



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 41 OF 2019

XPLICO INSURANCE COMPANY.....APPELLANT

VERSUS

PURITY WAWIRA DAVIEST.....RESPONDENT

JUDGMENT

1. This is an appeal arising out of the judgment of Hon. L.K. Mwendwa Senior Resident Magistrate Runyenjes in PMCC No.37 of 2017 delivered on 17/01/2019; a brief summary of the case is that the respondent had instituted a declaratory suit against the appellant who was the insurer of the owner of motor vehicle registration number KAT 636M; the appellant upon being duly served with summons had failed to tender a defence prompting an interlocutory judgment to be entered against it; the matter then proceeded for formal proof on the 8/02/2018; subsequently the appellant by a Notice of Motion under certificate of urgency dated 28/02/2018 sought to set aside the proceedings of 8/02/2018 and also sought unconditional leave to file its in terms of the draft copy defence annexed to the application;

2. On the 17/01/2019 the trial court dismissed the application citing that the appellants statement of defence raised no triable issues; the trial court proceeded to order a declaration to issue that the appellant satisfy the entire decretal sum in PMCC No.49 of 2014;

3. The appellant being dissatisfied with the trial court's decision filed this appeal and listed six (6) grounds of appeal in its Memorandum of Appeal which are as summarized hereunder;

(i) The trial court erred in denying the appellant leave to file its Statement of Defence despite there being a proper explanation as to why the appellant could not file its defence within time;

(ii) The trial court erred in failing to appreciate that the appellants draft Statement of Defence raised triable issues;

(iii) The trial court applied wrong principles of law in arriving at the decision to enter ex-parte judgment and condemning the appellant unheard despite the existence of triable issues;

(iv) The trial court erred in declaring the appellant liable to satisfy the entire sum of Kshs.479,222/04 hence allowing the plaintiff to benefit twice despite the sum already being settled in full;

(v) The trial court in fact in failing to appreciate that denying a party a constitutional right to be heard should be done sparingly, and it must be in the most plain and obvious cases and only in special circumstances which do not exist in the instant case;

(vi) The trial court was blatantly biased and took favour with the plaintiffs' case in unclear circumstances completely unsupported by law;

(vii) The trial court disregarded the defendants written submissions and did not fully appreciate all the material evidence on record and hence delivered an unconsidered judgment.

4. The parties were directed to dispose of the Appeal by filing and exchanging written submissions; hereunder is a summary of the parties respective submissions;

APPELLANTS SUBMISSIONS

5. The appellant submitted that the only issue was whether the appellant fully settled the decretal sum in Civil Suit No.49 of 2014 and this was the issue that was to be addressed in the declaratory suit Runyenjes Suit Civil Case No.37 of 2017 and all the appellant was requesting to be given a chance to ventilate its case by allowing it to file its Statement of Defence which raised this substantial issue;

6. The appellant submitted that it had forwarded three (3) cheques in the total sum of Kshs.1,193,230/- being cheque nos.003615, 003617 and 003614 for the four primary suits PMCC No.49, 50,78 and 79 all of 2014; the advocates acknowledged payment of the three (3) cheques but still demanded an outstanding sum of Kshs.158,116/50;

7. The appellants' contention was that there was a balance of Kshs.138,285/- and it paid vide cheques nos 0002551 and 0002561; cheque no.0002541 was payment for case No.77 of 2014 but the total decretal sum for this case was Kshs.330,337/- which would mean that the appellant had paid Kshs.3,035/- in excess; after deducting the amounts in cheque no.000255 (in the sum of Kshs.124,140/-) and cheque no.000256 (Kshs.5,700/-) and the excess of Kshs.3,035/- leaves the balance owed to the respondent is in the sum of Kshs.5,050/-;

8. Case law relied on **Mombasa Civil Case No.13 of 2012 Equatorial Commercial Bank Ltd vs Jodam Engineering Works Ltd; Kisumu Court of Appeal No.262 of 2003 Blue Shield Insurance Company Ltd vs Joseph Mboya Ogotu and Kisii Civil Appeal No.141 of 2009 Kenindia Assurance Co. Ltd vs Laban Idiah Nyamache** which support that the contention that where the defence raises triable issues the appellant ought to be allowed to ventilate this issue;

9. The appellant made reference to Section 107 of the Evidence Act and submitted that the respondent had not proved the liability of the appellant on payment of the suit amount; further the appellant submits that striking out a pleading is a draconian move which needs to be exercised cautiously; case law relied **DT Dobie & Company (Kenya) Limited vs Joseph Mbaria Muchina & Another [1980] eKLR;**

10. Accordingly, the appellant ought to be allowed to file its defence and be allowed to have its day in court to tender its evidence and cross examine the respondent/plaintiff's witnesses and it is willing to pay thrown away costs in the event the appeal is allowed and the interlocutory judgment is set aside; case law referred to **Philip Chemowolo & Another vs Augustine Kubede (1988) KLR and Belinda Murai & Others vs Amos Wainaina (1978) KLR.**

RESPONDENTS SUBMISSIONS

11. The respondent opposed the appeal and in response submitted that the appellant though duly informed that the Record of Appeal was incomplete had failed to rectify the position; the documents that were missing were the decree, the Order for Extension of Time, the appellants submissions and respondents submissions on the Notice of Motion dated 28/02/2018 and the annexures to the respondents Replying Affidavit dated 22/08/2018; since these documents were missing from the Record of Appeal then the appeal ought to be dismissed and the respondent relied on Order 42 Rule 13(4) of the Civil Procedure Rules and the case of **Cosmo Plastics Limited vs Stephen Kiamba Nzuva (2007) eKLR;**

12. The appellant had entered appearance and had thereafter gone to sleep; it also relied on documents meant for another claim to support the settlement of the declaratory suit and this fact was not denied when raised by the respondent in her Further Replying Affidavit, the appellant admitted everything in the respondents' plaint but purported that the claim was settled, yet when the matter came up for formal proof on 8/02/2018 no questions were put to the respondent in cross-examination;

13. The respondent submitted that the appellant's statement of defence raised no triable issues and it is the respondents' contention that the decretal sum was not fully settled and just by looking at the affidavits the appellant confirms as much; case law **Thomas Muoka Muthoka & Another vs ICEA (2008) eKLR;**

14. The cheque for Kshs.333,372/- 12/05/2017 was for Runyenjes PMCC No.77 of 2014 which is an unrelated matter and not relevant to this appeal; the other cheque numbers 002551 and 0002561 to K.Moseti Advocates and Commissioner of Domestic Taxes and has nothing to do with the present appeal;

15. The respondent prayed that the appeal be dismissed with costs to the respondent.

ISSUES FOR DETERMINATION

16. Upon reading the parties rival written submissions this court has framed the following issues for determination; which are;

(i) Whether the appellants Statement of Defence raises triable issues;

(ii) Whether the respondent proved her case on a balance of probabilities.

ANALYSIS

17. In considering the appeal, this court is guided by the Court of Appeal decision in the case of **Selle & Another vs Associated Motor Boat Co. Ltd & Another (1968) EA 123;** it held that

“A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.” (See also LAW JA, KNELLER & HANCOX AG JJA IN MKUBE VS NYAMURO [1983] KLR, 403-415, AT 403).

Whether the appellants Statement of Defence raises triable issues;

18. It is trite law that a court of law ought not to strike out a pleading if it discloses an arguable case or raises a triable issue; what amounts to

a triable issue was determined in the case of **Equatorial Commercial Bank Limited vs Engineering Works Limited & 2 others (2014) eKLR**; the court held that;

‘A Statement of Defence is said to raise a reasonable defence if that defence raises a prima facie triable issue. In the case of Olympic Escort International Co.Ltd& 2Others vs Parminder Singh Sandhu & Another (2009) eKLR the Court of Appeal held that for an issue to be triable, it has to be bona fide.

The court stated as follows

‘It is trite law that, a triable issue is not necessarily one that the defendant would ultimately succeed on. It need only be bona fide.’

19. This court is guided by the legions of Court of Appeal decisions that hold that all the defendant needs to demonstrate either by way of a draft defence, oral evidence or affidavits or other means is that the defence raises triable; once a bona fide triable issue has been disclosed the defendant will be entitled to unconditional leave to defend; case law referred to **Kenya Trade Combine Ltd vs Shah Civil Appeal No.193 of 1999**;

20. One triable issue raised by the appellant was that the respondent had not proved the liability of the appellant to pay the suit amount; however, upon perusal of the draft defence, the fact that the appellant had issued an Insurance Policy No.070/085672/13/10/010 Certificate No.10322611 to one Joseph Maina Mwangi who was the defendant in the related case No. PMCC No.49 of 2014 this fact was undisputed;

21. In its draft defence the appellant contends that the said sum was settled; however, the trial court noted and the Record of Appeal at page 30 contains the letter dated 10/10/2016 in which there is an admission to there being an outstanding balance due of Kshs.138,385/-; the trial court in the judgment used the words **‘unpaid to date’** which meant that the sum was still outstanding and unpaid at the time the trial court heard and made its determination;

22. Also, the court record reflects that Cheque No.002541 in the sum of Kshs.333,372/- was a payment for a different unrelated matter notably PMCC No.77 of 2014 and this is another fact that is not disputed by the appellant;

23. The trial court considered the above facts and made a finding that the draft defence did not raise any triable issues; for the same reasons considered by the trial court this court is satisfied that the draft defence does not raise any triable issues and therefore finds no good reason to interfere with the trial court’s decision as it had not applied wrong principles of law in arriving at the decision to dismiss the application dated 28/02/2018 for lack of merit;

24. This ground of appeal is found to be devoid of merit and it is hereby disallowed

Whether the respondent proved her case on a balance of probabilities.

25. The appellant also contends that the trial court applied wrong principles of law in arriving at the decision to enter judgment and thereby condemned the appellant unheard;

26. The court record reflects that interlocutory judgment was entered on the 31/10/2017 and on the 16/11/2017 a Notice of Appointment was filed on behalf of the appellant; the matter was then scheduled for hearing on 8/02/2018 and the appellant was aware of this date and was in attendance; the matter proceeded for hearing and though present the appellant put no questions to the respondent during cross-examination; it therefore follows that the appellant cannot claim to have been condemned unheard when it had been given an opportunity to defend itself but instead choose to sit on its rights;

27. The appellant’s contention was the decretal sum has been fully settled yet the court record at page 30 contains the letter demonstrating that there was an outstanding debt of Kshs.138,285/-;

28. From the respondents testimony and the documents produced at trial this court is satisfied that the respondent proved her case to the desired threshold and finds no good reason to interfere with the trial court’s decision as it did not apply wrong principles of law in arriving at its decision nor was the appellant condemned unheard;

29. This ground of appeal is found to be devoid of merit and it is hereby disallowed.

FINDINGS AND DETERMINATION

30. For the forgoing reasons this court makes the following findings and determinations;

(i) This court finds no triable issues raised in the draft statement of defence;

(ii) This court finds that the respondent proved her case to the desired threshold;

(iii) The appeal is found lacking in merit and is hereby dismissed; the judgment of the trial court delivered on 17/01/2019 is hereby upheld;

(iv) The respondent shall have costs of the appeal.

It is so Ordered.

DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NYERI THIS 6TH DAY OF MAY, 2021.

HON.A.MSHILA

JUDGE