



Sanlam General Insurance (Formerly Gateway Insurance Co. Ltd) v Magambo (Civil Case 198 of 2019) [2024] KEHC 2754 (KLR) (Civ) (14 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2754 (KLR)

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

CIVIL

CIVIL CASE 198 OF 2019

JN MULWA, J

MARCH 14, 2024

BETWEEN

SANLAM GENERAL INSURANCE (FORMERLY GATEWAY INSURANCE CO. LTD) APPELLANT

AND

SILAS OCHIENG MAGAMBO RESPONDENT

(Being an Appeal under Section 75 1() of the Civil Procedure Act Cap 21 laws of Kenya and Order 43 Rule 1 (1)(b) of the Civil Procedure Rules 2010 from the Ruling and Order of Hon. E. Wanjala, Senior Resident Magistrate, Milimani delivered on 28/03/2019 in CMCC No. 8310 of 2018)

JUDGMENT

1. This Appeal arose from the Ruling of the trial court in declaratory suit Milimani CMCC No. 8310 of 2018 wherein the Respondent was trying to enforce a judgment obtained in CMCC No. 4456 of 2011 the primary suit following an accident involving the Appellant's motor vehicle registration No. KBD 393J wherein he was injured.
2. The Appellant filed a defence to the declaratory suit but by a Ruling dated 28/03/2019, the defence was struck out and judgment entered for the Respondent as prayed in the Primary suit, in the sum of Kshs. 266,789.05 as stated in the decree dated 28/03/2019.
3. The grounds for the Appeal are stated in the Memorandum of Appeal dated 4/04/2019 that could be summarized into three (3) raising issues as to whether the trial court erred in law and fact in striking out the Appellants statement of defence and ignoring the gravamen issue being the defence that there existed no valid insurance cover by the Appellant with respect to the subject motor vehicle Registration



No. KBD 393J as at the date of the accident (3/03/2011) that could be enforced under Provisions of The Insurance (Motor Vehicle Third Part Risks) Act Cap 405 Laws of Kenya.

- Both parties filed written submissions in support of their respective positions which the court has carefully considered.

The Appellant's Submissions

- The appellant's submissions are dated 25/10/2023. The main contention is that it was not the insurer of the accident motor vehicle and as such it was not liable to settle any liabilities in the primary suit citing Section 10 of Cap 405 and submitting that no nexus was established between the Appellant and the Defendant in the primary suit and further that the police abstract cannot be proof of the contractual relationship between the Appellant and the Defendant in the primary suit as it was not the insurer of the said motor vehicle.

Respondents Submissions.

- I have considered the submissions dated 17/08/2023. Primarily, the Respondent's submissions are that the Appellant failed to prove or rebut the police abstract evidence that it was not the insurer of the subject motor vehicle adding that a certificate of Insurance on the vehicle bearing the name of the insured and the Policy Number is prima facie evidence that the insurer is admissible under Section 38 of the *Evidence Act*.
- Further it is submitted that the purpose of serving a Notice under Section 10 of Cap 405 is to enable the Insurance Company to defend the suit or to file a declaratory suit to avoid liability under the Act which it failed to do. Cited authorities in support are: -

Cannon Assurance Company Kenya Ltd. Vs. Peter Mulei Sammy [2020] eKLR and Gerald Njuguna Mwaura v. African Merchant Assurance Co. Ltd [2020] eKLR.

Analysis and Determination

- The Appellant's defence to the declaratory suit is dated 29/10/2018 against the plaint dated 1/08/2018. At paragraph 2 the Appellant vehemently denied the claim stating that it was a stranger to the averments in the plaint and in particular having issued an Insurance cover to motor vehicle KBD 393J and therefore had no obligation to compensate the Respondent and put the respondent to strict proof.

At paragraph 3, in the alternative, and without prejudice, it stated that if it had insured the said motor vehicle it repudiated the same for material breach of the terms of the policy and further that it was a stranger to the particulars of the accident involving the said motor vehicle.

It also stated to have been a stranger to all allegations stated at the primary suit.

- The motion that gave rise to the impugned ruling is dated 14/11/2018. The Applicant/Respondent sought only two prayers that the Defendant's defence be struck out and judgment be entered for the Plaintiff against the Defendant upon grounds that the defence is a mere sham tailored to buy time and delay finalization of the suit that there are no trial issues there being no legal defence to the claim under Cap 405 Laws of Kenya.
- In the Replying Affidavit, the Appellant's Legal Officer reiterated that having not insured the motor vehicle it had no responsibility to settle the claims arising from the accident the subject of the primary suit in the lower court.



11. I have perused the impugned ruling dated 28/03/2019. It is a very detailed ruling in respect of application of Sections 10(1), (2) of Cap 405, including several authorities; and in particular circumstances under which an insurer may avoid a policy under the Act, and when a police abstract may be admitted as evidence by the court.

I however find that despite the lengthy analysis of the issues raised by the applicant in the motion to strike out the defence, the main issue whether there were triable issues in the Appellants defence took a back seat despite citing very relevant decisions.

12. In particular in Richard Makau Ngumbi & another vs. Cannon Assurance Co. Ltd [2016] eKLR the court held that for the Respondent to be liable there must be a policy of insurance inforce and a judgment in respect of any such liability as covered under the policy. Additionally the court in the said ruling dismissed the appeal for reasons that it was not clear whether a statutory notice was indeed served or not and found that it to be an issue for determination during the hearing.
13. It was a further finding by the trial Magistrate that the police abstract was prove that the Appellant was the insurer of the subject motor vehicle under the stated policy and held that since ownership of the motor vehicle was not challenged the contents of the police abstract could not be challenged. The trial Magistrate further found that service of the statutory notice though denied was properly served.
14. With due respect to the trial Magistrate the issues she moved to analyze are issues that could be so analyzed upon full hearing of the suit not on affidavit evidence in an Interlocutory Application. In effect the trial Magistrate pronounced herself in finality in a suit that had not been heard and failed to restrict herself on the relevant issue – whether the defence raised triable issues.
15. It is trite that striking out a pleading denies a party an opportunity to be heard on merit. It is draconian and the court ought to exercise this power to strike out a pleading in very clear circumstances including where the defence does not disclose any triable issues.

In the case Britam General Insurance Ltd. Vs. Ukwale Agnes Ngungu [2019] eKLR, the Court rendered that principles of Civil Procedure are grounded on the principles of natural justice that no man should be condemned unheard. Likewise in DT Dobie & CO. Ltd vs. Joseph Mbaria [1982] IKLR, it was held that no suit ought to be summarily dismissed unless it is so hopeless that it plainly discloses no cause of action.

16. Further the court in Postal Corporation of Kenya V. I. T Inamdar & 2 others [2004] I KLR stated that the law is now well settled that if the defence raises even one bona fide triable issue, then the defendant must be given leave to defend.

The authorities are many and all agree that striking out a pleading should be resorted to only in plain and clear circumstances.

17. In totality and in answer to the issues framed for determination, I find that the trial Magistrate misdirected herself and erred both in law and fact by failing to find that the Appellant’s statement of defence raised numerous triable issues but proceeded to strike it out.
18. I therefore allow the appeal with costs and direct that the trial court file be remitted back to the Chief Magistrates Court with an order that the suit CMCC No. 8310 of 2018 be listed for hearing before any magistrate with jurisdiction save for the Hon. E. Wanjala SRM.

Orders accordingly.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 14TH MARCH, 2024.

J. N. MULWA



JUDGE

