



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 446 OF 2018**

**DIRECT LINE ASSURANCE COMPANY LIMITED.....APPELLANT**

**VERSUS**

**AGNES BOKE MURIRI (Suing as the legal**

**Representative of the Estate of MURIRI WENGESA.....RESPONDENT**

**JUDGMENT**

The late Marita Muriri Wengesa was involved in a road traffic accident on 11<sup>th</sup> June, 2013. The Respondent filed Civil Suit number 143 of 2014 before the Kisii Chief Magistrate's Court and was awarded Kshs. 4,326,525/= as damages. The Defendants in that case were Awadh Yusuf and David Kebesa. The Defendants filed Civil Appeal number 184 of 2015 before the Kisii High Court. Justice D. Majanja delivered his judgment on 19<sup>th</sup> July, 2018 and dismissed the appeal.

The Respondent filed Civil Suit number 7288 of 2018 before the Chief Magistrate, Milimani Commercial Court in August, 2018 seeking a declaration that the Appellant was bound to pay the decretal sum issued in Kisii CMCC No. 143 of 2014. The Appellant entered appearance and filed its defence dated 30<sup>th</sup> August, 2018. The Respondent filed a notice of motion dated 3<sup>rd</sup> September, 2018 seeking to strike out the statement of defence and entry of judgment as prayed in the plaint. The application was fixed for hearing on 24<sup>th</sup> September, 2018. Counsel for the Appellant pleaded with the court to grant him three days to respond to the application. The trial court declined the request and granted the Respondent's application as undefended. A decree was subsequently issue. The appeal is against the decree. The grounds of appeal are: -

- 1. THAT the Learned Magistrate erred in law by failing to provide any reasons whatsoever for the Court's decision to allow the Respondent's Notice of Motion dated 3<sup>rd</sup> September, 2018 which struck out the Appellant's Statement of Defence and as such the Court's ruling violated the mandatory provisions of Order 21 Rule 4 of the Civil Procedure Rules.**
- 2. THAT the Learned Magistrate erred in law by failing to ground the Court's decision to strike out the Appellant's Statement of Defence on any of the basic principles for striking out a statement of defence outlined in the hallowed case of - DT Dobie -vs- Muchina (1982) KLR 1 and thereby rendering a determination which was purely arbitrary.**
- 3. THAT the Learned Magistrate erred in law and in fact by completely disregarding the Statement of Defence filed by the Appellant and thereby rendering a decision without consideration of material facts which effectively condemned the Appellant unheard.**
- 4. THAT the Learned Magistrate erred in law and in fact by allowing an application whose Supporting Affidavit attesting to contentious issues of fact were deponed to by the Respondent's Advocate and not by the Respondent herself.**
- 5. THAT the Learned Magistrate erred in law and in fact by failing to consider the following issue raised in the Appellant's Statement of Defence which clearly indicated that the suit before the court warranted a full trial:**

*a. Under Section 5(iv) of the Insurance (Motor Vehicle Third Party Risks) Act, Cap 405 Laws of Kenya, an insurer cannot be compelled to pay a claim on a third party policy in excess of Kshs. 3,000,000/=, a fact captured in the insurance policy between the Appellant and its insured;*

*b. After judgment was obtained by the Respondent in Nairobi CMCC No. 143 of 2014 Agnes Boke Muriri (suing as the Legal Representative of the Estate of Marita Muriri Wengesa) -vs- Awadh Yusuf & Another the Appellant paid Kshs. 3,000,000/= to the Respondent in settlement of its obligations to the insured as well as its statutory obligations under the Insurance (Motor Vehicle Third Party Risks) Act: a fact attested to even by the Respondent in her suit; and*

*c. Having paid Kshs. 3,000,000/= to the Respondent in partial settlement of the decree in Nairobi CMCC No. 143 of 2014*

*Agnes Boko Muriri (suing as the Legal Representative of the Estate of Marita Muriri Wengesa) –vs- Awadh Yusuf & Another*, the Appellant had fully satisfied all its obligations under the Insurance (Motor Vehicle Third Party Risks) Act and as such the Respondent's suit was wholly defective and lacking in merit.

6. THAT the Learned Magistrate erred in law by relying on Order 51 Rule 14(2) of the Civil Procedure Rules to arrive at a finding that the Respondent's Application should be allowed because no Replying Affidavit had been filed and thereby arriving at a decision based on wrong principles of law.

7. THAT while delivering the ruling, the Learned Magistrate failed to give any reasons for declining the application for adjournment requested for by the Appellant despite the request by the Appellant being occasioned by the fact that the Appellant had been served with the Respondent's application only 10 days earlier and needed time to file a satisfactory response to the Application. As such, the Learned Magistrate erred in law and in fact by failing to exercise his discretion in a fair and impartial manner.

8. Other grounds and reasons to be adduced at the hearing hereof.

Counsel for the Appellant submit that the Respondent's application before the trial court sought to strike out the Appellant's defence for failure to disclose a reasonable cause of action. In essence therefore the trial court was being called upon to exercise its discretion. This court cannot interfere with the exercise of discretion by the lower court unless it is satisfied that the court misdirected itself on the law. Counsel referred to the case of **MBOGO & ANOTHER –V- SHAH [1968] EA 93** where the court held: -

**“...that this court will not interfere with the exercise of .....discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”**

On the issue of striking out of pleadings, counsel for the Appellant relies on the case of **DT Dobie & Company (Kenya) Ltd –v- Muchina [1982] 1 KLR** where it was held:-

**“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. Is 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.**

Counsel for the Appellant further made reference to the Court of Appeal case of **Co-operative Merchant Bank Ltd –v- George Fredrick Wekesa, Civil Appeal No. 54 of 1999** that was quoted by the same Court of Appeal in the case of **Uchumi Supermarkets Limited & Another –v- Sidhi Investment Limited [2019] eKLR** where it was 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”.**

It is further submitted that the Appellant's statement of defence raised several critical issues. The Appellant had insured the accident vehicle and settled a sum of Kshs. 3 million as per the insurance policy. Having made that payment, the Appellant was discharged from its contractual obligations and this is in line with the provisions of Section 5 (b) of the Insurance (Motor Vehicle Third Party Risks) Act, Cap 405 Laws of Kenya.

According to counsel for the Appellant, since the defence raised triable issues, the trial Court ought not to have granted the Respondent's application.

The Respondents were served but did not file any submissions in response to the Appellant's submission. Miss. Obaga was present for the Respondent on 26<sup>th</sup> January, 2021 when directions were given that the appeal was to be determined by way of written submissions, on 10<sup>th</sup> March, 2021 Miss. Obaga was present and sought 21 days to file her submissions but none were filed.

The Respondent's plaint before the Milimani Chief Magistrate Court sought a declaratory order and payment of the balance of Kshs. 2,880,921/= from the decretal sum awarded in Kisii (CMCC No. 143 of 2014). The Respondent's application before the trial court was dated 3<sup>rd</sup> September, 2018. It was served on 14<sup>th</sup> September 2018 and came for hearing on 24<sup>th</sup> September, 2018. The trial court's record of 24<sup>th</sup> September 2018 is as follows: -

24/9/2018

Before Hon. D.A. Ocharo (Mr) – SR

Court Assistant- Nduta

Mr. Okato holding brief for Mr. Kiune for the Defendant. M/s Obaga is present for the Plaintiff/Applicant.

M/s Obaga- Our application is dated 3<sup>rd</sup> September, 2018. The same was served on 14<sup>th</sup> September, 2018. There is an affidavit on record. It is not opposed. I pray that the defence be struck out.

Mr. Okato- Mr. Kiuna prays for 3 days to put in a Replying Affidavit.

Court- According to Order 51 Rule 14(2), the application is undefended. I allow it as prayed.

HON. D.A. OCHARO (MR)

SENIOR RESIDENT MAGISTRATE

24/9/2018

The trial court made reference to Order 51 Rule 14 (2). Order 51 Rules state as follows:-

**(1 Any respondent who wishes to oppose any application may file any one or a combination of the following documents —**

**(a) a notice preliminary objection: and/or;**

**(b) replying affidavit; and/or**

**(c) a statement of grounds of opposition;**

**(2) the said documents in subrule (1) and a list of authorities, if any shall be filed and served on the applicant not less than three clear days before the date of hearing.**

**(3) Any applicant upon whom a replying affidavit or statement of grounds of opposition has been served under subrule (1) may, with the leave of the court, file a supplementary affidavit.**

**(4) If a respondent fails to file to comply with subrule (1) and (2), the application may be heard *ex parte*.**

The trial Court's record is quite clear. Counsel for the Appellant prayed for three days to file a replying affidavit. Even if the trial court was of the view that the application was not opposed for lack of replying affidavit or grounds of opposition, there was a statement of defence already on record. The trial magistrate ought to have considered the application vis-à-vis the defence and deliver a reasoned ruling. The trial court used a short cut and concluded that the application was undefended. In my view, even if the application was undefended, its nature required interrogation of the defence on record so that the court could be satisfied that the same was vexatious, frivolous or an abuse of the court process as stated under Prayer (a) of the application. It was also alleged under Prayer (b) that the statement of defence did not comply with the Civil Procedure Rules, 2010. The specific rules are not stated.

The Respondent's application was coming for hearing for the first time before the trial court. The Plaintiff was filed in August, 2018 and a defence dated 30<sup>th</sup> August, 2018 was on record. About two weeks later on 12<sup>th</sup> September, 2018 the Respondent's application was filed and fixed for hearing on 24<sup>th</sup> September, 2018. The application was not under Certificate of Urgency. Indeed, there was no urgency in the matter. It is clear to me that the trial court did not exercise its discretion judiciously. Striking out of pleadings require thorough interrogation of such pleadings by a judicial officer before a decision to strike out is made. It is not clear whether the trial court granted the Respondent's application because it was undefended or because the statement of defence on record was frivolous, vexatious abuse of the court process or did not comply with the Civil Procedure Rules. If the reason for granting the application is that it was undefended, the trial court ought to have allowed the Appellant's counsel to respond to it. More still, even if it was undefended, it could not be granted without a proper ruling as to whether the defence on record raised triable issues or not.

I am satisfied that there was no proper exercise of discretion on the part of the trial court. I do not need to interrogate the Statement of defence for now. The Appellant is seeking reinstatement of the Respondent's application so that it can be heard on its own merit. The trial court will be able to evaluate the Appellant's defence and make its own conclusion.

The upshot is that the appeal is merited and is granted as prayed. The order of the trial court of 24<sup>th</sup> September, 2018 is hereby set aside and replaced with an order reinstating the Respondent's application dated 3<sup>rd</sup> September, 2018 for full hearing on its own merit. The Appellant to file and serve a replying affidavit and/or grounds of opposition to the application within fourteen (14) days hereof. Parties shall meet their respective costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14<sup>TH</sup> DAY OF JULY, 2021.

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S. CHITEMBWE

JUDGE