APA Insurance Co. Ltd v Githinji (Civil Appeal E186 of 2022)
[2024] KEHC 8634 (KLR) (12 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8634 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CIVIL APPEAL E186 OF 2022

AC BETT, J

JULY 12, 2024

BETWEEN

APA INSURANCE CO. LTD ..... APPELLANT

AND

NANCY MUHONJA GITHINJI ..... RESPONDENT

(An appeal from the ruling and resulting decree delivered by Hon. C. Mugo Chief Magistrate on 2nd August 2022 in Limuru SPMCC NO. 48 OF 2022 respecting the Respondent's notice of motion application dated 15th March 2022 and the Appellant's notice of motion dated 14th April 2022.)

JUDGMENT

1. On February 12, 2023, the respondent filed a declaratory suit against the appellant seeking judgement in her favor for the sum of ksh.289,927/= arising from a judgement and decree in Limuru SPMCC No. 61 of 2019. The basis of the claim was that the judgement debtor in the aforesaid case, one Geofrey Otieno Oduor was the appellant's insured and the appellant was thereof obligated to settle any judgement and decree arising from a road traffic accident involving the respondent's motor vehicle registration No. KAY xxxx and Geofrey Otieno Oduor's motor vehicle registration number KCD xxxx which occurred on March 10, 2016 along Mai Mahiu Road.

2. The appellant denied liability. It denied that it was the insurer of motor vehicle registration number KCD xxxx vide insurance Policy No. AN807/0003xxxx. It further denied knowledge of an accident involving the two aforesaid motor vehicles on March 10, 2016. It was their contention that it had no policy of insurance with Geofrey Otieno Oduor. The appellant also raised a point of law stating that since the decree that the respondent was seeking to enforce was a material damage claim, the same was bad in law and contrary to the provisions of Section 10 of the *Insurance(Motor Vehicle Third Party Risks) Act*.

3. By a notice of motion dated March 15, 2022, the respondent urged the court to strike out the appellant's statement of defence and to enter judgement as prayed in her plaint on the grounds provided under Order 2 Rule 15 of The *Civil Procedure Rules*. The application was supported by an affidavit sworn by the respondent's Advocate who deponed that there was a decree emanating from Limuru SPMCC No. 61 of 2019 in respect of which a statutory notice as required under section 10 of the *Insurance (Motor Vehicles Third Party Risks) Act*, had been served upon the appellant.

4. On April 14, 2022, the appellant filed a notice of motion pursuant to Order 2 Rule 15(1)(a) and (d) urging the court to strike out the plaint with costs. The grounds for the application were that since the judgement and decree in Limuru SPMCC No. 61 of 2019 was for material damage and not compensation in respect of death or bodily injury to any person, the remedy of a declaratory suit was not available under section 10 of the *Insurance(Motor Vehicle Third Party Risks) Act.* The appellant's other ground of appeal was that the judgement and decree in Limuru SPMCC No. 61 of 2019 was not against a person insured by the terms of the subject policy of insurance and could not be enforced against the appellant and that the respondent had no justiciable claim against the appellant. In her affidavit in support of the appellant's application, Ruth Mbalelo, a legal officer reiterated the appellant's assertion that the remedy of a declaration against an insurer is not available since Section 5(b) of the *Insurance (Motor Vehicle Third Party Risks) Act* only covers liability which may be incurred by an insured "in respect of the death of, or bodily injury to, any person caused by or arising out of the use of the vehicle on the road." It was also the appellant's case that the judgement and decree was in respect to Geofrey Otieno Oduor whereas their insured was Owuor Godfrey Otieno and therefore the Judgement debtor in the primary suit was not its insured and any judgement against him could not in law be enforced against the appellant.

5. After each party had filed their respective responses, directions were taken by consent that the two applications be heard jointly. Each party filed written submissions and upon considering the two applications, the trial magistrate delivered a ruling in which he dismissed the appellant's application to strike out the plaint and allowed the respondent's application to strike out the appellant's defence. The court then proceeded to enter judgement in favour of the respondent.

6. The appellant was aggrieved by the decision of the trial magistrate and filed an appeal in which it listed six grounds of appeal. I have perused the grounds of appeal and I find that it raises four issues:

    a. Whether the appellant's defence in Limuru SPMCC No.48 of 2022 raised weighty triable issues deserving interrogation by way of a full trial.

    b. Whether the respondent's plaint in Limuru SPMCC No. 48 of 2022 did not raise triable issues and was therefore suitable for striking out.

    c. Whether the judgement in Limuru SPMCC No. 61 of 2019 was against the appellant's insurer.

    d. Whether Section 10 of the *Insurance (Third Party Motor Risks) Act* is applicable in a material damage award.

7. Mr. Mege for the appellant submitted that the judgement and decree in Limuru SPMCC 61 of 2019 was against one Geofrey Otieno Oduor who is a stranger to the appellant. It was his case that the appellant's insured was Owuor Godfrey Owino and so any judgement against Geofrey Otieno Oduor could not be enforced against the appellant as a judgement "obtained against any person insured by the policy" pursuant to Section 10(2) of *Cap 405*. It was the respondent's submissions that its defence in regard to the enforceability of a judgement and decree in respect to Geofrey Otieno Oduor raised a triable issue and was not frivolous since there is a stark difference between Geofrey Otieno Oduor and Owuor Godfrey Otieno. The respondent submitted that one could not conclude at a preliminary

stage and before trial that the two names refer to one and the same person. Mr. Mege further pointed out that objection proceedings were successfully prosecuted in the primary suit by one Geoffrey Peter Otieno who proved that he was different from the judgement debtor, Geofrey Otieno Oduor. The Respondent submitted that considering the successful objection proceedings which were brought to the attention of the court during the hearing of the applications for striking out, the trial magistrate erred in casually dismissing the appellant's argument that the judgement debtor in the primary suit was not its insured.

8. In his submissions Mr. Mege for the appellant argued that the following facts had been established by the evidence on record:-

   a. Limuru SPMCC No. 61 of 2019 was a material damage claim for Ksh. 232,990/= and not a compensation claim.

   b. The Appellant's insured respecting motor vehicle registration number KCD xxxx was one Owuor Godfrey Otieno.

   c. The judgement entered in Limuru SPMCC No. 61 of 2019 is against one Geofrey Otieno Oduor who was not the appellant's policy holder and was not insured by the terms of the policy.

9. It was his submissions that the appellant's statement of defense raised numerous valid triable issues and could not by any stretch of imagination be deemed frivolous and underserving a trial. The appellant's argument was that in the first instance, the respondent was seeking judgement in a claim which was not valid as it included a liability that was not required to be covered under the provisions of Section 5(b) of *Cap 405*. He cited Section 5 (b) which states:

> " 5. In order to comply with the requirements of Section 4, the policy of insurance must be a policy which
>
> (a) .....
>
> (b) Insures such a person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of use of the vehicle on the road."

10. The appellant's Advocate postulated that based on the express provisions of Section 5(b) of *Cap 405*, there was a triable issue with respect to whether or not the appellant was under an obligation to settle the decree arising from material damage. He relied on the case of *Blue Shield Insurance Company Ltd -vs- Joseph Mboya Oguttu* [2009] eKLR. The appellant's advocate strongly argued that appellant's defence did not contain mere denials but raised triable issues and the appellant ought to have been granted an opportunity to be heard.

11. Regarding the dismissal of its application to strike out the plaint, it was the appellant's submissions that the plaint did not disclose a reasonable cause of action since it was for material damage and the appellant was not obligated by provision of the law to satisfy such material damage claim. He relied on the case of *Francis Maina -vs- Meshack Omari Munyori* [1998] eKLR and *Gateway Insurance Co. Ltd -vs- David Nyaga Muturi* [2019] eKLR. It was the appellant's submissions that the trial magistrate failed to specifically address the issues raised before it and the cited authorities and that he selectively read Section 10 of *Cap 405* thereby arriving at an erroneous decision. The appellant's prayer was that this court allows the appeal, sets aside the trial magistrate's ruling and consequent judgement, and

reinstate the defence. The appellant further prayed that the court do set aside the order dismissing its application and to substitute the same with orders allowing the said application and striking out the plaint with costs.

12. On the respondent's part, she prayed that the appeal be dismissed with costs. The respondent relied on the police abstract and maintained that it was prima facie proof of the insured's details and the evidence as to whether Geofrey Otieno Oduor was the rightful defendant was not rebutted in the primary suit. It was the respondent's argument that the appellant never raised queries as regards its insured upon receiving relevant notices. Reliance was placed on Article 159 (2) (d) of *the Constitution* which enjoins the court to administer justice without undue regard to procedural technicalities. She also relied on the case of *Davies -vs- Elsby Brothers Ltd* [1960] 3 ALLER 672: It was her argument that a mere misdescription of a party cannot render an entire suit untenable.

13. In response to the appellant's argument that the claim was invalid by operation of law, it was the respondent's submissions that for the appellant to succeed, it ought to have repudiated the claim. She also submitted that liability for claims in material damages are covered in the policy of insurance produced by the appellant in court. She relied on the case of *Phoenix East Africa Assurance Co. Ltd -vs- Alfred Onyango Obondo* [2011] eKLR where it was held that:-

> " It may well be that the policy had a clause extending to material damage claim and in the circumstances the insurance company was liable."

14. The Respondent also cited *Blueshield Insurance Co. Td -vs- Raymind Buuri M'rimberia* [1998] eKLR. She urged the court to find that the appellant never cancelled or repudiated the policy of insurance nor obtained a declaratory judgement that it was entitled to avoid liability. It was her further submissions that since the appellant acknowledged being the insurer of motor vehicle registration no. KCD xxxx at the time of the accident then the court rightly determined that the defence filed did not raise any triable issues and merely consisted of bare denials.

15. The two applications whose ruling gave rise to this appeal were premised on Order 2 Rule 15 of the *Civil Procedure Rules 2010*. Order 2 Rule 15 states: -

> " At any stage of the proceeding the court may order to be struck out or amended any pleading on the ground that:-
>
> a. It discloses no reasonable cause of action.
>
> b. It is scandalous, frivolous and vexatious; or
>
> c. It may prejudice, embarrass or delay the fair trial of the action; or
>
> d. It is otherwise an abuse of the process of the court and may order the suit to be stayed or dismissed or judgement to be entered accordingly, as the case may be."

16. The principle governing applications for striking out pleadings were set out in *D.T. Dobie And Company (k) Ltd -vs- Muchina* [1982] KLR where the court dealt with all aspects where striking out a pleading or part thereby is pleaded. It was held;-

> " The power to strike out should be exercised after the court has considered all the facts but it must not embark on the merits of the case itself as this is solely reserved for the trial judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial judge in disposing the case."

17. It was the holding of the Madan, JA, that the power to strike out a pleading which ends in driving a party from the judgement seat should be used very sparingly and only in cases where it is apparent on the face of it that the pleading is untenable.

18. In *Crescent Construction Co. Ltd -vs- Delphis Bank Ltd* [2007] eKLR the Court of Appeal restated the legal principles governing the court's power to strike out pleadings and held as follows;-

> " However, one thing remains clear, and that is the power to strike out a pleading is a discretionary one. It is to be exercised with the greatest care and caution. This comes from the realization that the rules of natural justice require that the court must not drive away any litigant however weak his case may be from the seat of justice. This is a time-honoured legal principle. At the same time, it is unfair to drag a person to the seat of justice when the case purportedly brought against him is a non-starter."

19. My understanding of the holding in *Crescent Construction Co. Lttd -vs- Delphis Bank Ltd* (*supra*) is that where the plaint does not disclose a reasonable cause of action or where the defence is a sham, and does not rise a triable issue, then the court can strike them out.

20. In *Abok James Odera and Associates -vs- John Patrick Machira t/a Machira and Co. Advocates* [2013] eKLR the Court of Appeal held:-

> " This being a first appeal, we are reminded of our primary role as a first appellate court namely to re-evaluate, re-assess and re-analyze the extracts on the record and determine whether the conclusion reached by the learned trial judge are to stand or not and give reasons why."

21. In order to determine this appeal, this court has to determine the question whether the plaint in Limuru SPMCC No. 48 of 2022 did not disclose a reasonable cause of action and whether the defence filed by the appellant to the said plaint was not a sham and raised triable issues.

22. I have carefully considered the grounds pf appeal. I have perused the Record of Appeal and the two applications whose ruling gave rise to this appeal. I have also considered the parties' submissions in the lower court and in this appeal together with the authorities cited.

23. It was the trial magistrate's finding that the appellant was obligated to settle the judgement even though it was a material damage and not a compensation in respect to bodily injury or death as envisaged by Section 10 of the *Insurance (Motor Vehicles Third Party) Act*. I have had the advantage of perusing the insurance policy. The cover issued to the appellant's insured was a comprehensive cover. Under the limits clause, there is a provision in Section 11 that states:-

> " (Liability to third parties-property damage) in respect to any one claim or series of claims arising out of one event.....3,000,000."

24. I find that the respondent's averment that there was an extension of the policy to cover material damage raised a triable issue. A trial needed to be conducted to prove whether an exceptional provision was made to cater for material loss incurred by third parties in the event the appellant's insured was held liable for an accident. The appellant further stated in paragraph 7 of it's defence:-

> " The defendant repeats that it was not the insurer of motor vehicle registration no. KCD xxxx at the material time and further states that it had no policy of insurance with or covering

Geofrey Otieno Oduor (the defendant in Limuru SPMCC No. 61 of 2019) respecting the said motor vehicle number KCD xxxx."

25. It was the appellant's defence that Geofrey Otieno Oduor was not its insured in respect to motor vehicle registration number KCD xxxx. A look at the insurance policy reveals critical differences in the information. Under the policy, the insured person is Owuor Godfrey Otieno. The motor vehicle covered is motor vehicle registration no. KCD xxxx and not KCD xxxx. The insurance policy number is AN807/0003xxx/000/00. The trial magistrate, in dismissing the appellant's case that it had a defence that raised triable issues because of the differing names, chose to agree with the respondent's advocates that they relied on the police abstract which abstract indicated the insured names as Geofery Otieno Oduor and the motor vehicle in question as KCD xxxx. I have duly noted that in its pleadings and even at the beginning of the ruling, the subject motor vehicle is referred to as motor vehicle registration No. KCD xxxx. According to the trial magistrate, the respondent was not privy to the policy document and therefore solely relied on the police abstract and in any event, the description of the defendant in the primary suit was a misnomer. It was the trial magistrate's holding that since the police abstract reveals the particulars of the motor vehicle and the respondent later admitted that the subject motor vehicle had been insured by it, and taking into account the fact that relevant notices had been served upon the appellant, taking into account the totality of the circumstances, the defendant/judgement debtor in the primary suit was the right person, only that his name was wrong.

26. From the record of appeal, it is apparent that the primary suit was heard ex parte. Since the defendant in the primary suit did not appear and defend the suit, it is difficult to confirm if the person served was the insured. I am persuaded by the fact that the discrepancies in respect to the description of the defendant in the primary suit are also contained in the statutory notice that was sent to the appellant. The uncertainty as to whether the right defendant was sued is evident. After securing judgement against the defendant in the primary suit, the Decree holder levied execution against one Geoffrey Peter Otieno who promptly filed objection proceedings protesting the attachment.

27. At the hearing of the objection to attachment proceedings, the decree holder maintained that Geofrey Otieno Oduor was one and the same person as the person known as Geoffrey Peter Otieno against whom the decree had been executed. Upon hearing the objection, the trial court allowed the proceedings on the basis that the objector was not one and the same person as the Defendant/ Judgement Debtor.

28. I find that the trial magistrate misapplied the holding in *J.B. Kohli And Others -vs- Bachulal Poparlal* [1964] EA 219 where Gabbe J.A. said:-

> " The question is not whom the plaintiff intended to sue but whether a reasonable man reading all the documents in the proceedings before the court and having regard to all the circumstances, would entertain no doubt the defendants were the defendants intended to be sued by the plaintiff. The test must be: How would a reasonable man receiving the document take it? If in all the circumstances of the case and looking at the document as a whole, he would say to himself "of course it must mean me, but they have got my name wrong", then there as a case of mere misnomer. If on the other hand, he would say: "I cannot tell from the document itself whether they mean me or not I shall have to make inquiries", then it seems that one is getting beyond the realm of misnomer. One of the factors which must operate on the mind of the recipient of a document, and which operates in this case is whether or not there is another entity to whom the description 'on the writ refers'."

29. It is my view that if the trial magistrate had properly applied the test laid out by Gabbe JA in the *JB Kholi case*, he would have come to the inevitable conclusion that no reasonable person would conclude that the Geofrey Otieno Oduor sued in the primary suit is one and the same person as the Owuor Godfrey Otieno who was insured by the appellant. There is a strong possibility that the wrong person was sued and served in the primary suit while the rightful defendant, having not received summons to enter appearance, was condemned unheard. At this juncture, I wish to point out that the dilemma facing the court with regard to whether Geofrey Otieno Oduor and Owuor Godfrey Otieno refer to one and the same person notwithstanding the fact that they only have one common name would not have risen if the respondent had taken the simple and requisite step of securing a copy of the records of the subject motor vehicle from the National Transport and Safety Authority(NTSA).

30. In my view, the appellant's contention that the person sued was not their insured in view of the difference in names raised a triable issue. The trial magistrate should have at the very least, allowed the case to proceed to trial so that each party could tender their respective evidence to be tested by cross-examination before making his determination. I therefore find that the trial magistrate erred in striking out the appellant's defence.

31. The appellant's other ground of appeal is that the trial magistrate erred in dismissing its application to strike out the plaint. The respondent's case is that it had a valid decree against the appellant's insured that it had properly served the statutory notices upon the appellant as required by law and that the appellant is under legal obligation to settle the claim on behalf of its insured. Despite the discrepancies in the description of the defendant and the subject motor vehicle in the primary suit, there is a possibility that the discrepancies were a result of inadvertence which can be resolved in a trial.

32. Having held earlier that the insurance policy produced by the appellant is the subordinate court contained a clause that could possibly cover property (read material) damage, I find that the plaint disclosed a reasonable cause of action.

33. The appellant's defence to the respondent's claim was that it was not payable because it was a material claim and hence did not fall within the provision of Section 10 of *Cap 405*. It has been demonstrated through the appellant's own document that the insurance policy had an extension. I find in the circumstances that the plaint discloses a reasonable cause of action to that extent. The court was therefore right in dismissing the application to strike out the plaint.

34. The upshot is that the appellant partially succeeds. I therefore allow the appeal and set aside the whole ruling of the trial of the court delivered on August 2, 2022 and make the following orders in substitution thereof:-

    a. The respondent's notice of motion application dated March 15, 2022 is dismissed and the appellant's statement of defence is reinstated.

    b. I dismiss the appeal against the trial magistrate's decision not to strike out the plaint but set aside the judgement entered in favor of Respondent.

35. I hereby order and direct that Limuru SPMCC No. 48 of 2022 do proceed to full hearing. Each party shall bear their own costs of the appeal.

36. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAKAMEGA THIS 12TH DAY OF JULY 2024.

A. C. BETT

JUDGE

In the presence of:

Mr. Odongo holding brief for Mr. Mege for the appellant

Mr. Njagi for the respondent

Court Assistant: Polycap Mukabwa