that the appellant's defence was of no substance as it contained denials and thus the trial court ruling should be sustained.

9. I have perused the pleadings by both parties and the submissions.

Being the first appellant court, the court's duty is well cut: to reconsider the entire evidence placed before the trial court and re-evaluate the same and make its own independent findings and conclusion – see *selle v. Associated Motor Boat Company* [1968] EA Page 126.

10. In the same breath for a court to grant summary judgment by striking out a defence has been held to be not only draconian but also a misdirection in the administration of justice.

However, the power to do so is likewise anchored under statute and upon superior courts decisions and ought to be exercised whenever necessary in clear circumstances.

Order 2 Rule 15 (1) Civil Procedure Rules grants that power to the court upon the conditions therein being complied with.

11. The statement of defence filed by the Appellant in the trial court is dated 30/05/2017. I have perused it against the trial court's ruling delivered on 12/10/2017.

Indeed, the trial Magistrate captured the trial parties' submissions before her, one being that the parties to the contract of insurance in respect of the motor vehicle KAK 006C taken out by the Appellant was not by the same parties it stated in the contract of Insurance hence the Respondent submissions that the Appellant (then defendant) were strangers to the suit before the trial Magistrate, despite a certificate of change of name by the Respondent having been provided to the court.

12. It is also a submission that the Plaintiff therein having not been a party in the initial case and the contract of Insurance could not benefit from the suit then under review; among other stated reasons



why the court found it appropriate to strike out the defence on the main ground that it raised no reasonable defence citing Order 2 Rule 15(1) Civil Procedure Rules.

13. In finding that the defence raised no triable issues, the trial court posed questions that the Appellant did not provide answers for instance why it did not pay the decretal sum soon after the judgment was entered in the primary case CMCC No. 587/2003; why it did not safeguard the insured's interest as it defended the motor vehicle and not the insured person and for that, found that the defence raised no reasonable defence yet proceeded to cite the case Olympic Escort International CO. Ltd & 2 others Vs. Parminder Singh Sandhu [2009]eKLR where the Court of Appeal rendered that if one bonafide triable issue is raised the defence must be sustained in the following manner:-

it is trite that a trial issue is not necessarily one that the defendant would ultimately succeed on. It need only to be bonafide.

And for the above reasoning the appellant's defence was struck out.

14. In the case Lalji t/a Vakkep Building Contractors vs. Casousel Ltd. [1989] KLR 386, the court held that: -

summary judgment is a draconian measure and should be given in only the clearest of cases. A trial must be ordered if a triable issue is found or one which is fairly arguable is found to exist.

15. Additionally, in Postal Corporation of Kenya v. Inamdar & 2 Others [2004] IKLR 35A it was held: -  
..... 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.

16. A bona fide triable issue is described in judicial precedents as any matter raised by the defendant that would required further interrogation by the court during a full trial.

In Black's Law Dictionary, 10<sup>th</sup> Edition, the term "triable" is described as subject or liable to judicial examination and trial hence the phrase adopted in judicial decisions among those cited above that one triable issue that does not need to be an issue that would succeed, but just one that warrants further interventions by the court

17. In Giciem Construction Company v. Amalgamated Trade & Services LLR No. 103 (CAK), the court rendered that:-

As a general principle, where a defendant shows he has a fair case for defence or reasonable grounds for setting up a defence or even a fair probability that he has a bonafide defence, he ought to have leave to defend. Leave to defend must be given unless it is clear that there is no real substantial question to be tried, that there is no dispute as to the facts or law which a reasonable doubt that the plaintiff is entitled to judgment

18. By the above legal pronouncements, it is trite that a defendant ought to be denied to defend its case only in very rare incidents where the defence is hopelessly unsustainable.

19. The defence by the defendant in the trial court, in my considered opinion, was one that demanded interrogation by the court in a full hearing. What the trial court did by striking out the defence was not only draconian but denied the defendant, now the Appellant an opportunity to be heard by a court and thus deprived it of a fair hearing as enshrined at Article 50 of the 2010 Kenya Constitution.

20. In the case D. T. Dobie & Company Kenya Limited v. Joseph Mbaria Muchina & Another [1980] eKLR Madan J. A, rendered that: -



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....

21. By and large the questions that the trial court flagged, (cited above) could only be answered by an interrogation by the court during a full hearing. It is therefore clear and evident that the Appellant's statement of defence contained not one but several trial issues.
22. I therefore find and hold that the trial court Magistrate not only misdirected himself in the application of provisions of Order 2 Rule 15 of the Civil Procedure Rules as well as in the trite pronouncements by the superior courts in the meaning and purport of what a triable issue means.
23. For the foregoing, the Appeal herein is merited and must be allowed.

The upshot is that the Appellant's Appeal is allowed with the result that the trial court's ruling dated 12/10/2017 is set aside as well as the judgment entered in favour of the Respondent and all subsequent orders arising therefrom.

The trial court file Milimani CMCC No. 2741 of 2017 is remitted back to the Milimani Chief Magistrates Court for hearing of the suit on merit before any Magistrate save for Hon. P. Muholi R.M.

Costs of this appeal shall abide the outcome of the suit.

Orders accordingly.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS 8<sup>TH</sup> DAY OF MARCH, 2024.**

**J. N. MULWA**

**JUDGE**

