



**Directline Assurance Company Limited v Wachira & another (Suing  
as administrators of the Estate of Lucy Wairimu) (Civil Appeal  
213 of 2019) [2024] KEHC 14496 (KLR) (20 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14496 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL 213 OF 2019  
JK NG'ARNG'AR, J  
NOVEMBER 20, 2024**

**BETWEEN**

**DIRECTLINE ASSURANCE COMPANY LIMITED ..... APPELLANT**

**AND**

**IRENE NJERI WACHIRA ..... 1<sup>ST</sup> RESPONDENT**

**MICHAEL MUTUGI KIRABA ..... 2<sup>ND</sup> RESPONDENT**

**SUING AS ADMINISTRATORS OF THE ESTATE OF LUCY WAIRIMU**

*(Being an appeal against the Ruling of Hon. C. N. Ndegwa (SPM) delivered on  
15th October 2019 in Mombasa Chief Magistrate's Court Civil Suit No. 1291 of  
2018, Michael Mutugi Kiraba & Irene Njeri Wachira (Suing as Administrators  
of the Estate of Lucy Wairimu) v Directline Assurance Company Limited)*

**JUDGMENT**

1. The background of the appeal is that a suit was filed by the Respondents in Mombasa CMCC No. 1716 of 2016, Michael Mutugi Kiraba and Irene Njeri Wachira (Suing as the legal representative of the Estate of Lucy Wairimu (deceased) v Horizon Company Limited where judgment was entered in favour of the Respondents. The Respondents then instituted Mombasa CMCC No. 1291 of 2018, Michael Mutugi Kiraba and Irene Njeri Wachira (Suing as the legal representative of the Estate of Lucy Wairimu (deceased) v Directline Assurance Company Limited to compel the Appellant pay the amount.
2. That on 21<sup>st</sup> January 2019, the Respondent filed a Notice of Motion dated 10<sup>th</sup> January 2019 seeking that the Defence be struck out and judgment entered as prayed in the Plaintiff, which Notice of Motion was later amended on 22<sup>nd</sup> May 2019 to indicate that the Respondents were seeking entry of judgment as per the Amended Plaintiff.



3. The ruling of the trial court was to the effect that the Appellant filed a Replying Affidavit that was sworn by Isabella Nyambura, their Legal Counsel, on 28<sup>th</sup> February 2019 in response to the Respondent's Notice of Motion dated 10<sup>th</sup> January 2019. That no response was filed in respect to the Amended Notice of Motion dated 22<sup>nd</sup> May 2019. That the application was therefore not opposed and allowed as prayed. The trial court therefore upheld the judgment in Mombasa CMCC No. 1716 of 2016, Michael Mutugi Kiraba and Irene Njeri Wachira (Suing as the legal representative of the Estate of Lucy Wairimu (deceased) v Horizon Company Limited for the sum of Kshs. 3,000,000 with costs and interest of the suit.
4. Being dissatisfied, the Appellant appealed against the ruling and order of the trial court through the Memorandum of Appeal dated 28<sup>th</sup> October 2019 on grounds that the learned trial magistrate erred in law and in fact in: striking out the Appellant's Statement of Defence thereby determining the Respondent's suit summarily contrary to the well settled principles governing striking out of pleadings; holding that the Respondent's Amended Notice of Motion application dated 22<sup>nd</sup> May 2019 was unopposed hence allowing it as prayed despite there being on record the Appellant's Replying Affidavit which substantively responded to the issues raised therein; failing to appreciate that no liability could lie against the Appellant by virtue of the Appellant having merely extended a policy of insurance over motor vehicle registration number KBM 688S; failing to appreciate that the judgment obtained in Mombasa CMCC No. 1716 of 2016, Michael Mutugi Kiraba & Irene Njeri Wachira (Suing as the legal representatives of the Estate of Lucy Wairimu (Deceased) v Horizon Company Limited was incapable of being executed against the Appellant; failing to appreciate the contents of the Appellant's Replying Affidavit filed on 4<sup>th</sup> March 2019 which annexed a copy of the Customer Audit Form and Policy Schedule in respect of motor vehicle registration number KBM 688S in favour of Basari Company Limited and thereby rendered a determination without consideration of the full facts; and disregarding the numerous binding authorities cited by the Appellant's counsel and thereby basing the ruling on erroneous principles.
5. The Appellant prayed for orders that the appeal be allowed, that the ruling and order of the subordinate court delivered on 15<sup>th</sup> October 2019 be set aside and substituted with an order dismissing the Respondents' Amended Notice of Motion application before the subordinate court dated 22<sup>nd</sup> May 2019, that the Respondents do pay the costs of this appeal, and any such other or further relief as this court may deem just to grant.
6. The appeal was canvassed by way of written submissions. The Appellant in their submissions dated 28<sup>th</sup> August 2023 argued that proceedings indicate that there was no proof that the amended notice of motion application was served upon the Appellants. That the court ought to have proceeded with the Appellant's Replying Affidavit which was already on record and which substantively responded to the issues raised in the application. The Appellant submitted that the Defendant in the suit in which judgment sought to be enforced was against a party that was not sued in the initial instance contrary to Section 10 of Cap 405. That onus was on the person suing to ensure they sued the correct Defendants.
7. The Appellant submitted that had the courts perused the Replying Affidavit filed by the Appellant dated 28<sup>th</sup> February 2019, they would have arrived at a different conclusion of allowing the Appellant's statement of defence filed on record to be heard on merit. That Section 5 (b) (iv) of the Insurance (Motor Vehicle Third Party Risk) Act limits the sums that can be recovered from a single claim to 3 million shillings as was stated in the Law Society of Kenya v Attorney General & 3 Others (2016) eKLR, the holding of Majanja, J. in Africa Merchant Assurance Company Limited v William Muriithi Kimaru (2016) eKLR and in Patricia Mona Anthony & Another v African Merchant Assurance Co. Ltd (2019) eKLR. The Appellant submitted that the appeal be allowed as prayed.



8. The Respondents in their submissions dated 19<sup>th</sup> December 2023 argued on whether the trial court erred in striking out the Appellant's statement of defence that the ruling appealed against by the Appellant was issued by a competent court with jurisdiction. That the Respondents exercised their right to file a Notice of Motion application which application was later amended reducing the amount claimed from Kshs. 6,372,971 to Kshs. 3,000,000 due to the insurance cap limit amount. That the defence filed therein consisted of mere denials and did not raise any triable issues. That the Appellant herein did not file a response to the amended application which was as a matter of fact unopposed. The Respondents argued that there is no defence in a declaratory suit and the Appellant being the insurer had an obligation to satisfy the judgment obtained against its insured as was held in *Murfin v Ashbridge* (1941) 1 All ER 231 and *Juliet Waringa Wanyonda v Lion of Kenya Insurance Company* which cited with authority the case of *Joseph Mwangi Gitundu v Gateway Insurance Company Limited*.
9. The Respondents submitted that summons, pleadings and all requisite notices were properly served in both the primary suit and the declaratory suit to which the appeal lies. Judgment was delivered by the honourable trial court to which the Appellant ignored to exercise his right of appeal or review therefore failing to table its evidence denying the existence of the insurance policy then despite being accorded an opportunity to do so. That the Appellants at trial produced evidence in the form of a police abstract which clearly indicated that the suit motor vehicle was insured by the Appellant herein and at the time of the accident, there was a valid policy of insurance. The Respondents relied on the case of *Gerald Njuguna Mwaura v Africa Merchant Assurance Co. Ltd* (2020) eKLR, *APA Insurance Company Ltd v George Masele* (2014) eKLR and *Monarch Insurance Company Limited v Wycliffe Onyango Odenda & 2 Others* (2018) eKLR which cited with authority *United Insurance Company v Lawrence Ruthi Mwangi* (2004) eKLR. The Respondents submitted that the trial court was right in striking out the defence which raised no triable issues.
10. On whether the Appellant has satisfied its requirements under Section 10 as read with Section 5 (b) of the Insurance (Motor Vehicle Third Party Risk) Act, the Respondents submitted that the decree holder herein was a third party as under the provisions of Section 4 (1) of the Act and as such is entitled to benefit under the policy. That the Appellant confirms having paid the decretal sum of Kshs. 3,000,000 but alleged that the payment was only done under threat of execution. However, this is not correct as the payment was made way back in the year 2020 and that warrants of attachment for the pending and unsettled costs were filed on 10<sup>th</sup> February 2021. That the Appellant did not make any payment after the said warrants were filed and as such the claim that the Appellant only paid the decretal sum due to the threat of execution is untrue. That the said execution was for recovery of costs which remained unsettled.
11. The Respondents also submitted that the Appellant has come to court with unclean hands upon which equity frowns and that the Appellant fails to disclose that Horizon Company Limited was its insured and has been wound up. That the Appellant was tasked to disprove this fact when it filed an application dated 14<sup>th</sup> August 2018 through the firm of Kairu & McCourt Advocates who were acting under instructions of the Appellant which application was dismissed with costs on 20<sup>th</sup> December 2018. That the appeal herein is therefore devoid of merit and the same ought to be dismissed with costs.
12. The role of the first appellate court to reexamine and to reevaluate evidence to come up with its own findings was set out in *Selle vs. Associated Motor Boat Co.* (1968) E.A 123 as follows: -

“ ... 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 ...”



13. I have considered the Record of Appeal dated 7<sup>th</sup> August 2023 and submissions by the parties. The issues for determination are: -
- a. Whether striking out the Appellant's statement of defence was justified
  - b. Whether liability lay with the Appellant for having extended the policy of insurance over the suit motor vehicle
  - c. Whether the Appellant met requirements under Section 10 as read with Section 5 (6) (iv) of the Insurance (Motor Vehicle Third Party Risk) Act
  - d. Who should bear costs
14. It is not in dispute that judgment was entered in favour of the Respondents in Mombasa CMCC No. 1716 of 2016, who then filed a declaratory suit in Mombasa CMCC No. 1291 of 2018 to compel the Appellant to pay the amount. The Appellant filed a Statement of Defence to the declaratory suit and subsequently the Respondents filed a Notice of Motion application dated 10<sup>th</sup> January 2019 seeking to strike out the defence and enter judgment as prayed in the Plaint. The Notice of Motion application was later amended on 22<sup>nd</sup> May 2019 for judgment to be entered as per the Amended Plaint. The Appellant filed a Replying Affidavit which the trial court in its ruling dated 15<sup>th</sup> October 2019 deemed it as having been a response to the application dated 10<sup>th</sup> January 2019 and not the amended application dated 22<sup>nd</sup> May 2019. The application was therefore considered unopposed and allowed as prayed.
15. Order 2 Rule 15 of the Civil Procedure Rules provides for the power of the court to strike out pleadings as follows: -

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.

16. The court in *Madison Insurance Company Limited v Augustine Kamanda Gitau (2020) eKLR* held as follows: -

“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.

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.”

17. The Appellant submitted that they were not served with the Amended Notice of Motion application dated 22<sup>nd</sup> May 2019 and the typed proceedings do not indicate proof of service. The Appellants stated that they opposed the application, which was later amended, through their Replying Affidavit and that the court ought to have proceeded with the said Replying Affidavit which was already on record and which substantively responded to the issues raised in the Amended Notice of Motion application. That had the court perused the Replying Affidavit, they would have arrived at a different conclusion of allowing the Appellant’s Statement of Defence to be heard on merit.
18. In *Postal Corporation of Kenya v I .T Inamdar & 2 Others* (2004) 1 KLR 359, the court held that: -  
“ ... the law is now well settled that if the defence filed by a defendant raises even one bona fide triable issue, then the defendant must be given leave to defend.”
19. Authorities on striking out of pleadings are explicit and the power has the effect of driving a litigant away from the seat of justice. Exercising the power ought to be done sparingly in deserving cases where pleadings are drawn hopelessly and the defect cannot be cured by an amendment.
20. A careful analysis of the evidence on record shows that the Appellant’s statement of defence raised triable issues which could only be determined conclusively during hearing of the main suit. The position of the Appellant that the Defendant in the suit in which judgment sought to be enforced was against a party that was not sued in the initial instance, that onus is on the person suing to ensure they sue the correct defendants and that the insurer was not served are facts that can only be resolved conclusively during hearing of the main suit.
21. This court need not belabor on the other issues for determination as it would amount to delving into the merits of the case that ought to be dealt with at the trial court.
22. In the upshot, the appeal is allowed, the ruling and order of the subordinate court delivered on 15<sup>th</sup> October 2019 is set aside with an order that the suit be remitted to the trial court for hearing on merit before a different magistrate.

**DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 20<sup>TH</sup> DAY OF NOVEMBER, 2024.**

.....

**J.K. NG’ARNG’AR, HSC**

**JUDGE**

**In the presence of: -**

No appearance Advocate for the Appellant

No appearance Advocate for the Respondent

Court Assistant – Mr. Samuel Shitemi

**J.K. NG’ARNG’AR, J.**

