REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CIVIL APPEAL NO. 16 OF 2019

FIDELITY SHIELD INSURANCE CO. LTD .....APPELLANT

VERSUS

PATRICIA ONDARI.....RESPONDENT

(Being an appeal from the Ruling and Order of Hon G. A. Ollimo (RM) in Kimilili CMCC No. 59/2018 delivered on 19/1/2019)

JUDGEMENT

By a plaint dated 4/5/2018, the respondent patricia ondari sued the appellant in the subordinate court seeking;

1. **A declaration under section 10(2) of the Insurance (Motor Vehicle Third Party Risks) Act, Cap 405 that the defendant is liable to pay the plaintiff judgement decree in CMCC No. 23 of 2016.**

2. **Costs of the suit**

3. **Interest.**

The appellant filed its statement of defence dated 5/6/2018 denying the claim stating *inter alia*; that it never insured the suit motor vehicle KAS 038D, that it was not aware of any suit involving the suit motor vehicle and that it had never been served with the statutory notice on any legal proceedings involving the motor vehicle.

Subsequently, by an application dated 9th July, 2018, the plaintiff (respondent herein) sought orders in the following terms;

1. **The honourable court be pleased to enter summary judgement against the defendant/ respondent for the sum of Kshs 837, 365/= together with costs of the suit and interest thereon.**

2. **In the alternative to prayer 1 above, the honourable court be pleased to strike out the defence dated 5th June, 2018 and consequently enter judgment against the defendant as per prayers (a), (b) and (c) of the plaint.**

3. **Costs of the application and the suit.**

The application was grounded on the fact that the defence was full of mere denials and raised no triable issue. That Motor Vehicle Registration Number KAS 038D was insured by the respondent at the time of the accident and therefore it was duty bound to settle the decretal sum as mandated by Section 10 of the Insurance (Motor Vehicle Third Party Risks) Act, Cap 405, **(hereinafter Cap 405**).

The respondent deponed that despite the appellant being duly served with the Statutory Notice on the intention to institute suit against the insured as well as the intention to file suit, the appellant refused to pay the decretal sum even after a court of competent jurisdiction having heard and determined the primary suit. That the appellant was served with the notice of entry of judgement against its insured on several occasions

The application was opposed by the appellant who filed a replying affidavit through its legal officer, Caren Jaguga who deponed *inter alia* that it was not the insurer of the suit motor vehicle and denied service of the notice of intention to file the primary suit as well as the current suit as provided for under Section 10(2) of Cap 405.

She deponed that the respondent did not file affidavits of service and that the suit proceeded ex-parte which is an affront to the rule of natural justice and denies being notified of the request for judgment in the primary suit.

She further deponed that the suit needs to be defended unlike in the primary suit which proceeded *ex-parte* and finally that the respondent did not prove that she was unable to recover the decretal sum from the defendant in the primary suit.

The application proceeded by way of written submissions, the court delivered its ruling and struck out the defence. The appellant was dissatisfied with this order and has now appealed to this court on the following grounds.

> ***1. The learned trial magistrate erred in law and in fact in striking out the appellant's defence thereby denying the appellant an opportunity to be heard.***
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> ***2. The learned trial magistrate erred in law and in fact in holding that the appellant's defence was a sham and that the defence did not raise a prima facie defence and did not warrant a trial contrary to the well laid down principles of law.***
>
> ***3. The learned trial magistrate erred in law and in fact in failing to hold that no requisite notices were sent/served upon the appellant in the primary suit in accordance with Section 10 of the Insurance (Motor Vehicle Third Party Risk) Act, Cap 405 Laws of Kenya.***
>
> ***4. The learned trial magistrate erred in law and in fact in striking out the appellant's defence in contravention of the principles of natural justice and the Constitution of Kenya.***

The appeal was disposed of by way of written submissions. The appellant did not file.

The respondent submitting on grounds 1 and 2 argues that it remains a fact that the appellant was served with all the necessary statutory notices, the appellant did insure the defendant in the primary suit as it did not refuse or reject the statutory notices served upon it and that the appellant was aware of the existence of the primary suit since it was served with the requisite notices, copies of the plaint, judgement and decree which documents were duly acknowledged.

In support of this argument, counsel relies on the authorities in; ***A.P.A Insurance Co. Ltd Vs Zainabu Ali Ruwa (2010) eKLR, Blue Shield Insurance Co. Ltd Vs Raymond Buuri M'rimbea (1998)eKLR, Francis Kimani Kariuki Vs Intra Africa Assurance Co. Ltd (2008)eKLR, Thomas Muoka Muthoka & Anor Vs Insurance Company Of East Africa Limited (2008)eKLR*** and ***Mwangi Keng'ara & Co. Advocates Vs Invesco Assurance Co. Ltd Civil Appeal No. 190 of 2013, Machakos***.

On ground 3, the respondent submits that the appellant was served with a statutory notice dated 23/09/2015 and received on 5/10/2015, another notice dated 17/04/2018 was served upon the appellant and received on 26/04/2018. That it was incumbent upon the appellant to demonstrate that it did not receive the notices. On this proposition, counsel relies in the case of ***Emre Global Investors Vs Hosing Finance Corporation of Kenya Ltd & 2 Others (2014)eKLR.***

On the 4th ground, it is submitted that the appellant was not a party in the primary suit, it was given an opportunity to be heard in the declaratory suit and that a right to be heard does not guarantee a party to win, what matters is the weight of the evidence. Counsel submits that the respondent would be delayed from enjoying the fruits of the judgement if the suit would be allowed to proceed to hearing where there are no triable issue. The case of ***Juliet Waringa Wanyondu (Deceased) Vs Lion of Kenya Insurance Co. Ltd (2017) eKLR*** has been cited.

The appeal herein arises from an order of the subordinate court which struck out the appellant's defence. The issue then that arises for determination is whether upon review of the evidence on record, the trial magistrate erred in striking out the defence.

The respondent's application was mainly based on the ground that the defence raised no triable issue. This calls for an interrogation of the defence as filed to ascertain that the defence indeed raises no triable issue and cannot be cured even by an amendment.

It is not in dispute that the respondent filed Kimilili SPM Civil Suit Number 23 of 2016 where judgement was entered against the appellant's insured in the sum of Kshs 700,000/= together with costs and interest bringing the total sum to Kshs 853, 699/=. The insured could not pay the amount thus the declaratory suit to compel the appellant pay the amount.

The appellant filed its defence to the declaratory suit. The same is dated 5th June, 2018, the subject of the application which gave rise to the instant appeal.

The power of the court to strike out pleadings is found in **Order 2 Rule 15** of the Civil Procedures Rules which provides;-

> ***(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."***

Madan JA in ***D.T. Dobie and Company (Kenya) Ltd vs Muchina (1982) KLR 1*** *while determining an application seeking to strike out a plaint for disclosing no cause of action held;-*

> ***"The power to strike out should be exercised after the Court has considered all 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."***

Similarly, the Court of Appeal in ***Blue Shield Insurance Company Ltd V Joseph Mboya Oguttu [2009] eKLR*** held;

> ***We may add that like Madan J.A, said, the power to strike out a pleading which ends in driving a party from the judgment seat should be used very sparingly and only in cases where the pleading is shown to be clearly untenable.***

Odunga J. in ***Madison Insurance Company Limited Vs Augustine Kamanda Gitau [2020] eKLR*** held;

> ***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.***
>
> ***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.***

In its defence, the appellant *inter alia* averred that it never insured the Motor vehicle Registration Number KAS 038D, that it was never served with the statutory notice under Section 10 of Cap 405 and that the respondent had not demonstrated that she could not recover the decretal sum from the alleged insured.

The authorities on striking out pleadings are explicit that the power to strike out pleadings is draconian and has the effect of driving away a litigant from the seat of justice. That this power ought to be exercised sparingly in the most deserving cases and where the pleadings are hopelessly drawn that even an amendment cannot cure the defect.

The 2010 Constitution under Article 159 also binds courts to administer substantive justice without undue regard to technicalities of procedure.

In an application of this sort, there is need to balance the interest of either parties to the dispute. The applicant's right to speedy determination of the dispute and the respondent's right to have his dispute determined on merit.

Having carefully analyzed the evidence on record, the court is satisfied that the appellant's defence raised triable issues which could only be conclusively determined in full trial. The denial by the appellant that it insured the motor vehicle which caused the accident is a fact that can only be resolved conclusively during the hearing of the main suit, the allegation that it was not served with the requisite notices is a fact that can be conclusively determined in the hearing of the main suit.

It is important to note that the appellant's liability in the declaratory suit is hinged on whether it was sufficiently notified of the impending suit against its insured under the provisions of Section 10 of Cap 405. When the issue is therefore raised by the insurer that it was not properly served, the court ought to ascertain this fact through a full trial.

Upon perusal of the evidence and the submissions on record, the court is satisfied that the defence as filed by the appellant raised triable issues and the court ought to have admitted the suit to a full hearing to determine the contentious issues raised in the defence.

In the end therefore, the appeal is allowed with an order that the suit is remitted to the trial court for hearing on merit before another magistrate.

DATED AT BUNGOMA THIS 9TH DAY OF NOVEMBER, 2021

S. N. RIECHI

JUDGE.