



**Mwaniki v UAP Insurance Company Limited (Civil Appeal E014 of 2023)
[2024] KEHC 14463 (KLR) (20 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14463 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL E014 OF 2023
LM NJUGUNA, J
NOVEMBER 20, 2024**

BETWEEN

CLEMENT MWANIKI APPELLANT

AND

UAP INSURANCE COMPANY LIMITED RESPONDENT

*(Appeal arising from the decision of Hon. H.N. Nyakweba in
Embu CMCC No.175 of 2019 delivered on 19th July 2022)*

JUDGMENT

1. The appellant filed a memorandum of appeal dated 15th August 2022 seeking the following orders:
 - a. That the appeal be allowed
 - b. The lower court suit in Embu CMCC No 175 of 2019 be reinstated and be set down for hearing on merit before a different court; and
 - c. Costs be provided for.
2. The appeal was premised on the grounds that:
 - a. The learned trial magistrate erred by applying unknown law in dismissing the appellant's suit without any justification;
 - b. The learned magistrate misdirected himself in law and fact by being partisan and proceeded to raise issues on the format of the suit while the defence did not have any objections to how the suit was framed;
 - c. The learned trial magistrate erred in law by dwelling on the form and technicalities at the expense of justice, which is against the constitution of Kenya;



- d. The learned magistrate erred by applying a draconian action by dismissing the suit which is contrary to the laid down principles of law which demand that dismissal should be the last resort and should be applied to the worst of scenarios; and
 - e. The learned magistrate erred in law by purporting to teach the appellant how to frame his suit in stead of letting the suit proceed on merit rather than dismissing it based on form.
3. The appellant filed a plaint dated 23rd October 2019 seeking judgment against the respondent, his insurer, for an order that it settles the decretal amount in Embu CMCC No. 76 of 2018, failing which execution be levied against it. The respondent filed a statement of defense denying the allegations made against it and added that no reasonable cause of action has been raised against it. It urged the court to strike out the plaint which was fatally defective.
 4. When the matter came up for pretrial directions, the court noted that the plaint did not disclose a reasonable cause of action against the respondent and urged the appellant to amend it. When the court mentioned the matter again for compliance, the appellant had not amended the plaint and he did not intend to do so. The court struck out the plaint in accordance with the provisions of Order 11 Rule 3 of the *Civil Procedure Rules*. The court stated that the action against the respondent is by way of indemnity and that the appellant had not provided proof that he had settled the impugned decretal amount so that he could be indemnified by the respondent.
 5. The appeal herein was canvassed by way of written submissions.
 6. The appellant submitted that the trial court erred in dismissing the suit under Order 11 Rule 3 instead of Order 2 Rule 15 of the *Civil Procedure Rules*. He relied on the case of *Simon Kirima Muraguri & Awali Tumaini Investment Limited v Equity Bank (Kenya) Limited & Antique Auctions Agencies* [2021] KEHC 4880 (KLR) and urged that the court should exercise its discretionary power judiciously. It was his argument that he was entitled to be heard on merit, regardless of whether his case had any chances of success as was held in the case of *Yaya Towers Limited v Trade Bank Limited (In Liquidation)* [2000] eKLR.
 7. The respondent submitted that the trial court struck out the plaint according to Order 11 Rule 3 as read with Order 2 Rule 15(1)(a) of the *Civil Procedure Rules*. It relied on the case of *D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another* (1980) eKLR where the court defined reasonable cause of action to mean one with some chance of success considering only the allegations made in the plaint.
 8. It was its case that the suit was incompetent since it failed to disclose a direct cause of action against the respondent and it would be a waste of the court's time to consider the pleadings therein. That the plaint did not produce evidence of the respondent being the appellant's insurer through a policy document nor did it disclose the total decretal amount owing and whether the same has been paid.
 9. That even without considering the merits of the plaint, the trial court rightly struck it out as it would only clog the court system and waste its time. It further relied on the case of *Nzoia Sugar Company Limited v. West Sugar Company Limited* (2020) eKLR and argued that the appellant was given sufficient time to amend his pleadings but he declined to do so. It stated that reinstating the suit at this point is prejudicial to the respondent who has been dragged into the proceedings without just cause.
 10. The issue for determination is whether the appeal has merit.
 11. The trial court struck out the plaint out under Order 11 Rule 3 of the *Civil Procedure Rules*. Before doing this, he had given the appellant a chance to amend the plaint but he expressed that he was not willing to amend it. It was the trial magistrate's view that the action between the appellant and the



respondent is one of indemnity and it only arises when the appellant has settled the decretal amount that is owing to the decree holder in Embu CMCC No. 76 of 2018. He found that no cause of action had been disclosed against the respondent.

12. Through the plaint, the appellant stated that his motor vehicle was comprehensively insured by the respondent and it was involved in a road traffic accident in which third parties were injured. That through Embu CMCC No. 76 of 2018, judgment was entered in favour of the third parties against the appellant. That the respondent was under statutory obligation to settle the decretal amount.
13. A court may strike out pleadings only based on a superficial look at them without considering the merits thereof. In the case of *DT Dobie and Company (K) Ltd vs Joseph Mbaria Muchina & Another* (1980) eKLR the court stated:

“The power to strike out should be exercised only after the court has considered all the 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.”

14. Part of the considerations by the court before striking out a plaint is whether the plaint discloses a cause of action against such a party. In other words, the plaint should directly disclose a cause of action against a defendant for it to be valid in the eyes of the court. The case of *Amon v. Raphael Tuck & Sons Ltd* (1956) 1 All ER 273, cited in *Pizza Harvest Limited v Felix Midigo* [2013] eKLR sought to establish who a necessary party is. The court held:

“What makes a person a necessary party? It is not of course, merely that he has relevant evidence to give on some of the questions involved; that would only make him a necessary witness. It is not merely that he has an interest in the correct solution of some question involved and has thought of relevant arguments to advance and is afraid that the existing parties may not advance them adequately ...the Court might often think it convenient or desirable that some of such persons should be heard so that the court could be sure that it had found the complete answer, but no one would suggest that it would be necessary to hear them for that purpose. The only reason which makes it necessary to make a person a party to an action is so that he should be bound by the result of the action, and the question to be settled, therefore, must be a question in the action which cannot be effectually and completely settled unless he is a party.”

15. In the present case, the appellant, like any other person would claim, claimed that the respondent was his insurer and it is liable to settle the decretal amount in another case. From a perusal of the plaint, I do note that it raises triable issues that should be subjected to judicial time if justice is to be served. The appellant stated that the respondent is his insurer and under the *evidence Act*, he is the one entitled to prove this allegation. The respondent’s liability in the matter can only be determined if the matter is brought to full trial and determined from the evidence on a balance of probabilities.
16. The plaint was struck out under Order 11 Rule 3 of the *Civil Procedure Rules* which provides for signing of the completed case management checklist. On the other hand, Order 2 Rule 15(1)(a) of the same rules gives a court the power to order striking out or amendment of pleadings for failure to disclose a cause of action or defense. The trial magistrate did err in relying on a provision of the Rules that was not applicable in the matter. In fact, it is my view, that he did err in striking out the plaint at that stage.



17. Therefore, I find that the appeal has merit and the same is hereby allowed with orders as follows:

- a. The lower court suit in Embu CMCC No.175 of 2019 is hereby reinstated for hearing on merit.
- b. Each Party to bear its own costs of the appeal.

18. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 20TH DAY OF NOVEMBER, 2024.

L. NJUGUNA

JUDGE

..... for the Appellant

..... for the Respondent

