



REPUBLIC OF KENYA



KENYA LAW
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**British Life Assurance Company (K) Ltd v Asiligwa (Civil Appeal
74 of 2019) [2023] KEHC 17696 (KLR) (17 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17696 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL 74 OF 2019
RN NYAKUNDI, J
MAY 17, 2023**

BETWEEN

BRITISH LIFE ASSURANCE COMPANY (K) LTD APPELLANT

AND

HARRIS AGINA ASILIGWA RESPONDENT

*(Being and appeal of the ruling and decree of Chief Magistrate Court at
Eldoret (Hon. E. Kigen) dated 24th May 2019 in Civil Suit No. 1085 of 2018)*

JUDGMENT

Coram: Before Hon. Justice R. Nyakundi

Mwinamo Lugonza & Co. Advocates

Kamau Lagat & Company Advocates

1. The appeal herein arises from the ruling and decree of Chief Magistrates Court at Eldoret dated May 24, 2019 in civil suit No 1085 of 2018.
2. The ruling arose from a notice of motion dated December 11, 2018 wherein the applicants sought to have the defendant's statement of defence struck out and judgement entered in favour of the plaintiff as prayed for in the plaint. The trial magistrate, upon considering the application and the submissions of the parties, allowed the application as prayed.
3. Being aggrieved with the ruling, the appellant instituted the present appeal *vide* a memorandum of appeal dated June 24, 2019 premised on the following grounds;
 1. That the learned magistrate erred in pronouncing ruling in favour of the respondent by striking out the appellant's defence and entering judgement in favour of the respondent when there was no basis to do so.



2. That the learned magistrate erred in pronouncing ruling in favour of the respondent despite the fact that the appellant had raised triable issues in its defence that ought to be heard and determined.
 3. That the learned magistrate erred in by failing to properly and exhaustively evaluate the defence and submissions on record; hence she arrived at wrong inferences and conclusions.
 4. That the learned magistrate erred both in fact and in law by proceeding to pronounce ruling in favour of the respondent in total disregard of the appellant's submissions.
 5. That the judgement of the magistrate is in the circumstances unfair and unjust.
4. The parties prosecuted the appeal by way of written submissions.

Appellant's Case

5. Learned counsel for the appellant submitted that in the trial court, his case was that the respondent was paid Kshs 706, 745. 16/= (aggregate of the same being, Kshs 478, 009.83/= deposited in the respondent's account upon maturity of the policy and 'cash blacks' from the year 2012 to 2017 totalling to Kshs 228,735.33/=). That in his claim he recognized that he was only paid Kshs 478, 009.83/= and termed the 'cash backs' as profit for his investment and/ or savings with the appellant. Counsel urged that the bone of contention therefore is whether the respondent herein is entitled to Kshs 336,085. 56/= being the monthly gross premium Kshs 5,633.44/= multiplied by the period of 12 years of the policy all summing up to Kshs 814, 095. 36/= less Kshs 478,009. 80/= being the payment made by the appellant herein upon maturity of the policy.
6. Counsel submitted that there is a dispute between the appellant and the respondent which culminates from a contract of insurance and there is a question as to how much the policy holder who is the respondent herein should have been paid upon maturity of the policy.
7. The appellant urged that the trial magistrate while exercising his discretion, the same was exercised unfairly. He cited the cases of *Rift Valley Water Services Board v Oriental Construction Co Limited* (2018) eKLR. He submitted that in the case which is the subject of this appeal, the learned trial magistrate did not record any analysis of the factors considered in arriving at the decision and in the said decision the learned magistrate took into account irrelevant factors in arriving at the decision.
8. Learned counsel stated that that all his pleadings specifically the defence, submissions and evidence were not considered by the trial court in giving out the verdict. Despite giving sworn evidence, a defence and drafting submissions on the same validly explaining the circumstances surrounding the subject policy it was not taken into consideration.
9. Counsel urged that learned trial magistrate used her discretion unwisely in holding that the defence did not raise any triable issues. He asked the court to allow the appeal and set aside the impugned ruling.

Respondent's Case

10. Learned counsel for the respondent submitted that the trial court was proper in its finding in striking out the appellants defence and entering judgement in favour of the respondent as against the appellant as prayed in the plaint. he urged that the respondent took out a Unit-Linked Education Endowment policy number 163 -915 which ran from September 15, 2016 until its maturity on September 15, 2018 at a savings premium rate of Kshs 5,633.44 per month making it to a total accumulated sum of Kshs 814,095.36 for the twelve (12) year period that the policy ran which amount was paid in full by the respondent to the appellant. Upon maturity of the policy the appellant remitted a sum of Kshs



478,009.80 to the respondent's account No 1xxxxxx4 held at the Kenya Commercial Bank Eldoret as cash backs as enumerated at paragraph 5 of the defence, and there was a balance of Kshs 336,085.56 which sum the appellant retained upon maturity of the policy.

11. The appellant was obligated to pay the accumulated figure of the contract consideration of Kshs 814,095.36 and not Kshs 478,009.08 as it unilaterally decided to do without consulting the respondent or issuing him with any explanation as to why it took the decision to pay a portion of the accumulated figure of the policy consideration. Counsel urged that the defence did not raise triable issues to warrant setting aside of the ruling made by the court.

Analysis & Determination

12. As a first appellate court, this court's role is to subject the whole of the evidence to a fresh and exhaustive scrutiny and make my own conclusions about it, bearing in mind that I did not have the opportunity of seeing and hearing the witnesses first hand. This duty was well stated in *Selle & another v Associated Motor Boat Co Ltd & others* (1968) EA 123 in the following terms:

“I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (*Abdul Hammed Saif v Ali Mohamed Sholan* (1955), 22 EACA 270).

13. Upon consideration of the memorandum of appeal and the attendant submissions, the following issues arise for determination;

Whether the trial court erred in striking out the defence

14. The conceptual structure of this appeal is in the realm of judicial discretion. This is an exercise of judgement performed by the session judge, magistrate, chairman of a tribunal or any other authority or person vested with judicial or quasi-judicial function. It is permissible under this rubric for the decision maker to exercise discretion among a close list of alternatives to arrive at a particular outcome. As stated in this appeal it is the intrinsic relationship between the legal realism and the penumbra of discretion of a judge or a magistrate. The legal doctrine of discretion has a great influence on all persons, organs, tribunals or courts stipulated under article 50(1) of the *Constitution* on the outcome of all decisions in court cases or any such constitutional organ with a mandate to adjudicate some form of dispute. Oliver Wendell Holmes in his classic article *The Path of the Law* 10 Harv L. Rev 457-66 (1897) emphasized the unconscious factors that influence a judge: “The language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainty generally is illusion, and repose is not the destiny of man. Behind the logical form lies a judgement as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment it is true, and yet the very root and nerve of the whole proceeding.”



15. Perhaps I should add the burden of proof that a particular judge or a judicial officer in exercising discretion erred or improperly misapplied the law to the facts of the case rests entirely upon the aggrieved party. Overtime judicial discretion exercised on reason and judiciously attributes to jurisprudence development in our legal system. A re-interpretation of the law and reality occurs under the model of judicial discretion. It follows therefore, the belief systems of judges/magistrate and other constitutional organs form part of the hidden aspects of judging or decision making process geared towards a particular outcome. The learned author Holmes (supra) propounded the balancing Act of these belief systems in the following extract; “The very considerations which judges most rarely mention, and always with apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned. Every important principle which is developed by litigation is in fact and at the bottom the result of more or less definitely understood views of public policy most generally, to be sure, under our practice and traditions the unconscious result of instinctive preferences and inarticulated convictions.”
16. In the same context of this appeal it is necessary to attribute due significance to the circumstances that informs the impugned decision by the learned trial magistrate. In considering whether the appellant has satisfied the criteria for review, revision or substitution of the aforesaid decision I find inspiration in the following principles as articulated by the court of appeal in *Price and another v Hikder* (1986) Eklr 95. “In consideration the exercise of judicial discretion as to whether or not to set aside a judgement the court considers whether in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties, it would be just and reasonable to set aside or vary the judgement, if necessary upon terms to be imposed. The court will not interfere with the exercise of its discretion by an inferior unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matter on which it should have taken into consideration and in doing so arrive at a wrong decision. See *Mbogo v Shah* (1968) EA 95.
17. As the bone of contention is the striking out of the defence, it follows that the only issue for determination is whether the court erred in striking it out. The basis of the striking out was that the defence failed to raise any triable issues. This therefore necessitates the court to delve into the said defence and determine the same.
18. The dispute in the trial court arose from an insurance contract between the parties where the plaintiff made monthly contributions of Kshs 5653.44 per month from September 15, 2006 to September 15, 2018 amounting to a total sum of Kshs 814,095.36. The respondent’s case is that the appellant remitted Kshs 478,009.08 and a balance of Kshs 336,085.56 was retained resulting in the claim by the trial court.
19. Order 2 rule 15 of *Civil Procedure Rules* provides:
 - “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”
20. I have perused the record of appeal and considered the defence that was filed by the appellant and in view of the defence raised, it cannot be termed as a mere denial, sham, an abuse of the court process nor can it be termed as vexatious and frivolous. The defence, 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 defence raising triable issues, need not convince court that the defence shall succeed, but a triable issue is the one, which raises a prima facie defence and which should go to trial for adjudication.

21. In the case of *Job Kiloch v Nation Media Group Ltd, Salaba Agencies Ltd & Michael Riorio* [2015] eKLR, the court stated 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.”

22. 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. From the plaint and the defence, it is apparent that there are disputes as to the type of insurance policy, what premiums were due, what returns were to be paid to the respondent and the correct interpretation of the policy. These are issues that cannot be ascertained from affidavit evidence and therefore should have been subjected to a full hearing. The learned trial magistrate erred in considering the plaintiff's claim and throwing out the defence without considering the facts and evidence set out therein. It is my considered view that these issues could not be sufficiently determined at the interlocutory stage. Questions of legal right and liability should ordinarily be resolved by the application of the law and not exercise of discretion by the court. The right to equality before the law in article 27 and the right to a fair hearing in article 50 of the *Constitution* are condition precedents in any trial proceedings from their commencement to the delivery of the final judgement on the merit. The right to a fair trial in article 50 of the *Constitution* may be deemed to violated in a case where the trial court shuts the door for a litigant prematurely so unless on a question of lack of jurisdiction. The mission of our legal system as set up by the *Constitution* is to determine disputes or issues of public policies in the general interest of the society and by the extension to uphold and protect the bill of rights. The constitutional imperatives is that the civil rights and obligations pursued by a litigant against a defendant entitles him or her to a fair and public hearing within a reasonable time by an independent and impartial tribunal or court established by law. See article 50(1) of the *Constitution*. The word dispute must be given a substantive meaning rather than a formal or procedural one. In essence any proceedings containing a mixture of contentious and non-contentious pleadings to me fall within the scope of article 50. The genuine and serious nature of the claim comes more clearer on the basis of evidence lodged by both parties. It may be therefore, logically sound to state that the guarantees on the right to a fair hearing Art. 50, the right to a fair administrative action in Art. 47 and the right to access to justice in substance under Art. 48 may arguably be threatened, infringed or violated when a decisive decision is made to terminate proceedings against a party without an opportunity of being heard. I strongly believe that access to fair procedures including the right to be heard and to participate in adversarial proceedings ordained in our legal system cannot be taken away at whim by any tribunal or court espoused in Art. 50(1) of the *Constitution*. The right to a fair trial enshrined in Art.50 of the *constitution* represents one of the most fundamental guarantees in administration of justice and the rule of law on the Kenyan Republic. The obligations therefore, upon the trial court is to go beyond the parameters afforded by the *Civil Procedure Act* and Rules. It is equally critical to appreciate the doctrine of equality of arms in every proceeding which mandates a tribunal or a court to give reasonable opportunity to everyone cited in the case file to present his/her case under conditions which do not place him or her at a prejudice, injustice or substantial disadvantage against the claimant, plaintiff, defendant or opponent or as the case may be.



24. I think this is the similar problem occasioned by the trial court to warrant the concerns raised by the appellant. In this circumstances stemming from the facts of the instant appeal and applicable principles in *Price Case* (Supra) the trial magistrate clearly misdirected and misapplied the governing principles resulting in a wrong decision.
25. In the premises, I hereby set aside the ruling of the trial court and direct that the defence be deemed as duly filed. The matter be set down for hearing before a magistrate's court with competent jurisdiction for hearing other than Hon E. Kigen. As a consequence the substratum of the appeal succeeds with no orders as to costs.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 17th DAY OF MAY 2023

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R. NYAKUNDI

JUDGE

In the presence:

