



REPUBLIC OF KENYA



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**CIC General Insurance Company Limited v Ngole (Civil Appeal
69 of 2017) [2023] KEHC 689 (KLR) (9 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 689 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL 69 OF 2017
MW MUIGAI, J
FEBRUARY 9, 2023**

BETWEEN

CIC GENERAL INSURANCE COMPANY LIMITED APPELLANT

AND

ONESMUS MWANZIA NGOLE RESPONDENT

*(Being an Appeal from a Ruling and Judgment dated 11.5.17
Delivered by Hon. I.M Kabuya (Pm) In Machakos CMCC 774 of 2016)*

JUDGMENT

Trial Court Record

1. This Appeal arises out of the Ruling delivered on May 11, 2017 on an application dated on February 6, 2017 brought under Article 159 (2) (b) of the [Constitution](#) of Kenya, Section 1A, 1B and 3A of the [Civil Procedure Act](#) and Order 51 Rule 1 of the [Civil Procedure Rules](#).
2. The Application, the Respondent/Applicant sought the following orders, that;
 - a. The Hon Court be pleased to strike out the Defendant's Defence filed herewith dated January 24, 2017 for being an abuse of the court process
 - b. Upon grant of prayer above, the court be pleased to enter judgment as prayed in the Plaint herein.
 - c. Costs of the application and the suit herein be borne by the Defendant.
3. The Application was supported by the Affidavit of Onesmus Mwanzia Ngole sworn on an even date in which he deposed that on April 18, 2016 along Ngei road Machakos town whilst he had parked his motor vehicle registration number xxxx on the side of the road, the insured's driver drove, managed and/or controlled motor vehicle registration number xxxx that it hit his motor vehicle xxxx thereby



occasioning excessive damage to it. He contended that the motor vehicle had been insured by the Defendant vide policy number xxxx commencing March 14, 2014 expiry on March 13, 2015.

4. He deposed that through his advocate, they issued a demand letter to the insured which letter was copied to the Defendant and after they failed to respond, he filed Machakos CMCC No 265 of 20015 on April 21, 2016. He indicated that he served the Defendant with a statutory notice under Cap 405 Laws of Kenya on April 22, 2015 which the Defendant acknowledged receipt. The case was heard and judgment entered in his favour. He opined that the decretal sum was not settled by the current defendant nor the Defendant in the primary suit and he deposed that under chapter 405 Laws of Kenya, the defendant had no defence to his claim having insured the subject motor vehicle and are duty bound to honour the decree.
5. The Court record indicated that the Defendant filed a Replying Affidavit on April 19, 2017 however the same was expunged from the court records vide a ruling delivered on April 19, 2017 as the court found that the Defendant had deliberately refused to file a response to the application and the reason given for non-compliance was not sufficient.
6. Both parties filed submissions and ruling was reserved for May 11, 2016. The Appellant was allowed to put in submissions on points of law only.

Trial Court Ruling

7. The Plaintiff/Respondent filed Plaintiff on December 7, 2016 against the Defendant/Appellant seeking a declaration that the Defendant is liable to indemnify the Defendant/Insured in Civil Suit 265 of 2015 Onesmus Mwanza Ngele vs Muli Sammy & Leonard Wambua Katela and a consequential order that, the Defendant pays the Plaintiff the decretal amount in the said suit in the sum of Kshs 164,223/- with interest and cost as from October 15, 2015.
8. The Ruling was determined and based on two issues. As to whether the Defendant's defence raised triable issues, the Trial Court analyzed the Defence and found that it consisted of mere denials save for paragraph 7 which appeared contentious hence likely to be a triable issue. The Trial court stated;

' In order to prove their point, the Defendants were required to furnish evidence in their Replying Affidavit that they were not the insurers in respect to the subject matter. The same was not furnished resulting in the court's ruling dated April 19, 2017 that ordered the Defendants; documents filed out of time be expunged from the court records.

Therefore, there was nothing substantive left in the Defence except for mere denials these being despite the fact that a Statutory Notice had been received by them on April 22, 2015; which notice was not responded to. It had to take them over a year to not only deny the alleged policy but also receipt of the statutory notice in question. A lot of resources had already been wasted as a result of the Defendants' delay and it was not for this court to aid them in their slumber.'

9. As to whether the Defendant was liable under Section 10 (1) of the insurance (Motor Vehicle Third Party Risks), the Trial Court found that this section was meant to address a scenario whereby an accident victim would obtain judgment against an insured person but is unable to recover from such an insured the judgment amount because the insured person is indigent. It was noted that the statutory notice bore the Defendant's stamp acknowledging receipt on April 22, 2015 demand letter was issued for payment of the decretal amount in Machakos CMCC 265 of 2015 bearing the Defendant's receipt stamp dated September 30, 2016. The Trial court found that despite being aware of the court proceedings, the Defendant failed to answer.



10. The Trial court found as follows;
 - a. A declaration is hereby made that the Defendant is statutorily bound to settle the decretal sum in Machakos CMCC 265 OF 2015 and to that end, judgment is hereby entered for the Plaintiff against the Defendant for Kshs 164,223 with interest from October 15, 2015 until payment in full.
 - b. The Plaintiff is awarded the costs of the suit.

The Appeal

11. Dissatisfied by this Ruling, the Appellant has filed a Memorandum of Appeal dated May 19, 2017 before this court seeking the following orders, that;
 - a. The ruling and judgment delivered on May 11, 2017 and all subsequent orders and decrees be set aside and /or quashed
 - b. This Court does grant the defendant leave to defend the suit on the merits
 - c. The costs of this Appeal and the application be borne by the Respondent in any event
12. This Appeal is premised on the following grounds;
 - a. The Learned Trial Magistrate erred in law and fact in entering judgment in the Plaintiff's favour on a material damage claim, in disregard of the law on summary procedure, in determining the merits of the case through affidavit evidence, in holding that the defendant as required to prove the merits of its defence at an interlocutory stage, by striking out the defendant's defence in complete disregard of the applicable law relating to striking out of pleadings, in disregarding the applicant's application to amend the defence which was already on record, in finding that the Defendant's defence did not raise a triable issue and in denying the defendant a right to be heard.
13. The Appeal was canvassed by way of written submissions.

Appellant Submissions

14. The Appellant filed submissions on June 21, 2022 and while relying on Order 36 Rule 1 of the Civil Procedure Rules 2010 that provides;

In all suits where a plaintiff seeks judgment for—

 - a. A liquidated demand with or without interest; or
 - b. The recovery of land, with or without a claim for rent or mesne profits, by a landlord from a tenant whose term has expired or been determined by notice to quit or been forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser, where the defendant has appeared but not filed a defence the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits.
15. It was submitted that this section only applies where the defendant has entered appearance but has not filed a defence but in the instant case, he had filed a defense. The Appellant contended that the Defence raised triable issues and was meritorious and issues of whether the subject motor vehicle had been insured could only be determined by way of verbal and documentary evidence and not affidavit evidence at the stage it was done by the Trial Court.



16. The Appellants contended that their right to fair trial was violated and there was a clear imputation of bias on the part of the trial court. The Appellant submitted that its affidavits were expunged on two separate occasions, on April 19, 2017 and June 14, 2017 when the interim orders of stay earlier issued were also vacated.
17. Reliance was placed on Article 50 of the Constitution and the case of Kipkoech Kangongo & 62 Others vs Board of Governors Sacho High School & 5 Others [2015] eKLR, and on alleged bias by the Trial Court relied on the case of President of the Republic of South Africa vs South Africa Rugby Football Union [1999] (4) SA 147, R VS Gough [1993] 2ALL CR 724.
18. The Appellant submitted that it had already filed an application to amend the defence on order or plead further particulars and had given reasons why it does not owe the Plaintiff because the insurance policy in question had been cancelled for non- payment of premiums and was no longer valid on the date of the accident. It was submitted that this proves that the defence is not fanciful and has a good foundation.

Respondent Submissions

19. The Respondent filed submissions on July 4, 2022 in which it was contended that the Appellant did not oppose the application and chose to raise a preliminary objection on a point of law. The Respondent submitted that the Appellant was given time lines to file a response but failed to comply nor seek leave to comply out of time. It was submitted that a party has a duty to ensure compliance of court orders to further the overriding objectives under Section 1A and 1B of the Civil Procedure Act.
20. It was submitted that it is not a ground of appeal that the court was biased and therefore an extraneous matter for the court to determine. The Respondent contended that it did not indicate Order 2 Rule 15 CPR in its application for striking out but this was cured by Order 51 Rule 10 (1) CPR that provides that no objection shall be made and no application shall be refused merely by reason of failure to comply with the rule. Further that Order 51 Rule 2 CPR provides that no application shall be defeated on a technicality or for want of form that does not affect the substance of the application. The court was urged to dismiss the Appeal.

Determination

21. This Court considered the Trial Court Record, Record of Appeal Record, the Memorandum of Appeal and Written Submissions of both parties through respective Counsel.
22. This being the first Appeal, the case of Court of Appeal for East Africa in *Peters –vs- Sunday Post Limited [1958] EA 424* is applicable where Sir Kenneth O’Connor stated as follows:-

‘ It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion.’

23. Hon JB Ojwang, J (as he then was) in *Haile Selassie Avenue Development Co Limited v Josephat Muriithi & 10 others [2004] eKLR* held that:

‘ The rules of procedure which regulate the trial process are intended to serve the constructive purpose of expediting trials, and facilitating judicial decision-making with finality. These



rules cannot be said to be oppressive to parties, or that they necessarily wreak injustice. On the facts of this particular case, the Defendants ought to have complied with these rules of procedure.'

24. Ideally, when a party is served with an Application, they have fourteen days within which to respond. In this case the subject Application of February 6, 2017 was filed, served and received by the Appellant on February 8, 2017 as per the Affidavit of Service filed on April 18, 2017. The Appellant appears to have filed the Replying affidavit on April 19, 2017 but it was expunged from the Court Record by the Trial Court without leave sought from the Court. Over 2 months after being served, the reason advanced by the Defendants Counsel was that the client was out of the country.
25. This Court finds that and agrees with the Respondent to the extent that the Defendant ought to have sought leave from the Court to file the response out of time or should have made the relevant application on time. The delay was found to be unreasonable in the circumstances but in the interest of the justice of the case ought to have been cured by admission of the pleadings out of time but subject to payment of punitive costs by the Defendant to the Plaintiff.
26. In the case of *David Gicheru v Gicheba Farms Limited & Another [2020] eKLR* the Court held that:-

' The fundamental duty of the Court is to do justice between the parties. It is in turn, fundamental that to that duty, those parties should each be allowed a proper opportunity to put their cases upon the merits of the matter.'

Striking Out/off Pleadings

27. Order 2 Rule 15 of the Civil Procedure Code which deals with striking out of pleadings and provides as follows;

' Rule 15. (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
28. The Court of Appeal in the case of *Blue Shield Insurance Company Ltd vs Joseph Mboya Oguttu [2009] eKLR* restated the principles as follows:

' The principles guiding the Court when considering such an application which seeks striking out of a pleading is now well settled. Madan JA (as he then was) in his judgment in the case of DT Dobie and Company (Kenya) Ltd vs Muchina (1982) KLR 1 discussed the issue at length and although what was before him was an application under Order 6 Rule 13 (1) (a) which was seeking striking out a plaint on grounds that it did not disclose a reasonable cause of action against the defendant, he nonetheless dealt with broad principles which in effect covered all other aspects where striking out a pleading or part of a pleading is sought. It was held in that case inter alia as follows:-



'The power to strike out should be exercised after the Court has considered all 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.'

29. Further, in the case of *Olympic Escort International Co Ltd & 2 Others -vs- Parminder Singh Sandhu & Another [2009] eKLR*, the Court of Appeal held that for an issue to be triable, it has to be bona fide issue. The court stated 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.'

30. In this case, the Plaintiff was filed on December 7, 2016, a memorandum of Appearance by the firm of ON Makau & Mulei advocates was filed on January 24, 2017, the defence was filed on an even date. Thereafter the subject application of February 6, 2017 was filed. The Application was received on February 8, 2017 as per the Affidavit of service filed on April 18, 2017.
31. The Appellant then filed an application to amend the defence on April 19, 2017 and another application on May 19, 2017 seeking stay of execution of the judgment and setting aside of the orders. Interim orders of stay of execution was/were issued on May 29, 2017. Subsequently, a notice of withdrawal was filed withdrawing the Application of May 19, 2017. The Application for amendment is still pending determination.
32. The statutory notice dated April 21, 2015 was received by the Appellant on April 22, 2015 and this has not been disputed by the Appellant. To that extent it seems that the Appellant received the notice and decided not to take any action until they were sued separately. Had they responded then it would have saved the court and the parties time.
33. . The Court of Appeal in the case of *Ramji Megji Gudka Ltd -vs- Alfred Morfat Omundi Michira & 2 others [2005] eKLR* held as follows:

' In our view, the power to strike out pleadings must be sparingly exercised. It can only be exercised in clearest of cases. The issue of summary procedure and striking out of pleadings was given very careful consideration by this Court in *DT Dobie & Company (Kenya) Ltd v Muchina [1982] KLR 1* in which Madan JA at page 9 said: -

'The Court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits 'without discovery, without oral evidence tested by cross-examination in the ordinary way.' (Sellers LJ (supra). As far as possible indeed, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks right.'

In dealing with the issue of triable issues, we must point out that even one triable issue would be sufficient. A Court would be entitled to strike out a defence when satisfied that the defence filed has no merit and is indeed a sham.'



Defense -triable Issue(s)

34. In the case of *Magunga General Stores v Pepco Distributors Limited [1986-89] EA 335*, the Court stated thus:

' A mere denial is not a sufficient defense and the defendant has to show either by affidavit, oral evidence, or otherwise, that there is a good defense'

35. In the case of *Desbro (Kenya) Limited versus Polypipes Limited & another [2018] eKLR* the Court stated;

' The Defendants defense, in my view, cannot in view of the defense raised, be termed as a mere denial, sham, an abuse of the court process nor can it be termed as vexatious and frivolous. The defense, in my view, raises serious triable issues. The issues raised cannot be determined summarily or by way of an application. I am alive to the fact that a defense raising triable issues, need not convince court that the defense shall succeed, but a triable issue is the one, which raises a prima facie defense and which should go to trial for adjudication'

36. In *Peeraj General Trading & Contracting Company Limited Kenya & Another versus Mumias Sugar Company Limited (2016) eKLR* the court stated;

' Whereas the power to strike out pleadings is a drastic step that should be used sparingly and only in the clearest of cases, a balance must be struck between this principle and the policy consideration that that a Plaintiff should not be kept away from his judgment by unscrupulous Defendant who files a defence which is a sham simply for the purpose of delaying the finalization of the case. (See the case of *Kenya Commercial Bank v Suntra Investment Bank Ltd [2015] eKLR*). A careful consideration of the facts placed before the court reveals that the Defendant's Statement of Defence does indeed comprise of mere denials, whereas the Plaintiffs have shown that the Defendant has made express admissions with regard to the Plaintiffs' claim.'

37. The Defendant's Defense on record was filed on January 24, 2017 and the Appellant submitted that they ought to have its day in court. The Trial Court noted that there was one triable issue, the Appellant should have been allowed to proceed to hearing and litigate that issue (s).

Trial Court Alleged Bias In Trial

38. The Appellant contended that the Trial Court on 2 separate occasions expunged the Appellant's Affidavits on April 19, 2017 and June 14, 2017 and vacated the interim orders of stay of execution that had earlier been issued. The Appellant submitted that the Trial Court's conduct indicated that the trial Court was impartial and raised an imputation of bias and denied them a fair trial envisaged by Article 50 of CoK 2010. Reference was made to the case of *Kipkoech Kangongo & 62 Others vs Board of Governors Sacho High School & 5 others [2015] eKLR*.

39. It is not clear to this court what actually transpired as per the original Trial Court record save for the said Rulings/Orders.

40. As per the Original Trial Court record this Court has gleaned as follows;

a. The Ruling subject of the Appeal was delivered on May 11, 2017



- b. On May 22, 2017 the Application dated May 19, 2017 was filed and the Trial Court ordered the application to be served and inter partes hearing was on May 29, 2017.
 - c. On May 29, 2017, the Respondent/Appellant was granted time to file Response 7 days to June 14, 2017. It is the Respondent through Counsel who applied the Trial Court to discharge the ex parte interim orders that had been granted.
 - d. On June 14, 2017, the Appellant sought leave to file Supplementary affidavit and written submissions the Respondent objected and filing of Supplementary Affidavit was rejected.
41. From the Trial Court proceedings of April 19, 2017, the Court was moved by parties through Counsel who made applications and/or objections and the Court granted orders. The Application of February 6, 2017 came up for hearing on April 19, 2017, the Trial Court was asked to place the file aside and the Trial Court obliged and proceeded at 10.30 am when both Counsel were present.
42. The Respondent's advocate objected to the filing of Replying Affidavit under Order 51 Rule 14 CPR 2010 and thereafter the Ruling expunging the Replying Affidavit was delivered.
43. In the United States Supreme Court, the case of [Caperton v AT Massey Coal Co, 129 S Ct 2252, 2262 \(2009\)](#) held that due process requires a judge to recuse herself when, based on 'objective and reasonable perceptions,' there is a 'probability of bias' by the judge towards [one of] the litigants.
44. The Court of Appeal in [Capital Markets Authority vs Alnashir Popat & 8 others \[2019\] eKLR](#) considered the test for impartiality or apprehension of bias relying on the cases of; [Kaplan H Rawal vs JSC & 2 others](#) thus;

It cannot be gainsaid that the Applicant bears the duty of establishing the facts upon which an inference is to be drawn that a fair minded and informed observer will conclude that the judge is biased. It is not enough to just make a bare allegation. Reasonable Grounds must be presented from which an inference may be drawn.

Prof Anyang Nyong'o & 10 Others EACJ where the Court held;

'We think that the objective test of reasonable apprehension of bias is good law. The test is stated variously, but amounts to this: do the circumstances give rise to a reasonable apprehension, in the mind of a reasonable, fair minded and informed member of the public that the judge did not (will not) apply his mind to the case impartially.'

45. On the issue of bias that the Appellant has also raised, I am guided by the case of [John Karani Mwenda V Japhet Bundi Chabari \[2017\] eKLR](#) where the court held: -
- 44. As already pointed out, our system of justice is adversarial. Everyday litigants win and lose cases. If every loser accuses the concerned Judge of bias, and we embraced the propositions postulated by the petitioner, there would be need to have an infinite number of Judges ready to be called upon to hear matters raised by the losing parties in future disputes. This would be a veritably ridiculous scenario bordering on the phasmagoric. It would promote untrammelled Judge shopping and unbridled forum shopping.
 - 45. If the petitioner's propositions are embraced by this court, every Judge in this planet who applies his mind to the facts and the law apposite to the particular case and decides it in favour of one of the parties will be in conflict in as far as the losing party is concerned.



46. The Court finds from the original Court record and/or Record of Appeal, the applications were made to the Trial Court by Counsel for parties present and each of them granted right of reply before the Trial Court's Ruling on the matter at hand.
47. Order 51 Rule 14 CPR 2010 relied on by the Respondent urging the Trial Court to expunge the Replying Affidavit filed and served on the hearing date contrary to the following;
- (1) Any respondent who wishes to oppose any application may file any one or a combination of the following documents —
 - (a) A notice preliminary objection: and/or;
 - (b) Replying affidavit; and/or
 - (c) A statement of grounds of opposition;
 - (2) the said documents in subrule (1) and a list of authorities, if any shall be filed and served on the applicant not less than three clear days before the date of hearing.
48. The Trial Court had judicial discretion to admit the Replying Affidavit albeit filed out of time and ordered the Defendant to pay Costs to the Plaintiff/Respondent. Order 51 Rule 6 CPR provides;
- ' The hearing of any application may from time to time be adjourned upon such terms as the court thinks fit'
49. From the above the reasonable person test applied to the circumstances do not disclose bias by the Trial Court to any party.
50. This Court on perusal of the Court Record found the following;
- a. The Application to amend the Defense dated April 19, 2017 at Pg 66 of Record of Appeal was on record and parties did move the Court to give directions hear and/or determine the same.
 - b. Order 7 & 8 CPR 2010 provide for filing of Defense & Counterclaim and amendment of pleadings respectively.
 - c. The proposed draft amended Defense at Pg 69 of the Record of Appeal indicates that the Appellant by correspondence had informed the Respondent and his advocate that the defendant in RMCC 265 of 2015 were not insured at the time of the accident as they defaulted on payment of premiums.
 - d. The Defendants List of Documents at Pg 44 of the Record of Appeal are copies of the 2 letters dated October 3, 2016 & May 21, 2015 respectively by the Appellant to the insured and the advocate confirming the insured failed to pay premiums of the insurance cover and was hence uninsured. This was/is an issue for determination during the hearing.
 - e. The matter did not proceed for hearing as it was pre-empted by the application for striking out the Defense and expunging the appellant's Replying Affidavit on the basis it was filed late yet the Respondent was aware between him and the Insurance Company whether he was insured at the time of the accident was a triable issue.
51. Contrary to the allegations of bias imposed on the Trial Court, there was material non-disclosure to the Court by parties and hence the Ruling appealed against was delivered on the basis of what presented before the Court at the time.



52. This Court finds that the Defense of January 24, 2017 had/has a triable issue whether the Defendant(s) in RMCC 265 of 2015 were insured or not, whether they had paid premiums for insurance cover to the Defendant or not. In fact, upon receipt of the letters of repudiation of contract of insurance, the defendants ought to have joined the Defendant/Appellant as 3rd Party for the Trial Court to determine liability between the Insurance Company and the insured in RMCC 265 of 2015.
53. This Court finds that the Defense raises triable issue(s) for hearing and determination inter partes and the application for amendment of defense to be heard and determined on merit.

Disposition

1. In the premises, the Appeal succeeds and the ruling and judgment delivered on May 11, 2017 and all subsequent orders and decrees are hereby set aside.
2. The matter shall be placed before another court for hearing.
3. It is so ordered.

**DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 9TH FEBRUARY, 2023
(PHYSICAL/VIRTUAL CONFERENCE).**

M.W.MUIGAI

JUDGE

IN THE PRESENCE/ABSENCE OF:

O. N. Makau for the Appellant – Absent

Mr. Mutava H/B Mr. Kamolo for the Respondent

Patrick/Geoffrey - Court Assistant(s)

