REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CIVIL APPEAL NO. 22 OF 2019

FIRST ASSUARANCE COMPANY LIMITED.....APPELLANT

VERSUS

JOSHUA MUTUA MWOLOLO.....RESPONDENT

(An Appeal from the Ruling of Hon D. Orimba, [Mr.] Senior Principal Magistrate, delivered on 23rd January, 2019 in Kangundo SPMCC No. 173 of 2017).

JOSHUA MUTUA MWOLOLO.....PLAINTIFF

-VERSUS-

FIRST ASSUARANCE COMPANY LIMITED.....DEFENDANT

JUDGEMENT

1. This is an appeal arising from the decision of **Hon. D. Orimba, [Mr.] Senior Principal Magistrate,** delivered on 23rd January, 2019 in Kangundo SPMCC No. 173 of 2017 (the declaratory suit). In that case the Respondent herein sued the Appellant seeking a declaration that the Appellant was obliged to satisfy the decree in Kangundo SPMCC No. 26 of 2016. According to the Respondent at all material times the Appellant was the insurer of motor vehicle registration no. KBQ 568C Hyundai Lorry vide policy number 11/21/007756/04 COMP.

2. It was pleaded that on or about 25th August, 2015, due to the negligence of the driver, the said vehicle was involved in a road traffic accident in which it collided with motor cycle reg. no. KMDL 251K Skygo in which the Respondent was lawfully riding. As a result, the Respondent sustained serious bodily injuries.

3. As a result of the said accident, the Respondent instituted Kangundo SPMCC No. 26 of 2016 (the primary suit) against the owner of the said vehicle seeking damages arising from the said accident. On or about 4th August, 2017, judgement was entered for the Respondent, the Plaintiff herein, against the Defendant which were assessed in the sum of Kshs 145,195/- with costs and interests. According to the Respondent, that decree has never been settled despite demands and notices having been given to both the insured and the insurance, the Appellant herein. It was pleaded that the Respondent was entitled to Kshs 211,325.85 plus costs and interests.

4. It was further pleaded that the Respondent's advocates caused a statutory notice to be served upon the Appellant pursuant to section 10(12) (a) of the ***Insurance (Motor Vehicles Third Party Risks) Act*** Cap 405 Laws of Kenya (hereinafter referred to as the Act) and a demand notice was served on the Appellant's insured.

5. In its defence, the Appellant herein denied that it insured the said vehicle at the material time or at all and that the said motor vehicle was owned by **Bake N Bite Mombasa Limited**, the Defendant in the primary suit. It further denied that fact that the accident was as a result of the negligence on the part of the driver of the said vehicle and that statutory notice was served upon the Appellant. It therefore denied that it was obliged to pay the plaintiff as claimed.

6. According to the said defence, the said **Bake N Bite Mombasa Limited** was not insured under any Insurance Policy issued by the Appellant and therefore the Respondent had no legal right to seek declaratory orders against it to satisfy the said judgement.

7. There a reply to the defence filed by the Respondent in which the Respondent reiterated the contents of its plaint.

8. Provoked by this defence, the Respondent applied vide his Motion on Notice dated 30th May, 2018 seeking to have the said defence struck out and judgement entered against the Appellant as prayed in the plaint. According to the Respondent, on 25th August, 2015 he was involved in the said accident with the said vehicle which was insured by the Appellant and he exhibited a copy of the police abstract. He then filed the primary suit to which the Defendant never appeared and interlocutory judgement was entered against the Appellant's insured and the mater proceeded to hearing pursuant to which judgement was entered in his favour for payment of Kshs 211,325.85 with interests and costs.

9. It was therefore his contention that the defence filed herein is a mere denial and a sham. He reiterated that prior to filing the primary suit, his advocates personally served a notice upon the Appellant under Cap 405 on 21st January, 2016 which was duly acknowledged and he exhibited a copy thereof. In addition, the Appellant was personally served with a Notice of Intention to file this suit on 16th November, 2017. According to the Respondent, the Appellant has never indicated that it was not the insurer of the said vehicle at the time of the accident upon being served with the said notices.

10. It was therefore the Respondent's case that the defence does not raise any triable issue and was only meant to delay paying him his fruits of judgement in the primary suit and therefore the Appellant had the obligation to satisfy the same pursuant to the provisions of Cap 405.

11. In the replying affidavit sworn by **Sophie Awino Omolo**, the deponent reiterated the contents of the defence and averred that the defence raises weighty and triable issues which ought to be canvassed in a full trial. These triable issues, according to the deponent, were such issues as:

a. Whether the Respondent's claim is enforceable under the provisions of the Insurance (Motor Vehicle Third Party Risks) Act, Cap 405 of the Laws of Kenya;

b. Whether any person or entity Insured by the Appellant had been sued and whether the Respondent had obtained Judgement against a person or entity insured by the Appellant;

c. Whether the Appellant is under a statutory duty to satisfy the Judgment awarded in ***Kangundo SPMCC No 26 of 2016; Joshua Mutua Mwololo -vs- Bake 'N' Bite Mombasa Limited .***

d. Whether the Respondent is a Third Party within the meaning of Section 5 of the Insurance (Motor Vehicles Third Party Risks) Act, Chapter 405 of the Laws of Kenya; and

e. Whether there was proper service of a Statutory Notice upon the Appellant within the meaning of Section 10(2) (a) of the Insurance (Motor Vehicles Third Party Risks) Act, Chapter 405 of the Laws of Kenya.

12. According to the deponent, there was no insurance policy between the Appellant and the Defendant in the primary suit hence no obligation on its part to indemnify the said Defendant. According to the deponent, the said Defendant had not taken out any policy with the Appellant as at 25th August, 2015 or at any time and she exhibited a copy of the policy schedule issued to Bake N Bite Limited and Debit Note dated 10th July, 2015. It was also noted that the Appellant had in its defence denied that it was served with the statutory notice.

13. According to the deponent the application was incompetent for seeking both striking out of the defence and summary judgement. It was therefore sought that the application be dismissed with costs.

14. In his ruling the learned trial magistrate noted that in its defence, the Appellant admitted that it was the insurer of motor vehicle registration no. KBQ 568C Hyundai Lorry owned by its insured Bake N Bite Mombasa Limited at the time of the accident in question as pleaded in the plaint. Accordingly, the turnabout of what was already admitted was surprising. Since there was judgement in Kangundo SPMCC No. 26 of 2016, the court wondered why the Appellant contended that it was unaware of the same. It was further noted that the Respondent exhibited a copy of the statutory notice duly acknowledged by the stamp of the Appellant. Therefore, the court found that all the procedures were followed. Despite being served with the notice of the declaratory suit more than a year before which was duly acknowledged by the Appellant, the court noted that no action was taken to settle the claim. In the court's view such issues as whether the accident occurred or not could not be re-litigated in the declaratory suit.

15. It was therefore found that no triable issue was raised in the defence which the court found to have ben frivolous and vexatious and the application was allowed and judgement entered against the Appellant.

16. In this appeal, the Appellant has relied on the following grounds:

1. The Learned Magistrate erred in Law and in fact in failing to find that even though the Appellant was the Insurer of Motor Vehicle Registration Number BBQ 568C Hyundai Lorry, its insured, Bake 'N' Limited, was never sued in the primary suit and that an unknown party, Bake 'N' Bite Mombasa Limited, had been sued, the factual verification of which warranted a full trial;

2. The Learned Magistrate erred in Law and in fact in misapprehending and misapplying the contents of Section 10 of the Insurance (Motor Vehicles Third Part Risk) Act which only obligates an Insurer to indemnify Judgements obtained against its Insured.

3. The Learned Magistrate erred in Law and in fact in failing to hold that in the absence of the Policy of Insurance or Certificate of Insurance being presented before the Court by the Respondent, the identity of the Insured therein, which was disputed, was unclear and was not proved and ought to have awaited the production of evidence at full trial;

4. The Learned Magistrate erred in Law and in fact in misapprehending the laws and principles governing an application for striking out pleadings thereby rendering a wrong decision.

5. The Learned Magistrate erred in Law and in fact in failing to exercise the Court's power of striking out pleadings sparingly and cautiously and struck out the Appellant's Statement of Defence without carefully considering the merits of the case through the process of trial;

6. The Learned Magistrate erred in Law and in fact by misapplying the Court's power of summary jurisdiction thus denying himself the opportunity of examining documents and facts of the case at trial; and

7. The Learned Magistrate erred in Law and fact by usurping the position of a trial judge thus conducting trial of the case in chambers, in Affidavits only, without discovery and without oral evidence by cross-examination in the ordinary way.

17. It was submitted on behalf of the Appellant that whereas the courts have inherent and unfettered power to strike out pleadings, that power must only be exercised when a pleading appears so hopeless that it plainly and obviously discloses no cause of action, and is so weak and incurable as to be beyond redemption by way of amendment and it must be exercised with extreme caution and must be sparingly exercised. This submission was based on the decision of the Environmental and Land Court in Nairobi ELC No 119 of 2014; **Alumark Investments Limited –vs- Tom Otieno Anyango**.

18. It was submitted that contrary to the findings of the trial court, the Appellant in the defence specifically denied that it was the Insurer of Motor Vehicle Registration Number KBQ 568C at the material time or at all. Further it averred that Bake 'N' Bite Mombasa Limited was not insured under any Insurance Policy issued by the Appellant and therefore the Respondent has no legal right to seek declaratory orders against the Appellant compelling the Appellant to satisfy any Judgement obtained against Bake 'N' Bite Mombasa Limited. It was therefore submitted that none of the paragraphs of the Appellant's Defence contained any admission to being the Insurers of Motor Vehicle Registration Number KBQ 568C.

19. While reiterating the issues identified in the replying affidavit, it was submitted that whereas the Appellant filed a Witness Statement, list of Documents and attached a copy of the Policy Schedule issued to **Bake 'N' Bite Limited** and Debit Note dated 10th July, 2015 for **Bake 'N' Bite Limited, Bake 'N' Bite Limited** and **Bake 'N' Bite Mombasa Limited** are two distinct entities**.** To the Appellant it had not Insured **Bake 'N' Bite Mombasa Limited** as alleged by the Respondent or at all**.** The Appellant is therefore not obligated to indemnify any Judgement obtained against Bake 'N' Bite Mombasa Limited.

20. It was submitted that Section 10(2) of the ***Insurance (Motor Vehicles Third Party Risks) Act*** requires that whenever a Party institutes a Suit against its Insured, it should, before or within a period of Fourteen (14) days of instituting a suit, notify the insurer of the suit. In this case, the Appellant in the defence denies having been served with a Statutory Notice and that that it had been notified of the existence of a Primary Suit.

21. From the above, it was submitted, the Appellant expressly denied each of the allegations contained in the Plaint and insisted on strict proof. Further, the Appellant raised weighty issues for which it would be in the interest of justice that they be canvassed at trial and not dealt with in a summary manner.

22. It was further submitted that the learned Magistrate erred in law by relying on Affidavit evidence to find that the Appellant's Defence raises no triable issues and that no reasonable Defence was demonstrated. In reaching a determination on the Respondent's Application dated 30th May, 2018, the Appellant submitted that the Court was required by law to only consider the pleadings filed and not Affidavit evidence. This submission was based on Order 2 Rule 15 (2) of the ***Civil Procedure Rules***.

23. The Appellant submitted that the learned Trial Magistrate erred in finding that it is clearly indicated in the Appellant's Defence that indeed they were the Insurers of the Motor Vehicle Registration Number KBQ 568C owned by Bake 'N' Bite Mombasa Limited at the time of the accident yet no such averment is contained in the Appellant's Statement of Defence; in failing to hold that the identity of the Insured and Insurers of Motor Vehicle Registration Number KBQ 568C was disputed and ought to have awaited production of evidence at full trial; by misapplying the Court's power of summary Judgement thus denying himself the opportunity of examining documents and facts of the case at trial; and by usurping the position of a trial Court thus conducting a trial of the case in chambers, on Affidavit only, without discovery and without oral evidence tested by cross-examination in the ordinary way.

24. This Court was therefore urged to find that the Appellant has a Defence that raises weighty and triable issues, set aside the decision made by the lower court and reinstate the Appellant's Defence. The Court was further urged to grant the Appellant unconditional leave to defend the suit in the lower court. The Appellant also sought the costs of the appeal.

25. On behalf of the Respondent, it was submitted that the Defendant in the primary suit did not deny the plaintiff's evidence that the motor vehicle was insured by the Appellant at the time of the accident in question. It was submitted that the certificate of insurance and policy document annexed by the Defendant in the defence filed in court and the record of appeal clearly showed the Appellant was the insurer of motor- vehicle Registration No. **KBQ 568C Hyudai Lorry** at the time of the accident in question. No evidence was adduced to prove the allegation in its defence that it was not the insurer of motor vehicle Registration No. **KBQ 568C Hyudai Lorry** as required by law so it is an undisputed fact that the Appellant was the insurer of the said motor vehicle on the date of the accident in question.

26. According to the Respondent, the statutory notice dated 20th January, 2016 was personally served upon the defendant on 21st January, 2016 who personally acknowledged service by stamping and dating the same. The said statutory notice clearly indicated the date of accident as 25th August, 2015, the motor vehicle which was involved in the accident and which had been insured by the defendant as registration No. KBQ 568C and the policy number issued by the defendant to the accident motor- vehicle as policy No. 11/21/007756/04. However, the Appellant did not adduce any evidence to prove the allegation in its defence that it was not served with the statutory notice as required by the

law.

27. It was further submitted that the owner of the motor vehicle registration No. KBQ 568C Hyudai Lorry is clearly stated both in the police Abstract and in the copy of Records as **Bake N Bite Limited** and **Bake N Bite Mombasa Limited** respectively and that the Defendant never objected to the production of the two documents in Court which amounts to admission of the plaintiff's claim. According to the Respondent, the Appellant's insured **Bake N Bite Limited** and **Bake N Bite Mombasa Limited** are just one and the same person as the insurer of motor vehicle registration number and policy number are the same. Accordingly, the Appellant's insured **Bake N Bite Limited** alias **Bake N Bite Mombasa Limited** and who is the registered owner of motor vehicle registration No. KBQ 568C was sued in the primary **Kangundo SPMCC No.26 of 2016**.

28. It was submitted that the Respondent served a statutory Notice upon the defendant on 21st January, 2016 through his Advocate before the primary suit was filed as required by the law and Appellant acknowledged receipt of the same by stamping and signing on the same. The Respondent further personally served the Appellant with a Notice of entry of judgment and intended execution on 11th September 2017 and they acknowledged receipt thereof by dating and affixing their official stamp. Later a notice of intention to file declaratory proceedings was also personally served upon the Appellant on 16th November 2017 who acknowledged receipt thereof by affixing official stamp and dating the said notice. However, despite being served with the above (3) three notices copies of which are in the Appellant's bundle of documents, the Appellant did not bother to file any Declaratory proceedings seeking to obtain a declaration that it is entitled to avoid liability on the Judgments and Decrees of all the claims arising from the accident that occurred on 25th August, 2015 along Nairobi-Kangundo road involving Motor vehicle Registration No. KBQ 568C Hyudai Lorry, insurance whereof had been effected by the Defendant as required by the provisions of the ***Insurance (Motor Vehicle Third Party Risks) Act, Cap. 405 Laws of Kenya.*** Further, the Plaintiff has demonstrated above that there is a valid judgment where he was awarded a Decretal Sum plus Costs and Interest totalling to Ksh. 211,325.85/= in the Primary Suit which the Defendant has refused to settle to date.

29. It was therefore submitted that the defendant is bound by the statute to satisfy the Decree and Judgment in the primary suit and this court was invited to find so.

30. It was therefore urged that the Appellant's appeal lacks merit and should be dismissed with costs.

Determination

31. I have considered the issues raised in this appeal.

32. The principles guiding the striking out of pleadings and cases are now well settled. These principles, as set out in **D T Dobie & Company (K) Ltd vs. Muchina [1982] KLR 1**, are that 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. If 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. The rationale for this is due to a realisation that the exercise of the powers for summary procedure are draconian, coercive and drastic. And because a party may thereby be deprived of his right to a plenary trial, the court exercises those powers with the greatest care and circumspection and only in the clearest of cases as regards the facts and the law. The summary procedure should therefore only be adopted when it can be clearly seen that a claim or case is clear and beyond doubt unarguable and the judicial system would never permit a party to be driven from the judgement seat without any court having considered his right to be heard, except in cases where the cause of action was obviously and almost incontestably bad.

33. The application before the trial court was principally brought under Order 2 rule 15 Subrule (1)(a)(b)(c) and (d) of the ***Civil Procedure Rules*** which provides 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.***

34. 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.

35. 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. To do this would amount to opening a front for parties to ventilate vexatious litigation which lack bona fides with the sole intention of causing the opposite party unnecessary anxiety, trouble and expense at the expense of deserving cases contrary to the spirit of the overriding objective which requires the court to allot appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

36. The ground upon which the application was based was that the defence filed is just a mere denial and sham. In other words, the Respondent's view was that the defence was frivolous. A matter is if (i) it has no substance; or (ii) it is fanciful; or (iii) where a party is trifling with the Court; or (iv) when to put up a defence would be wasting Court's time; or (v) when it is not capable of reasoned argument. See **Dawkins vs. Prince Edward of Save Weimber (1976) 1 QBD 499; Chaffers vs. Golds Mid (1894) 1 QBD 186.** Again a pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble and expense. See **Bullen & Leake and Jacobs Precedents of Pleading (12th Edn.) at 145.**

37. In the **Raghbir Singh Chatte vs. National Bank of Kenya Limited Civil Appeal No. 50 of 1996**, the Court of Appeal held:

> **"If a general traverse…were held to be sufficient and effectual, that would render meaningless provisions such as Order VI Rule 9(3) of the Civil Procedure Rules and even the decisions of this Court such as *Magunga General Stores vs. Pepco Distributors Limited [1988-92] 2 KAR 89*. The position of the law…is that a mere denial or general traverse in defence is not sufficient and a defendant who does not specifically plead to all the issues raised in a plaint risks the probability of his defence being struck out or being held to Constitute an admission of the issues raised in the Plaint."**

38. In **Magunga General Stores vs. Pepco Distributors Ltd. [1987] KLR 150; [1988-92] 2 KAR 89 [1986-1989] EA 334** the same Court held:

> **"Mere denial is not a sufficient defence in a claim for breach of contract for goods sold and delivered and cheques issued in settlement thereof. There must be a reason why the defendant does not owe the money. Either there was no contract or it was not carried out or failed. It could also be that payment had been made and could be proved. It is not sufficient therefore to simply deny liability without some reason given."**

39. However, in **The Co-Operative Merchant Bank Ltd. vs. George Fredrick Wekesa Civil Appeal No. 54 of 1999** the Court of Appeal 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."**

40. In **Yaya Towers Limited vs. Trade Bank Limited (In Liquidation) Civil Appeal No. 35 of 2000** the same court expressed itself thus:

> **"A plaintiff is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant can demonstrate shortly and conclusively that the plaintiff's claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court, it must be allowed to proceed to trial...It cannot be doubted that the Court has inherent jurisdiction to dismiss that, which is an abuse of the process of the Court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved...If the defendant assumes the heavy burden of demonstrating the claim is bound to fail, he will not be allowed to conduct a mini trial upon affidavits...It is not the length of arguments in the case but the inherent difficulty of the issues, which they have to address that, is decisive... The issue has nothing to do with the complexity or difficulty of the case or that it requires a minute or protracted examination of the documents and facts of the case but whether the action is one which cannot succeed or is in some ways an abuse of the process of the Court or is unarguable...Where the plaintiff brings an action where the cause of action is based on a request made by the defendant he must allege and prove inter alia, both the act done and the request made for doing such an act. In the absence of any request shown to have been made by the defendant in the particulars delivered of such allegation, it would not be possible for the plaintiff to prove any request made by the defendant and without this the essential ingredient of the cause of action cannot be proved and the plaintiff is bound to fail...No suit should be summarily dismissed unless it appears so hopeless that it is plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment."**

41. Section 10(1) of the ***Insurance (Motor Vehicle Third Party Risks) Act***, Cap 405, Laws of Kenya (the Act) provides as hereunder:

> ***(1) If, after a policy of insurance has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of section 5 (being a liability covered by the terms of the policy) is obtained against any***

person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.

42. The side note to that section is *"**Duty of insurer to satisfy judgments against persons insured".*** In **Bushell vs. Hammond [1904] 2 KB 563,** it was held that though it is true that the marginal notes do not form part of a statute, yet some help can be derived from the side note to show what the section is dealing with. From the side note it is clear that the section deals with the obligation by the insurer to satisfy judgements obtained against persons insured. What clearly comes out from the said provision it is clear that for an insurance company to be under a statutory obligation to satisfy a decree certain condition precedent must be satisfied. Firstly, before a judgement is obtained, there must have been a policy of insurance in effect. Secondly, the judgement must have been in respect of a liability required to be covered by a policy under paragraph (b) of section 5 (being a liability covered by the terms of the policy). Thirdly, the judgement must have been obtained against a person insured by the policy.

43. In this case, the appellant contended that the insured was **Bake N Bite Limited** and not **Bake N Bite Mombasa Limited.** According to the Appellant, **Bake N Bite Limited** and **Bake N Bite Mombasa Limited** are two different entities. I agree that the finding by the learned trial magistrate that the Appellant admitted in its pleadings that it was the insurer of the suit vehicle was an error since the Appellant expressly denied having insured the said vehicle. However, the Respondents contends that the owner of the motor vehicle registration No. KBQ 568C Hyudai Lorry is clearly stated both in the police Abstract and in the copy of Records as **Bake N Bite Limited** and **Bake N Bite Mombasa Limited** respectively. It is stated that the police abstract was produced as Plaintiff's Exhibit No.4 and the copy of records as Plaintiff's Exhibit No. 5. The Appellant has exhibited documents showing that it insured motor vehicle registration no. KBQ 568C, Hyundai Lorry. That was the same vehicle that was involved in the accident. The annexed abstract shows that it was owned by Bake N Bite Limited. The question that arises is whether Bake N Bite Limited and Bake N Bite Mombasa Limited are two distinct parties. If the description was just a misnomer resulting from the documentation that the Respondent possessed, then in my view it would be too technical to find for the Appellant. As was held by **Crabbe, JA** in **J B Kohli & Others vs. Bachulal Popatlal [1964] EA 219:**

> **"The question is not whom the plaintiff intended to sue but whether a reasonable man reading all the documents in the proceedings before the court and having regard to all the circumstances would entertain no doubt the defendants were the defendants intended to be sued by the plaintiff. The test must be: How would a reasonable person receiving the document take it? If, in all the circumstances of the case and looking at the document as a whole, he would say to himself "Of course it must mean me, but they have got my name wrong", then there is a case of mere misnomer. If, on the other hand, he would say: "I cannot tell from the document itself whether they mean me or not and I shall have to make inquiries", then it seems that one is getting beyond the realm of misnomer. One of the factors which must operate on the mind of the recipient of a document, and which operates in this case is whether there is or is not another entity to whom the description on the writ might refer."**

44. In this case the police abstract revealed the correct insured's name. It also revealed the particulars of the vehicle that was involved in the accident. The Appellant admits that the said vehicle was insured by it. When served with the relevant notices, the Appellant did not raise any queries as regards its insured. Considering the totality of this matter it is my view that any reasonable person looking at the matter holistically would clearly say to himself "Of course the entity sued must mean the insured, but the Plaintiff got its name wrong". That is what amounts to a misnomer and substantive justice as dictated under Article 159(2)(d) of the Constitution enjoins this Court to administer the same without undue regard to procedural technicalities. It is therefore my view and I find that the entity sued in the primary suit was the Appellant's insured.

45. The next issue is whether the Respondent is a Third Party within the meaning of Section 5 of the ***Insurance (Motor Vehicles Third Party Risks) Act***, Chapter 405 of the Laws of Kenya.

46. The said section 5 provides that:

> ***In order to comply with the requirements of section 4, the policy of insurance must be a policy which— (a) is issued by a company which is required under the Insurance Act, 1984 (Cap. 487) to carry on motor vehicle insurance business; and (b) insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of, or bodily injury to, any person caused by or arising out of the use of the vehicle on a road: Provided that a policy in terms of this section shall not be required to cover— (i) liability in respect of the death arising out of and in the course of his employment of a person in the employment of a person insured by the policy or of bodily injury sustained by such a person arising out of and in the course of his employment; or (ii) except in the case of a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, liability in respect of the death of or bodily injury to persons being carried in or upon or entering or getting on to or alighting from the vehicle at the time of the occurrence of the event out of which the claims arose; or (iii) any contractual liability; (iv) liability of any sum in excess of three million shillings, arising out of a claim by one person.***

47. The Respondent's claim was that he has hit by the insured's vehicle while she was on a motor cycle. A reading of the said section clearly reveals that he was covered by the policy under the said Act.

48. In my view, the other issues raised in the defence were issues that ought to have been raised before the trial court in the primary suit and are not issues for a declaratory suit. In **Ogada Odongo vs. Phoenix of E.A. Insurance Co. Ltd Kisumu HCC 132/2003,** it was held that:

> **(1) "By an insurer issuing a policy of insurance, it automatically assures the rights of third parties. It simply means, the rights/obligation of the insured automatically transferred to the insured unless it is proved otherwise.**
>
> **(2) By covering third parties, rights, the insurance was in essence performing a statutory duty imposed by an Act of**

Parliament."

49. Having considered the issues raised by the Appellant in light of the evidence placed before the trial court I find that the same did not constitute arguable triable issues. They were therefore brought merely for purposes of annoyance or for some fanciful advantage; and they could certainly really lead to no possible good. In other words, they were vexatious. To quote **Omollo, JA** in the case of **J P Machira vs. Wangethi Mwangi & Another Civil Appeal No. 179 of 1997**, although disputes ought to be heard by oral evidence in court, there is no magic in holding a trial and receiving oral evidence merely because it is normal and usual to do so since a trial must be based on issues; otherwise it may become a farce.

50. Accordingly, there is no basis upon which the ruling of the learned trial magistrate can be faulted. Consequently, this appeal fails and is dismissed with costs to the Respondent.

51. It is so ordered.

READ, SIGNED AND DELIVERED AT MACHAKOS THIS 22ND DAY OF JULY, 2021

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Maina for Mr Njoroge for the appellant

Mr Mburu for Miss Mutunga for the Respondent

CA Simon