



REPUBLIC OF KENYA



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Kenya Alliance Insurance Company Ltd v Musaki & another (Suing as personal representatives of the Estate of the Late Alice Nduku Musaki (Deceased)) (Civil Appeal 25 of 2020) [2023] KEHC 19323 (KLR) (21 June 2023) (Ruling)

Neutral citation: [2023] KEHC 19323 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL 25 OF 2020
FR OLEL, J
JUNE 21, 2023**

BETWEEN

KENYA ALLIANCE INSURANCE COMPANY LTD APPELLANT

AND

CHRISTOPHER MUSAU NDUKI 1ST RESPONDENT

JULIUS KIILU MUSAKI 2ND RESPONDENT

**SUING AS PERSONAL REPRESENTATIVES OF THE ESTATE OF THE LATE
ALICE NDUKU MUSAKI (DECEASED)**

*(Being an appeal arising from the decree emanating from the Ruling and
Judgement of Hon. Gilbert Shikwa, Senior Resident Magistrate, which
was delivered on 19th February 2020 in Kithimani PMCC 32 of 2018)*

RULING

1. This appeal arises from the Ruling/Order of Hon Gilbert Shikwa Senior Resident Magistrate dated February 19, 2020
2. Being aggrieved by the said Ruling the appellant filed their memorandum of appeal dated March 3, 2023 where they raised the following grounds of appeal;
 - a. That the learned trial magistrate erred in law and in fact in striking out the Appellant’s defence despite the appellant demonstrating that the defence raised enable issues.



- b. That the learned trial magistrate erred in law and in fact in finding that the deceased was an insured person within the meaning of Section 4(1) and 5(b) (11) of the Insurance (Motor vehicle third party risk) Act.
 - c. That the learned trial magistrate erred in law and in fact in failing to consider the Ruling in *M’Mairanyi and others versus BlueShield Insurance Company* in finding whether the deceased was an insured person.
 - d. That the learned trial magistrate erred in law in exercising his discretion in a manner that caused hardship and prejudice to the appellant.
3. The appellant prayed that this appeal be allowed, the order striking out the appellants defence be set aside and the appellant be awarded costs of this appeal.

Appellant submissions

4. The appellant submitted that the trial magistrate erred in law and in fact in striking out their statement of defence despite the fact that they had demonstrated that the said defence raised triable issues, which should have been allowed to go to full trial. The issues raised were that ;
- a. Whether the suit motor vehicle KBU 998W was being used as a private motor vehicle or was it being used for hire, reward or commercial travelling, as the insurance cover provided did not cover use of the said of the said motor vehicle for hire, reward or commercial travelling.
 - b. Whether the suit motor vehicle driver having been charged and convicted of carrying excess passenger’s contrary to section 100(2) of the *Traffic Act*, which section is made in relation to Public Service Vehicle, meant that the suit motor vehicle was being used as a public service vehicle for hire and reward contrary to the Insurance Policy issued.
 - c. Whether the deceased was an insured passenger within the meaning of Section 4(1) and 5 (b) (11) of the *Insurance (motor vehicle Third Party Risks) Act* and whether they were liable to indemnify the deceased estate.
- Reliance was placed on *Kenya Trade Combine Ltd v Shah* civil Appeal No 193 of 1991, *Olympic Escort International Co Ltd and 2 others v Parminder Singh Sandhu and another* [2009] eKLR, *Yaya Towers Ltd (in liquidation) civil Appeal no 35 of 2000* and *DT Dobie & company Kenya Ltd v Joseph Mbaria Muchina and another* [1980] eKLR.
5. The appellant on the second ground of appeal submitted that the trial magistrate erred in law and in fact in finding that the deceased was an insured person within the meaning of Section 4(1) and 5(b)(11) of the *Insurance (Motor Vehicle third party Risk) Act* and also failed to consider the ruling in *M’Mairanyi & others versus BlueShield Insurance Company Ltd*. The insurance cover taken out for the suit motor vehicle was a private cover, while the said motor vehicle was being used as a public service vehicle. The deceased was therefore not an insured passenger within the meaning of Section 4(1) and 5(b)(11) of the Insurance (Motor Vehicle third Party Risk) Act and the appellant was not liable to indemnify his estate.
6. The appellant thus submitted that in light of the foregoing, their defence raised triable issues and they sought to be accorded a fair hearing as envisaged under Article 50 of *the Constitution of Kenya 2010*. They prayed that the Ruling be set aside and this appeal be allowed with costs.



Respondent Submissions

7. The Respondent's file their submissions on March 2, 2023. They submitted that prior to filing of the suit they did serve a statutory notice upon the appellant on March 16, 2015 and it was clearly indicated therein that the deceased was a passenger in motor vehicle Registration Number KBU 998U Toyota Station Wagon. The appellant did not deny that it did not insure the said motor vehicle nor had they filed a suit to repudiate the claim. It was thus clearly established that the Respondent was fully covered by the Insurance Policy and the appellant could not be heard to deny the same 8 years later. Reliance was placed on HCC App No 1 of 2017 *Machakos APA Insurance Company Ltd v Vincent Nthoka & The court of Appeal in Hunker Trading Company Limited v Elf Oil Kenya Ltd.*
8. The Respondent's further submitted that he who alleges must prove there was no document on record to prove or show that the deceased was travelling in the suit motor vehicle for hire, reward or commercial travelling. The appellant had also not annexed any investigation report to support the same. The pleadings were thus clear and uncontroverted that the deceased was travelling as a passenger.
9. As regards provisions of Section 10(4) of the *Insurance (Motor vehicle third party risk) Act*, the Respondent urged this court to uphold the trial magistrate finding on the same as the third party insurance covered a travelling passenger. It was also noted that the appellant never sought to defence and/or set aside the exparte judgments obtained in the primary suit nor had they filed any suit to repudiate the respondent's claim. The Respondent's prayed that this appeal be dismissed with costs.

Analysis and Determination

10. I have considered the parties respective written submissions, the pleadings as filed and proceedings of the trial court. Though the appellant has raised three grounds of appeal, the only central issue for determination is whether the trial court was right in striking out the appellants statement of defence dated August 7, 2018 and entering judgment in favour of the respondent's. The other grounds of appeal raised are dependent on the finding of the court on this central issue.
11. Striking out of pleadings is a drastic remedy that should only be resorted to where a pleading is a complete sham. The Court of Appeal in the case of *Blue Shield Insurance Company Ltd v Joseph Mboya Ogunu* [2009] eKLR restated these 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 v Muchina* (1982) KLR 1 . 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.”

Further it was held that;

“No suit ought to be summarily struck out unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”



12. In the case of *Cail Zeiss Stiftung v Ranjuer & Keeler Ltd and others* (No 3) [1970]ChpD 506, it was held that:-

“The power to strike out any pleading or any part of a pleading under this rule is not mandatory; but permissive and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending pleading.”

13. The same sentiments were echoed by Danckwerts L.J when the House of Lords considered a similar matter in *Wenlock v Moloney*, [1965] 2 All ER 871 at page 874, as follows:

“There is no doubt that the inherent power of the court remains; but this summary jurisdiction of the court was never intended to be exercised by a minute and protracted examination of the documents and facts of the case, in order to see whether the plaintiff really has a cause of action. To do that, is to usurp the position of the trial judge, and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power. The learned master stated the relevant principles and practice correctly enough, and then, I am afraid, failed to apply them to the case.”

14. A careful consideration of the facts placed before this court reveals that the defendant’s statement of defence does not only comprise of mere denials as stated, but also there in they have pleaded that the insurance cover issued, was a private policy and it could not be used to cover use of the suit motor vehicle, which was being used for hire, reward or commercial traveling. Further the appellant pleaded that the deceased was an uninsured passenger within the meaning of section 4(1) and 5(b),(ii) of the insurance (Motor vehicle Third party Risks) Act and therefor the appellant was not entitled to indemnify his estate.

15. A statement of defence is said to raise reasonable defence if that defence raises a prima facie triable issue. In the case of *Olympic Escort International Co Ltd & 2 Others v Parminder Singh Sandhu & Another* [2009] eKLR, the Court of Appeal held that for an issue to be triable, it has to be bona fide. 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.”

16. The Court of Appeal also in the case of *Ramji Megji Gudka Ltd v 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.”

17. Thus where there is even one triable issue raised in the statement of defense, that would be sufficient to have the matter go for trial In Kenya Trade Combine Ltd v M Shah CA no 193 of 1999 (unreported), the Court of Appeal expressed itself in part as follows:

“In a matter of this nature, all a Defendant is supposed to show is that a defence on record raised triable issues which out to go for trial. We should hasten to add that in this respect a defence which raised triable issues does not mean a defence that must succeed.”

18. From the forgoing it is clear that the trial magistrate was wrong to strike out the appellants statement of defense, which clearly raised several triable issues.

Disposition

19. I do find and hold that the trial magistrate erred in striking out the appellant statement of defense and therefore I do set aside the ruling of Hon Gilbert Shikwe (RM) dated February 19, 2020, delivered in Kithimani SPMCC No 320 of 2018.

20. The primary suit being a fairly old matter, seeking to enforce a decree issued on March 29, 2018 I do direct that the said suit be heard by a different Magistrate, on priority basis within the next three months to allow the respective parties have their day in court.

21. Each part will bear their own costs of this appeal.

22. It is so ordered.

Judgement written, dated and signed at Machakos this 21st day of June 2023.

RAYOLA FRANCIS OLEL

JUDGE

Delivered on the virtual platform, Teams this 21st day of June, 2023.

In the presence of;

.....for Appellant

.....for Respondent

.....Court Assistant

