**CIC General Insurance Co Ltd v Ndung'u (Suing as the Personal Representative of the Estate of Stephen Ndung'u Burungu) (Civil Appeal 132 of 2020) [2024] KEHC 9433 (KLR) (24 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9433 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAKURU**

**CIVIL APPEAL 132 OF 2020**

**HI ONG'UDI, J**

**JULY 24, 2024**

**BETWEEN**

**CIC GENERAL INSURANCE CO LTD ..... APPELLANT**

**AND**

**GATHONI NDUNG'U ..... RESPONDENT**

**SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF STEPHEN NDUNG'U BURUNGU**

***(Being an appeal from the Ruling/Order of Honourable E. Kelly Senior Resident Magistrate in Nakuru CMCC No. 107 of 2019 delivered on 21st August, 2020)***

## JUDGMENT

1. CIC General Insurance Co. Ltd the appellant is the defendant in the lower court, while Veronicah Gathoni Ndung'u (suing as the personal representative of the estate of Stephen Ndung'u Burungu) the respondent is the plaintiff.

2. The parties appeared before the trial Magistrate on 14th February, 2020 to confirm filing of submissions with respect to the Notice of Motion dated 15th April, 2019, and filed by the respondent's advocates on 24th April, 2019. The application was heard by way of written submissions and a Ruling delivered virtually on 30th April, 2020 dismissing the application without any orders as to costs.

3. It is the said ruling that is the subject of this Appeal, which has raised the following grounds:

    i. That the learned magistrate erred in law and fact in allowing the plaintiff's/respondent's application dated 13th day of May 2020 (sic) as prayed for, thereby entering judgment on admission in the absence of clear and unequivocal admission of liability by the appellants

herein and despite having in an earlier ruling acknowledged the existence of triable issues beyond the mere fact of cover warranting the matter to proceed for full trial

ii. That the learned magistrate erred in law by failing to appreciate and/or apply the principles governing the grant or entry of judgment on admission.

iii. That the learned magistrate erred in law and fact in failing to consider existence and pendency of an appeal, Nakuru HCCA Number 26 of 2019 challenging the judgment of the primary suit and which had material bearing on the matter thus coming to an erroneous decision that is preemptive of the said appeal amongst others.

iv. That the learned magistrate's exercise of discretion in her subject Ruling was plainly capricious and unwarranted both in law and fact and it failed to appreciate that the fact that the appellant was on cover respecting the relevant motor vehicle was only one of the triable issues but not necessarily the most important and decisive issue that the court would try at the hearing.

v. That the learned magistrate erred and misdirected herself in law in failing to consider the submissions of the appellant herein and only adopting the submissions of the plaintiff/ respondent thus coming leading to a ruling/order that is not in conformity with the legal principles.

vi. That in the absence of unequivocal admission of liability on the part of the appellants herein, the learned magistrate erred in law and fact in making a finding that ultimately denied the appellant's right to be heard contrary to the principles of natural justice.

4. The Appeal was canvassed by way of written submissions.

**The appellant's submissions**

5. The submissions were filed by Sheth & Wathigo Advocates and are dated 30th August, 2022. Counsel relied on the grounds of appeal and argued the grounds together. On grounds one and two counsel cited Order 13 Rule 2 of the Civil Procedure Rules which deals with admission of facts provides as follows:

> "Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the court may upon such application make such order, or give such judgment, as the court may think just."

6. Counsel relied on several cases among them *Choitram V Nazari Civil Appeal No. 8 of 1982*, Ideal Ceramics Limited V Suraya Property Group Ltd Civil Appeal No. 2016, and Synergy Industrial Credit Limited V Oxyuplus International Limited & 2 others Civil case No. E077 of 2021 which both discussed admission of facts in accordance with Order 13 Rule 2 of the Civil Procedure Rules.

7. Counsel referred to pages 7 and 8 of the record of appeal showing the statement of defence filed by the appellant indicating that the ownership and insurance of motor vehicle registration number KCA 12J/ ZE 8327 are denied and service of the competent statutory notice was also challenged. He submitted that the appellant has raised objections that go to the core of the respondent's case and the court in exercising its discretion should not pass a decree in favour of the respondent which would result in an injustice. In Synergy Industrial Credit Limited V Oxyuplus International Limited & 2 others (supra) Mativo J expressly himself as follows: first, it is wholly inappropriate to permit any party to employ provision of Order 13 Rule 2 where vexed and complicated questions or issues of law have arisen.

Secondly, the rule invests discretion to the court if there is an unequivocal admission by a party but the passing of a judgment would cause injustice, the judgment ought to be declined. Third, where the defendants have raised objections that go to the very core of the case, it would not be proper to exercise this discretion and pass a decree in favour of the plaintiff. But the rule is not intended to apply where there are serious questions of law to be asked and determined. Likewise, where specific issues have been raised in spite of admission on the part of the defendants the plaintiff would be bound to lead evidence on those issues and prove the same before he becomes entitled to the decree and the plaintiff in the event cannot have a decree by virtue of provision of Order 13 Rule 2 without proving those issues.

8. On ground three, counsel referred to pages 56 to 60 of the record of appeal citing the ruling where it referred to appeal Nakuru HCCA No. 26 of 2019 on two occasions and the trial court mentioned Nakuru HCCA No. 26 of 2019 in by passing. There is nowhere stated in the ruling that the trial court analyzed the application dated 13th May, 2020 and considered the implication of the ruling in appealNakuru HCCA No. 26 of 2019 challenging the judgment of the primary suit which had material bearing on Nakuru CMCC No. 107 of 2019. It is submitted that the trial court acknowledged the existence and pendency of the appeal in Nakuru HCCA No. 26 of 2019, but failed to consider it while arriving at its outcome which was not only erroneous but pre-emptive of the said Appeal.

9. On grounds four and six, counsel referred to pages 56 to 60 of the record of appeal, the ruling of the learned magistrate, and noted from the judgment obtained in the primary suit (Nakuru CMCC No. 1008 of 2016) that the defendant in the said suit is the insured of the defendant in Nakuru CMCC No. 107 of 2019 and the trial court noted that the said defendant covered David Mwangi in respect of motor vehicle registration number KCA 12J/ZE 8327 in the course of its business in or around the year 2015 when the accident subject to the primary suit is alleged to have occurred. Counsel submitted that the appellant had a cover regarding the subject motor vehicle which was one of the triable issues that the court would try at the hearing. Even if it was the only triable issue, the trial court in the circumstances would have been required to accord the appellant an opportunity to ventilate the same in its defence and allow the application. The trial court did condemn the appellant unheard contrary to the principles of natural justice. Counsel relied on the case of *Madison Insurance Company Limited V Augustine Kamande Gitau Civil Appeal No. 123 of 2018* where the court held that:

> "It must be clear that the defence filed by the appellant disclosed at least one triable issue regarding the issue whether the person against the judgment in the primary suit was obtained was a person insured by the policy. Therefore, the decision striking out the Appellant's defence and entering judgment was improper".

10. On ground five, it is submitted that the appellant has demonstrated that the learned trial magistrate failed to consider the appellant's submissions as she considered the principles of judgment on admission and noted that the admission was not intended to apply where there exist serious questions of law to be determined where specific issues have been raised despite admission on the part of the defendant. That the respondent was bound to give evidence on those issues and prove the same before he could become entitled to the decree.

11. Counsel submitted that the appeal has merit and the same should be allowed by setting aside the ruling of 21st August, 2020 and substitute it with the decree allowing the appellant's claim.

**The respondent's submissions**

12. These were filed by Kiyondi Nyachae Advocates and are dated 14th September, 2022. Counsel identified two issues for determination namely; whether this appeal is incompetent for want of leave of

court, and whether judgment upon admission entered against the appellant by the learned magistrate was merited.

13. On the first issue, counsel referred to pages 11 and 12 of the record of appeal which challenges the ruling dated 21st August, 2020 whose application was brought under Order 13 Rule 2 of the Civil Procedure Rules 2010, sections 1A, 1B and 3A of the *Civil Procedure Act*, sections 10 of the Insurance (Motor Vehicle Third Party Risks) Act and all enabling laws. In the ruling, the trial court entered judgment on admission against the appellant underOrder 13 Rule 2 and Order 43 Rule 1(2) of the Civil Procedure Rules. Order 43 Rule 1(2) of the Civil Procedure Rules which provides that an appeal shall lie with the leave of court. Counsel orally sought leave to appeal after the ruling was delivered on 21st August, 2020 but the same was not issued. He referred to page 54 of the record of appeal.

14. Counsel submitted that Order 43 Rule 1(3) of the Civil Procedure Rules provides that leave to appeal may be sought within 14 days from the date the order was made. He argued that the appellant did not file a formal application seeking leave to appeal under the said provision and within the time provided. In this case, the appeal was filed without leave of court as demonstrated and he submitted that the appeal is fatally incompetent ab initio, and therefore this Court lacks jurisdiction to hear and determine it.

15. Counsel relied on the case of Lucy Wanjiku Nyaga v James Mwaniki Munyi & another (2018) eKLR where the court held that:

> " Without leave of court, there can be no valid notice of appeal and without a notice of appeal, the jurisdiction of this court is not properly involved. In short, the application for stay is an intended appeal against an order that is appealable only with leave for which leave has been sought. In this case, it cited the case of Kakuta Maimai Hamisi vs Peris Pesi Tobiko & 2 others [2013] eKLR the court observed that the right of appeal goes to jurisdiction and is so fundamental that we are unprepared to hold that absence of statutory donation or conferment is a mere procedural technicality to be ignored by parties or a court by pitching tent at Article 159(2) (d) of *the Constitution*. We do not consider Article 159(2) (d) of *the Constitution* to be a panacea, nay, a general whitewash, that cures and mends all ills, misdeeds, and defaults of litigation".

16. On the second issue, counsel argued that to succeed in the appeal, the appellant needed to prove that the learned magistrate did not exercise her discretion judiciously. In seeking to demonstrate that the appellant had failed to meet the standard counsel cited the case of Mbogo & Another vs Shah [1968] EA 93 at 96 where the court held:

> " ..... a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been wrong in the exercise of his discretion and that as a result there has been mis-justice".

17. Counsel referred to pages 44 to 46 of the record of appeal relying on and reiterating the respondent's submissions made before the trial court dated 16th June, 2020. On page 3 of the appellant's submissions dated 30th August, 2020, the statement of defence denies ownership of motor vehicle KCA 112J and service of the statutory notice, therefore, the trial court should not have passed the decree in favour of the respondent.

18. Counsel referred to pages 16 to 21 of the record of appeal and argued that the appellant did not disclose admissions made before the trial court through its notice of motion dated 20th May, 2019 and was therefore guilty of material non-disclosure. It is submitted that the omission was deliberate and aimed at misleading this Court. Counsel also referred to page 59 of the record of appeal where the learned magistrate made a finding that the appellant through the affidavit of Erastus Mbaka admitted to be the insurer of the motor vehicle of KCA 112J/ZE8317 owned by David Mwangi and that Tom Mutei & Co. Advocates was appointed to defend Nakuru CMCC No. 1008 of 2016 thus it had notice of the original suit.

19. It is contended that the learned magistrate did not consider the effect of Nakuru HCCA No. 26 of 2019 and the issue was not raised before the trial court for consideration and it amounted to changing its case on appeal which is untenable. Counsel submitted that there was no active stay of execution order at the material time and it is not in dispute that the existence of the Appeal itself did not affect the decision of the learned magistrate according to the provisions of Cap 405 section 10 (1) (2) (b). Counsel argued that the only issue that can be raised is if there was an active stay of execution order in place and that the trial court cannot be blamed for exercising its discretion judiciously. Counsel therefore urged this Court to find that the appeal lacks merit and should be dismissed with costs.

**Analysis and determination**

20. This is a first appeal and this court has a duty to re-evaluate and re-consider the evidence on record to arrive at its own conclusion. It has to bear in mind that it did not see nor hear the witnesses and hence give an allowance for it. See Selle V Associated Motor Boat Company Ltd [1968] EA 123 and Kenya Posts Authority V Kuston (Kenya) Ltd [2009] 2 EA 212.

21. This Court has carefully considered the evidence on record, the grounds of appeal, both parties' submissions, and the law, and finds two issues falling for determination namely:

    i. Whether the appellant's statement of defence raised triable issues according to the application dated 15th April, 2019

    ii. Whether the trial magistrate erred in striking out the appellant's statement of defence.

    iii. Who should bear the costs of the appeal?

22. On the first issue, the Black's Law Dictionary 9th Edition defines triable as "subject or liable to judicial examination and trial". In the case of Patel V E.A Holdings Services Ltd (1974) E. A 75 the court explained what amounts to a triable issue. In Job Kilach vs Nation Media Group Ltd, Salaba Agencies Ltd & Michael Rono [2015] eKLR, the Court of Appeal posited summary judgment as follows: -

> " Before the grant of summary judgment, the court must satisfy itself that there are no triable issues raised by the defendant, either in his statement of defence or in the affidavit in opposition to the application for summary judgment or in any other manner. What then is a defence that raises no bona fide triable issue? A bona fide triable issue is any matter raised by the defendant that would require further interrogation by the court during a full trial. The Black's Law Dictionary defines the term "triable" as, "subject or liable to judicial examination and trial". It therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the Court."

23. In the instant case, the respondent filed an application dated 15th April, 2019 seeking the statement of defence to be struck out and a summary judgment for the liquidated sum of Kshs. 2,023,861/= being the decretal sum and costs in Nakuru CMCC No. 1008 of 2016 together with the accrued interest as of

26th October, 2018 being the date of judgment thereof be entered against the appellant. The appellant in its response vide a replying affidavit through its senior legal officer stated that it had instructed the firm of Tom Mutei & Company Advocates to defend the appellant. It happened that a consent was entered into without the appellant's instructions thus leading to the admission of judgment on the part of the appellant as per Order 13 Rule 2 of the Civil Procedure Rules.

24. Dissatisfied with the judgment in Nakuru CMCC No.1008 of 2016 an appeal was lodged by the defendants vide Nakuru HCCA No. 26 of 2019. The 1st appellant therein David Mwangi was insured by the appellant in this Appeal. Nakuru CMCC No. 1008 of 2016 was the original suit while Nakuru CMCC No. 107 of 2019, the subject of this Appeal was the declaratory suit.

25. The Judgment (which is before this court) in Nakuru HCCA No. 26 of 2019 was delivered on 10th November, 2022 by Justice H. Chemitei. The out come of the said Appeal is as follows:

> "In the premises the appeal is allowed, the trial court's Judgment set aside with all the consequential orders. The lower court matter shall proceed afresh before another court other than E. Kelly".

26. The purpose of a declaratory suit is to compel the Insurance Company to satisfy the decretal amount awarded. In the present scenario the Judgment that gave rise to the declaratory suit was set aside.

27. The trial Magistrate in Nakuru CMCC 107 of 2019 was very well aware of the original suit whose decision was being challenged vide HCCA No. 26 of 2019, as she is the one who had dealt with it. She even made reference to it in her Ruling of 21st August, 2020. There was no need of rushing with the said matter before the determination of the said Appeal whose decision would be binding on her.

28. The respondent herein raised issue with the failure by the appellant to seek leave before filing the Appeal as required under Order 43 Rule 1(2) of the Civil Procedure Rules. The record of appeal at pg 54 shows that indeed the appellant sought stay of execution and leave to file appeal upon delivery of the ruling on 21st August 2020. The respondent's counsel did not object to the stay of execution but did not say anything about the leave sought. The trial court then made an order granting stay of execution but did not say anything about the request for leave to file appeal. It therefore remained hanging.

29. The issue of leave aside, whether an Appeal was filed or not, there is no way the decision in Nakuru CMCC 107/19 would be left to stand in view of the Judgment in HCCA No. 26/2019.

30. I therefore allow the Appeal and set aside the Judgment and all consequential orders in Nakuru CMCC No. 107/2019. The said matter shall be placed before the Chief Magistrate Hon. Elizabeth Juma for allocation before another Magistrate other than Hon. E. Kelly for hearing and determination.

31. Each party to bear its own costs of the appeal.

32. Orders accordingly

**DELIVERED VIRTUALLY DATED AND SIGNED THIS 24TH DAY OF JULY, 2024 IN OPEN COURT AT NAKURU.**

**H. I. ONG'UDI**

**JUDGE**