



Directline Assurance Co Ltd v Wanjiru (Suing as the next friend to the minor, WC) (Civil Appeal E529 of 2023) [2024] KEHC 13121 (KLR) (Civ) (9 October 2024) (Judgment)

Neutral citation: [2024] KEHC 13121 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
CIVIL APPEAL E529 OF 2023
AM MUTETI, J
OCTOBER 9, 2024

BETWEEN

DIRECTLINE ASSURANCE CO LTD APPELLANT

AND

**VIANGA WANJIRU (SUING AS THE NEXT FRIEND TO THE MINOR,
WC) RESPONDENT**

*(Being an appeal against the Ruling of Hon. S.A OPANDE (MR) PM
delivered on 22nd May 2023 in Nairobi CMCC NO. E579 of 2022)*

JUDGMENT

Introduction

1. The appellant is aggrieved by the decision on the Learned Honourable magistrate striking out his defence for being a mere denial.
2. The appellant has raised 7 grounds of appeal as hereunder; -
3. The issue that arises from the grounds are;-
 - i. Whether the learned Honourable magistrate properly exercised his discretion in striking out the defence. And,
 - ii. Whether the defence by the appellant raised trial issues thus rendering its striking out illegal and improper.



Analysis

4. The respondent by way of plaint dated the 14th July 2022 sued the appellant seeking to have the appellant satisfy a judgement entered in Kajiado Civil case NO. 98 of 2020; Vihanga Wanjiru Karibu (suing as the next friend of the Minor Dwayne Caleb) Vs. Japeth Kiteme Mwalimu against the said insured for damages in respect of Respondent's personal injuries and consequential loss and damage.
5. The decretal sum in the said matter was for Kshs. 333, 285 as at the time the suit was filed against the appellant.
6. The statement of defense to the suit the appellant was struck out as being a mere denial prompting this appeal.
7. The position taken by the Courts in a myriad of decisions is that the power to strike out pleadings, awesome as it is, must be exercised sparingly and in the clearest of cases.
8. It is a drastic remedy that has the potential of curtailing a party's right to be heard which is sacrosanct under our constitutional architecture.
9. The right to a fair hearing being one of the non derogable rights under Article 25 of *the Constitution* must be closely guarded by all those that are tasked with the resolution of disputes.
10. The Court before rendering itself on an application to strike out a defence, it must consider and satisfy itself that the defence raises no triable issue from a plain reading of it.
11. In *Misort Africa Ltd Vs. P.S National Treasury and Planning & Another* [2020] eKLR the Court had this say;-

“The key consideration in determining an application to strike out a Defense is the consideration as to whether the said Defense raises triable issues. In the case of *JOB KWACH -VS- NATION MEDIA GROUP LTD* it was held 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 raised no bonafide 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 to 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.”

12. If in the opinion of the Court that is called upon to strike out a defence, there appears to be raised of matter in the defence that requires further interrogation, the Court must reject the invitation by the party to strike out the defence.
13. The defendant must be allowed in that case to defend the suit and ventilate the issue at the hearing.
14. It is important to add that from the authority cited it matters not whether the issue raised will succeed.
15. The determination of the merit or otherwise of the issue raised in the defense would only be relevant at the end of the trial of the matter.



16. The judicial officer or trier of the fact would have to pronounce himself on the issue after hearing the evidence by the parties.
17. I have closely examined the statement of the defence that the learned Honourable Magistrate found to be a mere denial and I do not agree with the assessment of the same by the learned Honourable Magistrate.
18. The appellant in the defence raises the issue of not having been aware of the occurrence of the accident giving rise to the suit in Kajiado that led to the judgement she is called upon to satisfy.
19. That in my view is a matter that cannot be dismissed as a mere denial for there would certainly be need to hear evidence on the issue.
20. It would be an injustice to condemn a party to satisfy a judgement whose foundation is disputed without hearing the party on merit.
21. The appellant also denied ever being served with the plaint and statutory notice. This again raises an important question regarding the process leading to the judgement she is called upon to satisfy.
22. The question of service being a matter of fact is a triable issue.
23. Lastly the appellant in paragraph 3 of the defence denied ever insuring the defendant in Kajiado once No. 98 of 2020. Again, this would be an issue of evidence that cannot be summarily determined.
24. The learned Honourable Magistrate in a bid to expeditiously dispense justice forgot the whole important point that justice must not only be done but be seen to be done.
25. The principle requiring a court to determine whether a defense raises a triable issue stems from the need to observe the rules of natural justice before condemning a party.
26. In *Shepherd on others Vs. Others Vs. Union of India* AIR 1988 SC 686 at 693 his Lordship Ranganath Misra, J while dealing with natural justice observed:-

Mullan in fairness: The New natural Justice has stated;-

“Natural justice co-exists with , or reflected , a wider principle of fairness in decision making and that all judicial and administration decision making and that all judicial and administrative decision makers had a duty to act fairly.”

27. The Courts duty to act fairly by allowing the defendant to defend a suit need not be overemphasized. The defendant must be able to leave the Courtroom feeling satisfied that they were fairly heard and the decision to dismiss their defence was fair.
28. In this appeal the appellant has maintained that the issues raised in their defence are not mere denials but substantial issues that require determination through a substantive hearing. I agree.

Conclusion

29. In conclusion therefore the Court finds that the Appeal has merit. The defence by the appellant raises triable issues that call for further interrogation by the Court.
30. The appeal therefore is allowed with costs to the appellant.



31. The defence of the appellant is accordingly reinstated with an order that the matter be fast tracked considering the period that has so far lapsed and in the interest of ensuring the minor gets justice delivered expeditiously.

32. It is so ordered.

DATED, SIGNED AND DELIVERED IN VIRTUAL COURT AT NAIROBI THIS 9TH DAY OF OCTOBER 2024.

A. M. MUTETI

JUDGE

In the presence of:

Kiptoo: Court Assistant

Cooton Absent for the Appellant

Ngigi for the Respondent

