



Britam General Insurance Co. Ltd v VM (Minor Suing Thro' His Next Friend and Uncle EKR) (Civil Appeal E038 of 2023) [2024] KEHC 8279 (KLR) (4 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8279 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CIVIL APPEAL E038 OF 2023
WA OKWANY, J
JULY 4, 2024**

BETWEEN

BRITAM GENERAL INSURANCE CO. LTD APPELLANT

AND

**VM (MINOR SUING THRO' HIS NEXT FRIEND AND UNCLE
EKR) RESPONDENT**

(Being an Appeal from the Ruling/Order in the Principal Magistrate's Court at Keroka PMCC No. E068 of 2023 delivered by Hon. B.M. Kimtai, Principal Magistrate on 25th July 2023)

JUDGMENT

1. The Respondent herein was the Plaintiff before the trial court in Keroka SPMCC No. 233 of 2016 (hereinafter "the Primary Suit") seeking compensation for damages arising out of a road traffic accident that occurred on 12th July 2016. The Respondent's case in the primary suit was that he was on 12th July 2016 walking along Keroka-Sotik Road when at Masimba Junction, the Appellant's insured's motor vehicle registration No. KBT 801C-ZC 9261 veered off the road and knocked him down as a result of which he suffered serious injuries.
2. The trial court heard the primary suit and at the end, entered judgment for the Respondent as follows: -
General Damages - Kshs. 128,800/=
Interest – Kshs. 51,090/=
Costs – Kshs. 70,308/=
Total – Kshs. 250,198/=
3. After securing judgment in the primary suit, the Respondent sued the Appellant herein in Keroka PMCC No. E068 of 2023 (hereinafter "the Declaratory Suit") seeking orders, inter alia, for a



- declaration that the Appellant was bound to settle the decretal sum awarded in the primary suit on the basis that it had insured the motor vehicle that caused the accident.
4. The Respondent's case was that the Appellant was liable to settle the decretal sum awarded to him in the primary suit as it had insured the suit motor vehicle and further, that he had served the Appellant with the requisite Statutory Notice under Section 10 of Motor Vehicle Third Party Risks Act Cap. 405 of the Laws of Kenya (hereinafter "the Act").
 5. The Appellant denied the Respondent's claim through its Statement of Defence dated 6th May 2023 wherein it denied all the allegations contained in the plaint. At paragraphs 4 and 6 of the said the defence, the Appellant specifically averred that it did not insure the subject motor vehicle and further, that it was not served with the statutory notice pursuant to the provisions of Section 10 (1) of Cap. 405 Laws of Kenya.
 6. The Respondent however filed an Application dated 9th June 2023 seeking, inter alia, orders for the striking off of the Appellant's said defence and the entry of judgment for the amount awarded in the primary suit. The Respondent's case was that the defence did not raise any triable issues and was an abuse of the court process as the Appellant was duty bound to satisfy the judgment in the primary suit.
 7. The Appellant opposed the Respondent's said application through the following Grounds of Opposition: -
 - a. That the Application was premature and bad in law and an abuse of the process, frivolous and vexatious and should be struck out with costs of to the Defendant/ Respondent.
 - b. That the Application was an afterthought made in bad faith.
 - c. That the Application prejudiced the defendant and is against the principles of fair play.
 - d. That the defence herein raises triable issues which the Defendant should be allowed to ventilate at trial.
 - e. That the defence raised issues which should be ventilated at trial and not at the interlocutory stage.
 - f. That the Application was an end in itself and the same be dismissed with costs to the defendant.
 8. In a Ruling rendered on 25th July 2023, the trial court allowed the Respondent's Application and struck out the Appellant's Statement of Defence. The trial court also entered judgment for the Respondent for the decretal sum awarded in the primary suit together with costs of the Application.
 9. The trial court's said decision in respect to the declaratory suit precipitated the filing of the instant appeal in which the Appellant listed the following grounds of appeal: -
 - i. That the learned trial magistrate erred in law and fact by making a declaration that the Appellant be compelled to satisfy the judgment in Keroka PMCC No. E069 of 2023 Evans Kegoya Robare vs. Britam General Insurance Co. Ltd.
 - ii. That the learned trial magistrate erred in law and fact by failing to hold that the Appellant was not properly served with a statutory notice in accordance with Section 10 (1) of the Insurance (Motor Vehicle) Third Party Risks Act, Cap 405 Laws of Kenya.
 - iii. That the learned trial magistrate erred in law and fact by holding the Appellant liable to indemnify the Respondent in respect to the accident which occurred on 12th July 2016.



- iv. That the learned trial magistrate erred in law and fact by failing to dismiss the Respondent's case in view of the documentary evidence on record.
 - v. That the learned trial magistrate erred in law and fact by failing to take into account the Appellant's submissions on record thereby arriving at an erroneous decision.
10. The appeal was canvassed by way of written submissions which I have considered.

The Appellant's Submissions

11. The Appellant highlighted the circumstances under which the court may strike out a defence and submitted that it had a formidable defence that raised several triable issues. According to the Appellant, the trial court could only strike out a defence if it is frivolous, without substance, fanciful and vexatious, where it is brought in bad faith and is intended to embarrass or delay a fair trial. Reference was made to the decision in *Kenindia Assurance Co. Ltd vs. Laban Idiab Nyamache (2011) eKLR Kisii, HCCA No. 141 of 2009* where the High Court held that striking out a defence was such a drastic remedy that required good reasons before it could be effected.

The Respondent's Submissions

12. The Respondent, on the other hand, submitted that, the Appellant's Statement of Defence did not raise any bona fide triable issues and that the trial magistrate properly considered all the evidence before it and exercised his discretion in striking out the Appellant's Statement of Defence. The Respondent cited the decision in *Mathew Adams Karauri vs. Zablon Mathenge Itewa (2018) eKLR* and Order 2 Rule 15 of the Civil Procedure Rules wherein the principles governing the striking out of pleadings were outlined.

The Duty of the Court

13. In *Abok James Odera & Associates vs. John Patrick Machira t/a Machira & Co. Advocates Civil Appeal No. 161 of 1999*, the Court of Appeal held thus: -

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

14. The main issue for my determination is whether the Appeal is merited.

Analysis and Determination

15. Order 2 Rule 15 of the Civil Procedure Rules 2010 stipulates as follows on the striking out of pleadings:

- (1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that -
 - (a) It discloses no reasonable cause of action or defence in law; or
 - (b) It is scandalous, frivolous or 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 judgment to be entered accordingly, as the case may be.

16. In *Coast Projects Ltd vs. M.R. Shah Construction (K) Ltd* (2004) K.L.R 119 at page 122 the Court of Appeal held as follows:-

“The Plaintiff is entitled to proceed with an application for striking out a defence with the consequential entry of judgement for liquidated claim in situations where the defence is frivolous and or vexatious. It is a procedure, which is intended to give a quick remedy to a party which is being denied its claim by what may be described as a sham defence. This is, however, a procedure which is to be resorted to in very clear and plain cases. A mere denial is not sufficient defence in most cases.”

17. Courts have taken the position that striking out of pleadings involves exercise of discretion which should be exercised sparingly and only in the clearest of cases. This means that where there is doubt, the court should allow parties to have their day in court. In *Postal Corporation of Kenya vs. I.T Inamdar & 2 Others* [2004] 1 KLR 359, the court stated that: -

“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.”

18. In the *Co-operative Merchant Bank Ltd. Vs. George Fredrick Wekesa* (Civil Appeal No. 54 of 1999) the Court of Appeal stated:

“Striking out a pleading is a draconian act, which may only be resorted to, in plain cases...Whether or not a case is plain is a matter of fact...Since oral evidence would be necessary to disprove what either of the parties says, the appellant’s defence cannot be said to present a plain case of a frivolous, scandalous, vexatious defence, or one likely to prejudice, embarrass or delay the expeditious disposal of the respondent’s action or which is otherwise an abuse of the process of the court.”

19. In *Yaya Towers Limited vs. Trade Bank Limited (In Liquidation)* (Civil Appeal No. 35 of 2000) the same court expressed itself thus:

“A plaintiff (defendant) is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant (plaintiff) can demonstrate shortly and conclusively that the plaintiff’s claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court, it must be allowed to proceed to trial...It cannot be doubted that the Court has inherent jurisdiction to dismiss that, which is an abuse of the process of the Court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved.”

20. Similarly, in *D.T. Dobie & Company Kenya Limited vs. Joseph Mbaria Muchina & Another* [1980] eKLR, Madan JA, stated:

“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. If a suit shows a mere semblance of a cause of action, provided



it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”

21. The principle that emerges from the above cited decisions is that the court’s discretion to strike out pleadings should be exercised in a sparing manner and only in clear and plain cases where such pleadings are frivolous or a sham. In the present case, the exercise of such discretion required the trial court to consider if the Statement of Defence filed by the Appellant raised a prima facie triable issue. The court of Appeal discussed what constitutes a triable issue in *Olympic Escort International Co. Ltd. & 2 Others vs. Parminder Singh Sandhu & Another* [2009] eKLR, and held as follows:-

“It is trite that, a triable issue is not necessarily one that the defendant would ultimately succeed on. It need only be bona fide.”

22. I have perused the Appellant’s Statement of Defence filed in the declaratory suit and I note that in the said Defence, the Appellant not only denied the allegation that he was served with the statutory notice under Section 10 of the Act but also denied the claim that it was the insurer of the motor vehicle that caused the accident in question. The question that begs an answer is whether the Appellant’s Defence in the declaratory suit can be said to have been frivolous and did not raise any triable issues.
23. My finding is that the Statement of Defence in the declaratory suit was not frivolous or vexatious. The Defence raised critical triable issues of service of the statutory notice and whether the Appellant insured the accident motor vehicle. To my mind, the issues raised in the Appellant’s said defence could only be determined after hearing the parties in the declaratory suit. I therefore find that the trial court misdirected itself in striking out the Appellant’s defence without according the Appellant a hearing contrary to the adage that no man shall be condemned unheard.
24. For the above reasons, I find that the instant appeal is merited and I therefore allow it and direct that the declaratory suit be heard on its own merits. The costs of this appeal shall abide the outcome of the declaratory suit.
25. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA VIRTUALLY VIA MICROSOFT TEAMS THIS 4TH DAY OF JULY 2024.

W. A. OKWANY

JUDGE

