



**Directline Assurance Company Limited v Yatich (Civil Appeal
E099 of 2022) [2024] KEHC 10601 (KLR) (22 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 10601 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E099 OF 2022
CJ KENDAGOR, J
JULY 22, 2024**

BETWEEN

DIRECTLINE ASSURANCE COMPANY LIMITED APPELLANT

AND

JAMES KIBICHII YATICH RESPONDENT

JUDGMENT

1. This Judgment relates to the memorandum of appeal dated 23rd May, 2022. It is an appeal from the ruling delivered on 11th May 2022 at the Senior Magistrate's Court at Limuru by Honourable I. F. Koome, Resident Magistrate, in Limuru Senior Resident Magistrate's Court Civil Case No. E592 of 2021: *James Kibichii Yatich v Directline Assurance Company Limited*.
2. The impugned ruling allowed an application dated 28th January, 2022, which prayed for the striking out of the appellant's defence and entry of judgment in favour of the respondent herein. The suit (E592 of 2021) is a declaratory suit anchored on a decree issued in Limuru CMCC E393 of 2021 for special damages of Kes. 98,742/= awarded in favour of the respondent and as against the appellant's insured.
3. The appeal is based on the grounds that:
 1. The learned trial magistrate erred in law and fact by striking out the appellant's statement of defense and thus denying the appellant a chance to canvass their defence on a full trial.
 2. The learned trial magistrate erred in law and fact by striking out the appellant's statement of defence when the same was not vexatious and scandalous, and raised triable issues in law.
 3. The learned trial magistrate erred in law and fact in failing to consider and appreciate the appellant's replying affidavit in response to the respondent's application to strike out the defence.



4. The learned trial magistrate erred in law and fact in taking a draconian measure by striking out the appellant's statement of defence when the circumstances did not call for such a measure.
 5. The learned trial magistrate overlooked the appellant's replying affidavit, and misconstrued the legal principles for striking out pleadings, thereby taking an improper course of striking out the appellant's statement of defence in the presence of triable issues and analyzing the merits of the case without first hearing the parties.
 6. The learned trial magistrate erred in fact and law in disregarding the provisions of sections 4 and 5 (b) of the *Insurance (Motor Vehicle Third Party Risks) Act* and the fact that there was a breach of the policy by the respondent for non – payment of policy excess which were pleaded as a defence in the statement of defence, the appellant's replying affidavit in response to the respondent's application to strike out the defence.
 7. The learned trial magistrate erred in fact and in law in failing to appreciate or consider the appellant's submissions.
4. The appeal was canvassed by way of written submissions. The appellant filed written submissions dated 15th May, 2024, and the respondent's submissions are dated 17th May, 2024.

Analysis and Determination:

5. I have carefully considered the grounds of appeal, the record of appeal, and the rival submissions by the parties before this court.
6. The issue for determination can be condensed to one question: whether the trial court erred in striking out the appellant's statement of defence. In the ruling, the trial court struck out the defence because it is mere denial and does not raise a triable issue. The trial court, in making its decision, relied on Order 2 Rule 15 of the *Civil Procedure Rules*, which clothes the court with powers to issue the orders sought. It provides as follows;

“(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.
- b. Its scandalous, frivolous or vexatious; or
- c. It may prejudice, embarrass or delay the fair trial of the action; or
- d. It's otherwise an abuse of the Court process and may order the suit be stayed or dismissed or judgment to be entered accordingly as the case may be.”

7. The object of striking out pleadings is to avoid unnecessary litigation over claims/defences which are bound to fail. It is well settled in law that striking out pleadings is a draconian measure that courts should employ very cautiously and sparingly and only in the clearest of cases.
8. In the case of *Saudi Arabian Airlines Corporation V Premium Petroleum Company Ltd* [2014] eKLR the Court of Appeal held that:

“I need not re-invent the wheel on the subject of striking out a defence. A great number of judicial decisions have now settled the legal principles which should guide the Court in determining whether to strike out a pleading. The power to strike out a suit or defence



should be used sparingly and only on the clearest of cases where the impugned pleading is “demurer of something worse than a demurer” beyond redemption and not curable by even an amendment. Thirdly, in case of a defence, the court must be convinced upon looking at the defence, that it is a sham; it raises no bona fide triable issue worth a trial by the court. And a triable issue need not be one which will succeed but one that passes the Shedridan J Test in *Patel v E.A. Cargo Handling Services LTD.* [1974] EA 75 at p. 76 (Duffus P.) that

“... a triable issue... is an issue which raises a prima facie defence and which should go to trial for adjudication.” Therefore, on applying the test, a defence which is a sham should be struck out straight away.”

9. The Respondent’s application was made under the whole of Rule 15 (1) (a), and from the reading of the Ruling delivered on 11th May, 2022, the trial court made a finding that the statement of defence was conventional, that it was full of denials and raised no triable issues. This falls under Order 2 Rule 15 (2) which states as follows:

(2) No evidence shall be admissible on an application under sub-rule (1) (a) but the application shall state concisely the grounds on which it is made.

10. The above provision envisages that for a court to strike out pleadings under this sub-rule, it should be able to make such a finding from plain reading of the pleadings and without having to call evidence for it.

11. The question is whether the defence raised bona fide triable issues. In *National Social Security Fund Board of Trustees v Protection Custody Limited* (Civil Appeal E311 of 2021) [2024] KEHC 2549 (KLR) (12 March 2024) (Judgment), Njagi J. held as follows;

“The Respondent herein combined prayers where evidence was required to be called with one that does not require evidence to be called. The court seems to have relied on rule 15 (1) (a) to strike out the defence. The trial magistrate in the matter considered the affidavit evidence to hold that the defence did not raise triable issues. The court erred in that respect. The appeal should be allowed for that reason.”

12. The statement of defence dated 25th January, 2022 denied the claim and raised several issues, among them that the claim in Limuru Civil Case No. E393 of 2021: *James Kibichii Yatich v Moses Njoroge & Another* was a material damage claim and which claim is not provided for under Section 4 and 5 (b) of the *Insurance Motor Vehicle (Third Party Risk) Act* Cap 405b Laws of Kenya. That the claim is not among the claims anticipated and provided for under Sections 4 and 5 (b) of the *Insurance Motor Vehicle (Third Party Risk) Act* Cap 405 Laws of Kenya and further that the claim was repudiated for non-payment of the policy excess by the insured as such the defendant denies being liable to satisfy any decretal amounts arising out of the alleged policy.

13. In this case, the respondent argued the grounds cumulatively in the supporting affidavit sworn on 28th January, 2022 and the submissions dated 22nd February, 2022 supporting the application. The finding of the trial court was made under Order 2 Rule 15 (1) (a). The substance of the ruling and the proceedings thereto considered matters of evidence, and the trial court analyzed the case’s merits through an application without hearing the parties.

14. If it were a mere denial, there would be no need to interrogate the defence as the trial court was invited to.



15. In the case of *Giciem Construction Company v Amalgamated Trade & Services* LLR No.103 CAK, which was quoted with approval in *Job Kilach v Nation Media Group Ltd, Salaba Agencies Ltd & Michael Rono* (2015) eKLR it was held:

“....A triable issue is said to exist if there is a dispute in the facts, which dispute can only be resolved after ventilation in a full hearing. As a general principle, where a defendant shows that he has a fair case for defence or reasonable grounds for setting up a defence or even a fair probability that he has a bona fide defence, he ought to have leave to defend.”
16. Striking out the statement of defence denies the appellant an opportunity to be heard on the issues raised, which should have gone to trial and interrogation. The trial court failed to properly consider the principles that should guide a court in striking out of pleadings.
17. The memorandum of appeal raised additional ground for appeal regarding the provisions of Sections 4 and 5 (b) of the *Insurance (Motor Vehicle Third Party Risks) Act*. The parties also extensively submitted on it; however, since the issue is based on the case's merits, this court will not delve into it.
18. In light of the foregoing, I find merit in the appeal and reinstate the statement of defence dated 25th January, 2022. The ruling and order dated 11th May, 2022 and the consequential orders are hereby set aside, and the lower court file shall be remitted back to Limuru Chief Magistrates Court for hearing and determination on merit.
19. The respondent shall bear the costs of this appeal.
20. It is so ordered.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 22ND DAY OF JULY, 2024.

C. KENDAGOR

JUDGE

Judgment delivered through the Microsoft Online Platform.

In the presence of:-

Court Assistant – Hellen

Advocate for Appellant – Kabit (Present)

Advocate for Respondent – Nyakweba (Present) – holding brief for Njagi, Advocate

