REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CIVIL APPEAL NO. NO. 142 OF 2015

HERITAGE INSURANCE COMPANY LIMITED............................APPELANT

VERSUS

SAMUEL KASINA KISILU...RESPONDENT

(Being an appeal from the ruling of the Chief Magistrate's Court at Machakos by the Honourable Magistrate I.M. KAHUYA (RM) delivered on 28th August, 2015 in Machakos Chief Magistrate's Court Civil Suit No.939 of 2014)

BETWEEN

SAMUEL KASINA KISILU...PLAINTIFF

VERSUS

HERITAGE INSURANCE COMPANY LIMITED...................DEFENDANT

JUDGEMENT

1. On 4th December, 2014, the Respondent herein, **Samuel Kasina Kisilu**, filed a plaint dated 1st December, 2014 before the Chief Magistrate's Court Machakos in Machakos CMCC No. 939 of 2014 (the declaratory suit) seeking a declaration that the Appellant was bound to satisfy the decree in Machakos CMCC No. 108 of 2011 – **Samuel Kasina vs. Fredrick Otieno Ochieng** (the primary suit). He also sought the costs of the declaratory suit.

2. The cause of action, according to the plaint was that the Appellant was the insurer of motor vehicle registration no. KBL 897X which had a valid insurance cover. It was pleaded that on or about 22nd October, 2010, the Respondent was lawfully traveling aboard the said motor vehicle when the same was negligently driven that it was caused to lose control and overturn thereby occasioning the Respondent herein severe and extensive injuries. Following the filing of the primary suit, judgement was entered for the Plaintiff in the primary suit (the Respondent herein) against the Appellant's insured on 13th March, 2014 and decree was issued for Kshs 488,395/- as at 15th May, 2014. As a result of the failure by the Appellant herein to settle the said decree, the Respondent instituted the declaratory suit.

3. In its defence, the Appellant denied the occurrence of the accident as alleged. While admitting that **Fredrick Otieno Ochieng** was its insured, the Appellant at the material time, it averred that it was not a party to the primary suit. According to the Appellant, section 10(1) of the ***Insurance (Motor Vehicle Third Party Risks) Act***, Cap 405, Laws of Kenya (the Act) under which the Respondent sought a declaration that the Appellant was liable to satisfy the decree in the primary suit, only applied to such liability as is required to be covered under paragraph (b) of section 5 and that passenger liability for private motor vehicles which the accident motor vehicle was, is not a liability required to be covered hence section 10(1) aforesaid is not applicable. It was therefore pleaded that the Respondent was not entitled to the declaration sought.

4. It was further pleaded that the mandatory notice required under subsection 2 of the said Section 10 to be served on the insurer was not served on the Defendant till long after the expiry of the prescribed period.

5. Irked by the defence, the 24th April, 2015 grounded on Order 2 Rule 15, Order 51 rule 1 and Order 36 rule 1 of the ***Civil Procedure Rules***

and all other enabling provisions of the law, seeking that the Appellant's said defence be struck out on the ground that the same was frivolous, vexatious, a sham based on misconception of the law and otherwise amounting to an abuse of the court process and only made to delay the fast disposition of the suit. It also sought that summary judgement be entered for the Plaintiff/Applicant against the Appellant in terms of the Plaint. He also sought the costs of the application.

6. In the supporting affidavit the Respondent reiterated her averment in the plaint and averred that the Appellant was duly aware of the matter and thus cannot allege that they were not served with a statutory notice. He annexed copies of the correspondences between the Advocates for the two parties and averred that the Appellant never repudiated any contract between it and its insured thus was bound to pay.

7. In response to the application, t was averred that section 10(1) of the said Act was inapplicable and that the insurance policy in question was for a private motor vehicle. It was reiterated that the alleged statutory notice was served long after the expiry of the prescribe d period under section 10(2) of the Act and that the letter dated 6th December, 2010 was never served on the Appellant.

8. In her ruling, the learned trial magistrate found that Order 36 rule 1 cited was inapplicable as the Appellant had appeared and filed a defence hence the main focus was Order 2 Rule 15 of the Rules. The Court noted that contrary to subsection 2 of the said rule 15, both parties heavily relied on their affidavits and submissions. The Court however found that the defence filed contained routine paragraphs found in various statements of defence while the remaining contentious paragraphs were mere denials. It was found that the Respondent only relied on three sentences within the initial plaint to deny liability instead of providing full disclosure of the Court's proceedings that resulted into the judgement in favour of the Respondent. The Court while appreciating that the statutory notice confirmed the Appellant's position that the statutory notice was served of the Appellant over a month after the commencement of the proceedings, found that the issue ought to have been dealt with by setting aside the judgement in Machakos CMCC No. 108 of 2011. According to the Learned Trial Magistrate, it was not for her to re-examine the circumstances that led to the judgement in Machakos CMCC No. 108 of 2011 when the same was still properly on record.

9. The Learned Trial Magistrate therefore found that in light of the mere denials in the defence, it was difficult for the court to proceed further with the suit, found merit in the application and allowed the same with costs.

10. Although in this appeal a whopping 14 grounds were identified, all these grounds may be summaries into one ground: Whether in the circumstances of the case, the Appellant's statement of defence ought to have been struck out.

Determination

11. I have considered the issues raised in this appeal.

12. The principles guiding the striking out of pleadings and cases is now well settled. These principles, as set out in **D T Dobie & Company (K) Ltd vs. Muchina [1982] KLR 1**, are that 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. 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. The rationale for this is due to a realisation that the exercise of the powers for summary procedure are draconian, coercive and drastic. And because a party may thereby be deprived of his right to a plenary trial, the court exercises those powers with the greatest care and circumspection and only in the clearest of cases as regards the facts and the law. The summary procedure should therefore only be adopted when it can be clearly seen that a claim or case is clear and beyond doubt unarguable and the judicial system would never permit a party to be driven from the judgement seat without any court having considered his right to be heard, except in cases where the cause of action was obviously and almost incontestably bad.

13. As correctly appreciated by the Learned Trial Magistrate relevant provision under which the application was hinged was brought under Order 2 rule 15 of the ***Civil Procedure Rules***. Subrule (1) of the said provision provides as follows:

> ***At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—***
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> ***(a) it discloses no reasonable cause of action or defence in law; or***
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> ***(b) it is scandalous, frivolous or vexatious; or***
>
> ***(c) it may prejudice, embarrass or delay the fair trial of the action; or***
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> ***(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.***

14. In the exercise of its powers under the said provision there are certain well established principles that a court of law is to adhere to. Whereas the essence of the said provisions is the striking out of an action or defence, that is a jurisdiction that must be exercised sparingly and in clear and obvious cases and unless the matter is plain and obvious, a party to civil litigation is not to be deprived of his right to have his suit tried by a proper trial. 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 or striking out a defence for not disclosing a reasonable cause of action defence for being otherwise an abuse of the process of the court.

15. The power to strike out pleadings must be sparingly exercised and it can only be exercised in clearest of cases. If a pleading raises a triable issue even if at the end of the day, it may not succeed then the suit ought to go to trial. However, where the suit is without substance or groundless of fanciful and or is brought is instituted with some ulterior motive or for some collateral one or to gain some collateral

advantage, which the law does not recognise as a legitimate use of the process, the court will not allow its process to be a forum for such ventures. To do this would amount to opening a front for parties to ventilate vexatious litigation which lack bona fides with the sole intention of causing the opposite party unnecessary anxiety, trouble and expense at the expense of deserving cases contrary to the spirit of the overriding objective which requires the court to allot appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

16. The grounds upon which the application was based were that the defence filed was frivolous, vexatious, a sham based on misconception of the law and otherwise amounting to an abuse of the court process and only made to delay the fast disposition of the suit.

17. A matter is frivolous if (i) it has no substance; or (ii) it is fanciful; or (iii) where a party is trifling with the Court; or (iv) when to put up a defence would be wasting Court's time; or (v) when it is not capable of reasoned argument. See **Dawkins vs. Prince Edward of Save Weimber (1976) 1 QBD 499; Chaffers vs. Golds Mid (1894) 1 QBD 186.**

18. Again a pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble and expense. See **Bullen & Leake and Jacobs Precedents of Pleading (12th Edn.) at 145.**

19. A matter is said to be vexatious when (i) it has no foundation; or (ii) it has no chance of succeeding; or (iii) the defence (pleading) is brought merely for purposes of annoyance; or (iv) it is brought so that the party's pleading should have some fanciful advantage; or (v). where it can really lead to no possible good. See **Willis Vs. Earl Beauchamp (1886) 11 PD 59**.

20. Pleading tend to prejudice, embarrass or delay fair trial when (i) it is evasive; or (ii) obscuring or concealing the real question in issue between the parties in the case. It is embarrassing if (i) It is ambiguous and unintelligible; or (ii) it raises immaterial matter thereby enlarging issues, creating more trouble, delay and expense; or (iii) it is a pleading the party is not entitled to make use of; or (iv) where the defendant does not say how much of the claim he admits and how much he denies. See **Strokes vs. Grant (1878) AC 345; Hardnbord vs. Monk (1876) 1 Ex. D. 367; Preston vs. Lamont (1876).**

21. A pleading which tends to embarrass or delay fair trial is described as a pleading which is ambiguous or unintelligible or which states immaterial matters and raises irrelevant issues which may involve expenses, trouble and delay and that which contains unnecessary or irrelevant allegations which will prejudice the fair trial of the action and lastly a pleading which is abuse of the process of the court really means in brief a pleading which is a misuse of the Court machinery or process. See **Trust Bank Limited vs. Hemanshu Siryakat Amin & Company Limited & Another Nairobi HCCC No. 984 of 1999.**

22. A pleading is an abuse of the process where it is frivolous or vexatious or both.

23. Where the pleading as it stands is not really and seriously embarrassing it is wiser to leave it un-amended or to apply for further particulars. See **Kemsley vs. Foot (1952) AC 325.**

24. In the **Raghbir Singh Chatte vs. National Bank of Kenya Limited Civil Appeal No. 50 of 1996**, the Court of Appeal held:

> **"If a general traverse…were held to be sufficient and effectual, that would render meaningless provisions such as Order VI Rule 9(3) of the Civil Procedure Rules and even the decisions of this Court such as *Magunga General Stores vs. Pepco Distributors Limited [1988-92] 2 KAR 89*. The position of the law…is that a mere denial or general traverse in defence is not sufficient and a defendant who does not specifically plead to all the issues raised in a plaint risks the probability of his defence being struck out or being held to Constitute an admission of the issues raised in the Plaint."**

25. In **Magunga General Stores vs. Pepco Distributors Ltd. [1987] KLR 150; [1988-92] 2 KAR 89 [1986-1989] EA 334** the same Court held:

> **"Mere denial is not a sufficient defence in a claim for breach of contract for goods sold and delivered and cheques issued in settlement thereof. There must be a reason why the defendant does not owe the money. Either there was no contract or it was not carried out or failed. It could also be that payment had been made and could be proved. It is not sufficient therefore to simply deny liability without some reason given."**

26. However, in **The Co-Operative Merchant Bank Ltd. vs. George Fredrick Wekesa Civil Appeal No. 54 of 1999** the Court of Appeal stated as follows:

> **"The power of the Court to strike out a pleading under Order 6 rule 13(1)(b)(c) and (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 is a matter of fact...Since oral evidence would be necessary to disprove what either of the parties says, the appellant's defence cannot be said to present a plain case of a frivolous, scandalous, vexatious defence, or one likely to prejudice, embarrass or delay the expeditious disposal of the respondent's action or which is otherwise an abuse of the process of the court. The defence raises a fundamental issue, namely, whether there was any misrepresentation as alleged by the respondent, a question which, cannot possibly be answered at the stage of an application for striking out; nor will it be competent for the court of appeal to try to answer it as its jurisdiction only extends to identifying whether, if any, there are issues which are fit to go for trial. The court has no doubt whatsoever, that the above is a fundamental triable issue...A Court may only strike out pleadings where they disclose no semblance of a cause of action or defence and are incurable by amendment. The appellant's defence cannot be said to fall into that category and had the trial Judge considered**

fully all the matters alluded to, he would not have come to the same conclusion as he did."

27. In **Yaya Towers Limited vs. Trade Bank Limited (In Liquidation) Civil Appeal No. 35 of 2000** the same court expressed itself thus:

> **"A plaintiff is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant can demonstrate shortly and conclusively that the plaintiff's claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court, it must be allowed to proceed to trial...It cannot be doubted that the Court has inherent jurisdiction to dismiss that, which is an abuse of the process of the Court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved...If the defendant assumes the heavy burden of demonstrating the claim is bound to fail, he will not be allowed to conduct a mini trial upon affidavits...It is not the length of arguments in the case but the inherent difficulty of the issues, which they have to address that, is decisive... The issue has nothing to do with the complexity or difficulty of the case or that it requires a minute or protracted examination of the documents and facts of the case but whether the action is one which cannot succeed or is in some ways an abuse of the process of the Court or is unarguable...Where the plaintiff brings an action where the cause of action is based on a request made by the defendant he must allege and prove inter alia, both the act done and the request made for doing such an act. In the absence of any request shown to have been made by the defendant in the particulars delivered of such allegation, it would not be possible for the plaintiff to prove any request made by the defendant and without this the essential ingredient of the cause of action cannot be proved and the plaintiff is bound to fail...No suit should be summarily dismissed unless it appears so hopeless that it is plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment."**

28. Section 10(1) of the said Act provides as hereunder:

> ***(1) If, after a policy of insurance has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of section 5 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.***

29. The side note to that section is *"**Duty of insurer to satisfy judgments against persons insured**"***.** In **Bushell vs. Hammond [1904] 2 KB 563,** it was held that though it is true that the marginal notes do not form part of a statute, yet some help can be derived from the side note to show what the section is dealing with. From the side note it is clear that the section deals with the obligation by the insurer to satisfy judgements obtained against persons insured. What clearly comes out from the said provision it is clear that for an insurance company to be under a statutory obligation to satisfy a decree certain condition precedent must be satisfied. Firstly, before a judgement is obtained, there must have been a policy of insurance in effect. Secondly, the judgement must have been in respect of a liability required to be covered by a policy under paragraph (b) of section 5 (being a liability covered by the terms of the policy). Thirdly, the judgement must have been obtained against a person insured by the policy.

30. In this case, the Appellant's defence was, firstly, that passenger liability for private motor vehicles which the accident motor vehicle was, is not a liability required to be covered, Secondly, it was averred that the mandatory notice required under subsection 2 of the said Section 10 to be served on the insurer was not served on the Defendant till long after the expiry of the prescribed period.

31. Regrettably, the Learned Trial Magistrate did not seem to attach much weight to the first line of the defence. She simply waved it away by stating that it was a standard defence. As regards the second line of defence, it was her view that whereas the notice was served outside the prescribed period, that was an issue for the primary suit and did not concern her.

32. For avoidance of doubt, section 10(2)(a) of the said Act provides that:

> ***No sum shall be payable by an insurer under the foregoing provisions of this section—***
>
> ***(a) in respect of any judgment, unless before or within fourteen days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings.***

33. In light of the foregoing provision, the Appellant's defence that it was not liable because the notice was served outside the prescribed period, cannot be said to have been frivolous. While it may not necessarily succeed, it was an arguable defence on a point of law that needed to have been properly determined. The Appellant, being the insured, and having pleaded that it was not a party in the primary suit, could only take up the defence in the declaratory suit and not in the primary suit as was found by the Learned Trial Magistrate.

34. It must now be clear that the defence filed by the Appellant disclosed at least one triable issue regarding the issue whether the Appellant was liable in light of the finding that section 10(2)(a) of the Act was not complied with. Accordingly, the decision striking out the Appellant's defence and entering judgement was improper. Consequently, this appeal succeeds, the ruling of the Chief Magistrate's Court at Machakos delivered on 28th August, 2015 in Machakos Chief Magistrate's Court Civil Suit No.939 of 2014 is hereby set aside and it is hereby directed that the case be heard on its merits. As the Appellant did not comply with this Court's directions to furnish soft copies in word format, there will be no order as to the costs of this appeal. It is so ordered.

Read, signed and delivered in open Court at Machakos this 8th day of February, 2022

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Kinyanjui for Mrs Thoronjo for the Respondent

CA Susan