**Fidelity Insurance Co. Ltd v Kinyanjui (Civil Appeal 604 of 2017) [2023] KEHC 20739 (KLR) (Civ) (21 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20739 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL 604 OF 2017**

**CW MEOLI, J**

**JULY 21, 2023**

**BETWEEN**

**FIDELITY INSURANCE CO. LTD ....................................................... APPELLANT**

**AND**

**PATRICK MBURU KINYANJUI ....................................................... RESPONDENT**

***(Being an appeal from the ruling of M.W. Murage (RM) Delivered on 11th October , 2017 in Nairobi Milimani CMCC No. 1479 of 2017)***

## JUDGMENT

1. This appeal emanates from the ruling delivered on October 11, 2017 in Nairobi CMCC No 1479 of 2017. The events leading to the ruling were that in 2017, Patrick Mburu Kinyanjui, (hereafter the respondent) filed a declaratory suit in the lower court against Fidelity Shield Insurance Company Ltd (hereafter the appellant) seeking payment of a sum of Kshs 951,654.90/- being the decretal sum in Nairobi Milimani CMCC No 3003 of 2012 (hereafter the primary suit).

2. The gist of the respondent's averments in the suit was that the appellant's insured had under policy number MPxxxx insured motor vehicle registration number KAW 303P (hereafter the suit motor vehicle), , which was involved in an accident on or about January 31, 2011; that the respondent filed the primary suit seeking general and special damages as a result of the accident in question; and that on March 18, 2016, judgment was entered in favour of the respondent against the appellant in the primary suit to the time of Kshs 951,645.90/=.

3. The respondent further averred that appellant had insured the suit motor vehicle against any such liability as required to be covered by policy under para. (b) of section 5 of the *Insurance (Motor Vehicle Third Party Risk) Act* and the accident involving the suit motor vehicle was a liability covered by the terms of the policy and that judgment in respect of the said liability having been obtained against the

appellant's insured, the appellant was obligated under section 10(1) of the *Insurance (Motor Vehicle Third Party Risk) Act* to pay the adjudged sum to the respondent as a person entitled to the benefit of the said judgment.

4. The appellant filed a statement of defence on April 6, 2017 denying the key averments in the plaint and asserted without prejudice to the averments in the statement of defence that, it was not bound to satisfy the judgment and decree in Nairobi Milimani CMCC No 3003 of 2012, as the respondent had failed to comply with the provisions of section 10 of the *Insurance (Motor Vehicle Third Party Risk) Act*.

5. On April 28, 2017 the appellant filed a motion expressed to be brought under sections 3A of the *Civil Procedure Act* and order 2 rule 15(1) (b) (c) & (d) of the *Civil Procedure Rules* *inter alia* seeking that the appellant's defence be struck out on account of being frivolous, vexatious and only intended to delay the finalization of the suit and was otherwise an abuse of the court process; and that the court be pleased to enter judgment in favour of the respondent and against the appellant as prayed in the plaint.

6. The grounds on the face of the motion were amplified in the supporting affidavit of respondent, essentially reiterating the background outlined earlier in this judgment.

7. The respondent opposed the motion through a replying affidavit dated June 21, 2017. Thereafter, the parties canvassed the motion by way of written submissions. The lower court's ruling allowing the respondent's motion provoked the instant appeal, which is based on the following grounds:-

    1. That the honorable resident magistrate erred in and misdirected herself in law by holding that the appellant's defence raised no triable issues whereas the defence on record denied that the defendant had insured motor vehicle KAW 303P at the material time and the respondent had not provided any evidence of the policy of insurance.

    2. That the honorable resident magistrate erred and misdirected herself in law and fact by failing to appreciate that the defence had raised issue that the plaintiff had failed to comply with the mandatory provisions of section 10 of the *Insurance (Motor Vehicle Third Party Risk) Act*, cap 405 Laws of Kenya, which required statutory notice to be served within 14 days prior or after filing of the primary suit namely Nairobi CMCC No 3003 of 2012 which the plaintiff had failed to do.

    3. That the honorable resident magistrate erred and misdirected herself in law in failing to address her mind to the provisions of section 10 (2)(a) of the *Insurance (Motor Vehicle Third Party Risk) Act*, cap 405 Laws of Kenya makes it a condition precedent that the statutory notice must be served before any insurer is held liable in a declaratory suit.

    4. That the learned honorable magistrate erred in law by failing to take into account, consider and give effect the binding case law that the defendant relied on its submissions in particular *Cannon Assurance Company Ltd v Peter Mulei Sammy* [2016] eKLR and *Mary Adhiambo Onyango v Jubilee Insurance Co Ltd* [2007] eKLR." (sic)

8. The appeal was canvassed by way of written submissions. Counsel for the appellant, while restating the events leading to the instant appeal, condensed the grounds of appeal into the question whether the appellant's statement of defence raised triable issues or amounted to mere denials. It was summarily submitted that the trial court erred in holding that the appellant's statement of defence did not raise any triable issues when the appellant had expressly denied having insured the suit motor vehicle. That the respondent failed to demonstrate that the appellant had insured the suit motor vehicle by adducing a copy of the policy document or the certificate of insurance; and that the police abstract was not conclusive proof that the appellant was the insurer of the suit motor vehicle. The decision in *Cannon Assurance Co Limited* (supra) was called to aid in that regard.

9. Further calling to aid the decision in *Kenya Orient Insurance Co Ltd v Farida Hemed* [2015] eKLR counsel submitted that, the trial court erred in relying entirely on the untested documents attached to the respondent's supporting affidavit ; that striking out of a defence infringes upon the appellant's right to a fair hearing on the merits of its case; and that the court misdirected itself in holding that the defence raised no triable issues. Counsel asserting that the court's finding that the appellant did not deny having insured the suit vehicle in writing upon being served with the statutory notice was erroneous as the appellant is not required by any law to respond to a statutory notice. Moreover, counsel relied on the decision in *Kenindia Assurance Co Ltd v Laban Idiah Nyamache* [2011] eKLR to argue that service of the statutory notice having been disputed the asserted proof of service by the respondent could only be tested by way of cross examination of witnesses at the hearing of the suit.

10. Citing the decision in *Mary Adhiambo Onyango* (supra), counsel contended that the defence challenged the respondent's compliance with section 10(2)(a) of the *Insurance (Motor Vehicle Third Party Risks) Act* cap 405 concerning service of the statutory notice before or within fourteen days of commencement of court proceedings, which issue , though canvassed in written submissions was disregarded by the trial court in its ruling.

11. Placing reliance on the decision in Mombasa High Court civil suit No 542 of 2000 *Beth Wanjiru Mulinge v James Mutonga Mulinge*, counsel asserted that it was contrary to the principle of stare decisis for the trial court to disregard clear and unequivocal and binding legal precedents of a superior court on the issue of service of statutory notice. In conclusion, it was argued that the trial court ought to have appreciated that striking out of a defence is a drastic remedy therefore sustained, rather than struck out the defence in view of the triable issues raised. The decision in *Dorine Akula v Apa Insurance Company Limited* [2016] eKLR was cited here. Counsel thus urged the court to allow the appeal as prayed with costs.

12. The respondent naturally supported the trial court's findings. Counsel addressed the grounds of appeal under three key issues in his submissions. Citing the decision in *Gibbs Africa Ltd v Machakos County Government* [2018] eKLR, he defended the trial court's holding that the defence did not raised any triable issues to warrant the suit to proceed to trial. Asserting that the appellant was served with statutory notice and did not deny receiving the same or aver that the receipt stamp thereon did not belong to it. The decision in *Caroline Wanyanga Njagi v Invesco Assurance Company Limited* [2016] eKLR was cited in that regard. Attacking the appeal generally, counsel placed reliance on the decision in *Kivanga Estates Limited v National Bank of Kenya Limited* [2017] eKLR to argue it was filed for the sole purpose of denying the respondent the fruits of his judgment. The court was urged to find that the appeal lacked merit and to dismiss it with costs.

13. The court has perused the record of appeal as well as the original record and considered the material canvassed in respect of the appeal. The duty of this court as a first appellate court is to re-evaluate the evidence adduced in the lower court and to draw its own conclusions, but always bearing in mind that it did not have an opportunity to see or hear the witnesses testify. See *Peters v Sunday Post Ltd* (1958) EA 424; *Selle and Anor. v Associated Motor Boat Co Ltd and others* (1968) EA 123; *William Diamonds Ltd v Brown* [1970] EA 11 and *Ephantus Mwangi and another v Duncan Mwangi Wambugu* (1982) – 88) 1 KAR 278.

14. The Court of Appeal stated in *Abok James Odera t/a A. J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR that:

> "This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine

whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way."

15. The lower court in allowing the motion expressed itself in part as follows:

> " I have considered the application, supporting affidavit and the submissions filed. It is clear that the defendants were notified of the suit on May 31, 2013. Although they deny having insured the motor vehicle KAW 303P, they did not deny the fact in writing once they were served with the notice. The police abstract indicates clearly that the defendant had insured the motor vehicle in question at the time of the accident. I have looked at the defence the same denies all these facts. It is a mere denial. The same is struck out and judgment is entered in favour of the plaintiff against the defendant as prayed in the plaint herein. it is so ordered." (sic)

16. The appeal turns on the question whether the trial court misdirected itself in allowing the respondent's motion before it. The motion leading to the impugned ruling was anchored on the provisions of order 2 rule 15(1) of the *Civil Procedure Rules*; which provides that:

> " 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"

17. Concerning striking out of pleadings, the Court of Appeal in *Cooperative Merchant Bank Ltd v George Fredrick Wekesa* civil appeal No 54 of 1999 as cited in *Jubilee Insurance Co Ltd v Grace Anyona Mbinda* [2016] eKLR, stated that:

> " The power of the court to strike out a pleading under order 6 rule 13 (1) (b) (c) & (d) is discretionary and an appellate court will not interfere with the exercise of the power unless it is clear that there was either an error on principle or that the trial judge was plainly wrong. Striking out a pleading is a draconian act, which may only be resorted to, in plain cases. Whether or not a case is plain in a matter of fact...."
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> See also *Kivanga Estates Limited* (supra).

18. Concerning the exercise of discretion, the same court later in *Mashreq Bank P.S.C v Kuguru Food Complex Limited* [2018] eKLR stated:

> " This court ought not to interfere with the exercise of a judges' discretion unless it is satisfied that the judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it is manifest from the case as a whole that the judge was clearly wrong in the exercise of discretion and occasioned injustice. Conversely, a court exercising judicial discretion must be guided by law and facts and not ulterior considerations. This much was stated by the Court of Appeal in the case of *Mbogo v Shah*, (supra):
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> "A court of appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising this discretion has misdirected himself in some matter

and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and as a result there has been injustice".

See; *United India Insurance Co Ltd v East African Underwriters (K) Ltd* [1985] EA 898: -

19. Madan J.A in *D.T Dobie & Company (Kenya) Ltd v Muchina* [1982] eKLR, enunciated several principles to be applied in an application brought under then, order vi rule 13 (now order 2 rule 15) of the *Civil Procedure Rules*. Referring to various English decisions, Madan J.A distilled the following principles:

a) The rule is to be acted upon in plain and obvious cases and the jurisdiction exercised sparingly and with care.

b) ...

c)...."

> It is relevant to consider all averments and prayers when assessing under order 6 rule 13 whether a pleading discloses a reasonable cause of action, and also the contents of any affidavits that may be filed in support of an application that a pleading is otherwise an abuse of the process of the court... The court ought to act very cautiously and carefully and consider all the facts of the case without embarking on 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... A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal... No suit ought to be summarily dismissed 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."

20. Alongside the prayer for striking out, the respondent equally sought that the court enter judgment in his favour as against the appellant as prayed in the plaint. In *Isaac Awuondo v Surgipharm Limited & another* [2011] eKLR the Court of Appeal stated:

" Summary judgment is a drastic remedy which may be granted in the clearest of cases in which there is no bonafide defence to the plaintiff's claim.... In *Moi University v Vishva builders Limited* civil appeal No 296 of 2004 (unreported) this court said:

"The law is now settled that if the defence raises even one bonafide triable issue, then the defendant must be given leave to defend...As we know, even one triable issue would be sufficient – see *H. D. Hasmani v Banque Congo Belge* [1938] 5 EACA 89. We must, however, hasten to add that a triable issue does not mean one that will succeed. Indeed, in *Patel v E. A Cargo Handling Services Ltd* (1974) EA 75 at P 76 Duffus P said:

"In this respect defence on the merits does not mean, in my view a defence that must succeed. It means as Sheridan J put it "a triable issue" that is, an issue which raises a *prima facie* defence and which should go for trial for adjudication."

21. In the case of *Crescent Construction Co Ltd v Delphis Bank Ltd* civil appeal No 146 of 2001; [2007] eKLR cited in *Jubilee Insurance Co* (supra) the Court of Appeal stated the rationale for the exhortation

that the power of striking out a pleading ought to be exercised with the greatest care and caution. The court stated that:

> "This comes from a realization that the rules of natural justice require that the court must not drive away any litigant however weak his case may be from the seat of justice. This is a time-honoured legal principle. At the same time, it is unfair to drag a person to the seat of justice when the case purportedly brought against him is a non-starter."

22. These then are the guiding principles. The gist of the respondent's pleadings in his plaint were restated earlier in this judgment. However, of particular interest are the averments in the appellant's statement of defence filed on April 6, 2017, that the trial court described as amounting to no more than mere denials. The appellant averred at paragraph 4, 5, 6 and 7 of its statement of defence that:-

    4. The defendant denies paragraph 4, 5 & 6 of the plaint and particularly denies that it covered motor vehicle KAW 303P under policy number MPxxxx at the material time and puts the plaintiff to strict proof thereof.

    5. The defendant without prejudice to the foregoing further denies paragraph 6 & 7 of the plaint and avers that it is not bound to satisfy the judgment and decree in Nairobi CMCC No 3003 of 2012 as the plaintiff has not complied with the provisions of section 10 of The *Insurance (Motor Vehicles Third Party Risks) Act* cap 405 Laws of Kenya and puts the plaintiff to strict proof thereof.

    6. The defendant denies paragraph 5 of the plaint and avers that even if the plaintiff had served a statutory notice as alleged (which is denied) the same was of no legal effect the suit herein not being in compliance with the provisions of cap 405 The *Insurance (Motor Vehicles Third Party Risks) Act*.

    7. The defendant specifically denies being served with the demand and notice to sue and puts the plaintiff to strict proof thereof." (sic)

23. The respondent did not join issue with the appellant by filing a reply to the statement of defence. That notwithstanding the crucial question is whether the appellant's statement of defence disclosed a single triable issue. The respondent clearly did not think so, thus its motion filed April 28, 2017. As stated in *Kenya Trade Combine Ltd v Shah* civil appeal No 193 of 1999, "a defence which raises triable issues does not mean a defence that must succeed." Averments at paragraph 4, 5 and 6 above of the appellant's statement of defence evidently challenged three fundamental averments by the respondent. Firstly, that it had insured the suit motor vehicle; secondly, the respondent's compliance with the provisions of section 10 of the *Insurance (Motor Vehicles Third Party Risks) Act* cap 405 Laws of Kenya; and thirdly, the legal effect of the notice purportedly served, for want of compliance with the latter section.

24. These were with respect, not mere denials. They were critical issues that warranted interrogating of the material evidence relied on by the respondent in support of the averments in his plaint and grounds of his motion. The provisions of section 10 of cap 405 articulated in the authorities and relied on by the respondent could not aid the respondent's case in this instance where the very existence of the insurance cover in respect of the suit motor vehicle and proper service of the statutory notice were disputed in the defence.

25. The trial magistrate erred by failing to consider the material tendered by the respondent to see whether it demonstrated sufficiently the fact of the appellant having insured the vehicle. Instead shifting the burden of proof on the appellant by stating that it ought to have denied the fact in writing upon being served with the statutory notice, the latter fact which was also surrounded by contestation. In

an application of this nature, even a single triable issue demonstrated by a defendant entitles him to defend the suit, in furtherance of the time-honored principle that no litigant should be peremptorily driven from the seat of justice and condemned unheard. The foregoing is adequate to dispose of the appeal without pre-empting the full trial of the issues.

26. Consequently, this court finds that the trial court failed to properly exercise its discretion and misdirected itself, thus allowing the respondent's motion before it. The appeal has merit and is allowed. The ruling and order of the lower court are hereby set aside and the court substitutes therefor an order dismissing with costs the respondent's motion in the lower court filed on April 28, 2017. The costs of this appeal are awarded to the appellant.

**DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 21ST DAY OF JULY 2023.**

**C.MEOLI**

**JUDGE**

**In the presence of:**

For the Appellant: Mr. Thuo

For the Defendant: Mr. Kiptanui h/b for Mr. Wachira.

C/A: Carol