



**Kenya Orient Insurance Company v Mutuku (Civil Appeal E553 of 2022)
[2024] KEHC 16109 (KLR) (13 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16109 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL APPEAL E553 OF 2022
REA OUGO, J
DECEMBER 13, 2024**

BETWEEN

KENYA ORIENT INSURANCE COMPANY APPELLANT

AND

MESHACK MUTUA MUTUKU RESPONDENT

*(An appeal from the ruling of the Hon Gathogo Sogomo delivered on 11th
February 2022 in Milimani Chief Magistrate's Courts MCCC. E2867 of 2021)*

JUDGMENT

1. The respondent filed a suit at the lower court seeking a declaration that the appellant be held liable to satisfy the Milimani CMCC NO 11413 of 2019 judgment. According to the respondent, the appellant insured Ezekiel Obanda Olunga and/or Shah Nawaz Shaffi for the death or bodily injury to any person arising out of the use of motor vehicle registration number KBT 216J. On 24/4/2017 the respondent was knocked down by the vehicle negligently driven.
2. The respondent brought an action against the insured for damages based on the tort of negligence in respect of the respondent's personal injuries and consequential loss and damage. The respondent duly served the required notice under the provisions of the Insurance (Motor Vehicle Third Party Insurance) Act on 27th November 2018. The respondent thereafter obtained a judgment on 9th September 2020 for the sum of Kshs 3,183,846.76/-. Upon entry of the judgment, the appellant became liable to satisfy the said judgment by paying the respondent Kshs 3,183,846.76/- together with interest thereon at the court's rates.
3. The appellant denied that it had an insurable interest over KBT 216J. It also denied being served with the statutory notice as alleged as well as the pleadings filed in Milimani CMCC NO 11413 of 2019.



4. The respondent thereafter filed a Notice of Motion before the subordinate court seeking an order that the appellant's statement of defence dated 17th June 2021 be struck out and/or dismissed and judgment thereof be entered for the respondent. The application was based on the grounds that the statement of defence was scandalous, frivolous and vexatious. The defence consists of mere denials and discloses no arguable case. The appellant is justly liable to satisfy the judgment in Milimani CMCC NO 11413 of 2019.
5. The respondent in their supporting affidavit annexed the police abstract issued in respect of the accident that captured the appellant as the insurance company for the insured and the policy number. He also annexed the statutory notice that was sent to the appellant and received by them on the face of the letter through its stamp. Once interlocutory judgment was entered, the respondent notified the appellant of the entry of an interlocutory judgment through a letter dated 26/7/2019 and annexed the letters and the certificate of postage. Once judgment was delivered, the appellant was notified of the same through a letter dated 24/10/2020. The appellant having insured the subject motor vehicle and having been served with statutory notice as required by the law and participated in Milimani CMCC NO 11413 of 2019, they are estopped from claiming otherwise and refusing to settle the judgment sum.
6. The application was opposed by the respondent and their legal officer, Catherine Kendi deposed the replying affidavit on its behalf. She averred that the respondent's application sought to draw the subordinate court into the merits of the case where it is settled law that for that is a function of the trial court. The application should be dismissed with costs as it seeks to remove the defendant from the seat of judgment where the court is not fully informed without discovery, without oral evidence ordinarily tested by cross-examination. It was argued that the defence raised triable issues such as fraud, indemnity and contribution, privity of contract and proof of the alleged service of the statutory notice.
7. The appellant averred that the application was devoid of merit where it called the court to address evidence that ought to be tendered at a hearing. The fundamentals of a fair trial would be extremely foundered if both parties are not heard and the issues between them are determined on merit.
8. The trial magistrate in his judgment concurred with the respondent that against the backdrop of the documentary evidence by the respondent and the averments and denials by the appellant, their defence was starkly bland and bare. He observed that the defence depicted no triable issues that were worth the court's time at full trial. The court found that the application by the respondent was merited.
9. The appellant dissatisfied with the ruling of the trial court has filed this appeal on raising 17 grounds of appeal which can be summarised as: the trial magistrate erred in striking out the appellant's defence and failed to consider the defence raised by the appellant in its merits.
10. In his submissions, argued that the issue raised in the appeal is the rule underpinning striking out of pleadings. The law on striking out pleadings is codified under Order 2 Rule 15 (1) of the Civil Procedure Rules. Order 2 Rule 15 (2) requires that an application under subrule 1 (a) should be made without recourse to evidentiary references. The trial court heavily relied on the documentary evidence contained within the depositions made by the respondent in total disregard of Order 2 Rule 15 (2). The trial magistrate in his ruling referred to the case of Ranghbir Singh Chatte v National Bank Limited of Kenya [1996] eKLR where the claim was a liquidated matter, however, declaratory suits are not liquidated damage claims. (See Rosemary Wanjiru Kungu v Directline Assurance Company Limited [2017] eKLR).
11. The defence raised a crucial issue of insurable interest and the appellant should have been afforded the opportunity to present its case. What constitutes a triable issue does not depend on the potential of its



success or failure but raises a matter worthy of further examination. The appellant also raised the issue of service of the statutory notice. If the same is not served, it has great legal implications.

12. The judgment that the respondent sought to enforce exceeded the statutory limit of Kshs 3,000,000/- as set out in section 5 of CAP 405. This critical aspect was overlooked by the trial magistrate. The ruling rendered the appellant condemned unheard. They urged the court to order a retrial of the matter before a different magistrate.
13. The respondent submitted that from the documents annexed to the supporting affidavit, it was clear that the appellant was the insurer of KBT 216J. The respondent also annexed copies of documents bearing the official stamp of the appellant and their respective dates of service. The appellant was served with the statutory notice as per the law but did not file any proceedings to repudiate liability.
14. Section 10 (1) of CAP 405 is clear that where judgment is obtained against an insured after an insurance policy has been issued covering the liability, the duty of the insurer is to satisfy the judgment and decree even if it had subsequently cancelled the policy. The appellant cited the cases of Corporate Insurance Co. Ltd v Violet Nabwire Ouma [2019] eKLR and APA Insurance Limited v Theodora Atieno Okal [2012] eKLR to aid his case.
15. It was submitted that having established that indeed there is clear evidence before the court that the appellant was the insurer of the subject motor vehicle owned by the defendants in the primary suit at the time of the accident; secondly, that the appellant was duly served with a statutory notice as required by the law; and finally, that a decree was obtained against their insured and the same have never been appealed or settled. Therefore, the trial magistrate did not error in striking out the appellant's statement of defence as the same contained mere denials. It was frivolous, vexatious, an abuse of the due process of the court and meant to delay the settlement of the respondent's claim.

Analysis And Determination

16. I have considered the pleadings before the subordinate court, the trial magistrate's ruling, the appeal filed herein, and the rival submissions; the sole issue raised in the appeal is whether the respondent established a case of striking out of the appellant's defence before the subordinate court.
17. Order 2 rule 15 of the Civil Procedure Rules, has established clear principles which guide the court in the exercise of that power in the following terms;

“ 15.

- (1) 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.”



18. In the Co-operative Merchant Bank Ltd. Vs. George Fredrick Wekesa (Civil Appeal No. 54 of 1999) the Court of Appeal stated:

“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.”

19. In this case, the trial magistrate found that the defence did not raise any triable issue. However, having carefully considered the defence, the appellant contends that it did not have an insurable interest in KBT 216J. It was averred that the appellant would crave leave to enjoin the alleged insured as a third party for contribution. It also denied being served with the statutory notice.

20. The trial magistrate failed to consider that a triable issue is not necessarily one that the defendant would ultimately succeed on (see Olympic Escort International Co. Ltd. & 2 Others vs. Parminder Singh Sandhu & Another [2009] eKLR). Instead, he based the decision to strike out the suit on the holding of Ranghbir Singh Chatte v National Bank of Kenya Ltd (Supra) where the suit in question was for a liquidated claim. In this case, the respondent sought a declaration that the appellant is liable to satisfy the judgment in Milimani CMCC No 11413 of 2019. Therefore, the trial magistrate erred when it relied on a case that referred to a claim for liquidated claim and the court struck out the defence. The court in Directline Assurance Company Limited v Nancy Naliaka & another [2021] eKLR held as follows:

“ 22. The key relief sought in the Respondents’ declaratory suit was a declaration that the Appellant was “liable to satisfy judgment in Milimani CMCC 4166 of 2017.” This relief does not qualify as a liquidated demand...”

21. It is clear that the trial magistrate failed to consider the statement of defence which on prima facie raised triable issues. Therefore, I allow the appeal and direct that the declaratory suit be heard on its own merits before a magistrate other than Hon Gathogo Sogomo (PM). The costs of this appeal shall abide the outcome of the declaratory suit.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 13TH DAY OF DECEMBER 2024

R.E. OUGO

JUDGE

In the presence of:

Miss Nyabanje h/b Mr. Mutegi -For the Appellant

Miss Oganga h/b Musilli Mbiti -For the Respondent

Kizito - C/A

