



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 724 OF 2017**

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

**VERSUS**

**JANE WAIRIMU KIRURU.....RESPONDENT**

**JUDGMENT**

(Being an appeal from the ruling of Hon. E. Wanjala (Mrs) SRM delivered on 28<sup>th</sup> April, 2017 in CMCC No. 2348 of 2016 Milimani Commercial Courts)

The respondent sued the appellant in the lower court seeking enforcement of a decree obtained in her favour, in a case she had lodged against a party said to have been insured by the appellant. In effect this was a declaratory suit. The appellant denied liability and the respondent's claim in the statement of defence filed. The respondent then filed an application by way of Notice of Motion under Order 7 Rules 1 And 5, Order 10 Rule 3, and Order 2 rules 15 (1) (b) (c) and (d) of the Civil Procedure Rules for an order that judgment be entered against the appellant herein, for reasons that the defence was a sham and intended to delay the final determination of the suit, and that no legal defence was available, and in particular under the Insurance (Motor Vehicles Third Party Risks Act) Cap 405 Laws of Kenya. In any case there were no triable issues.

The respondent further stated in that application, the defence was not in compliance with Order 7 Rule 5 of the Civil Procedure rules. The application was supported by an affidavit sworn by the respondent. The application was opposed and a replying affidavit to that effect was sworn and filed by Jackline Ndirangu, the legal officer of the appellant. After hearing the application in a ruling delivered on 28<sup>th</sup> April, 2017 the application was allowed and judgment entered in favour of the respondent leading to the present appeal.

Aggrieved by the said ruling, the appellant filed a Memorandum of appeal dated 3<sup>rd</sup> May, 2017. In the Memorandum of Appeal aforesaid the appellant faulted the lower court for failing to consider the principles applicable in striking out the pleadings, and in finding that the statement of defence did not raise any triable issues. The lower court was also faulted for relying on the police abstract to find that the appellant had insured the owner of the motor vehicle that led to the accident complained of by the respondent and further that the submissions made to the court and authorities cited were ignored. Parties filed submissions in the argument of this appeal which I have noted.

It is my duty to reconsider and evaluate the lower court record with a view to arriving at independent conclusions. As at the time the application was being heard before the lower court, the appellant had lodged a statement of defence which however did not comply with the requirement of Order 7 Rule 5 of the Civil Procedure Rules in that there was no list of witnesses to be called at the trial, neither were any witness statement filed. Further, there were no copies of documents to be relied upon at the trial.

The requirement to file those documents is coached in mandatory terms, but this does not preclude the court from admitting such documents before the trial where the court had been moved and reasons given for noncompliance. This is in the spirit of arriving at a just and proportionate decision in compliance with Section 1 and 1 A of the Civil Procedure Act, provided that no prejudice shall be occasioned to any party. This discretion has been exercised over and over again so that injustice may not be visited upon any party who is before the court.

It is also accepted that striking out of any pleading is a drastic measure which should be applied cautiously, because the ultimate duty of the court is to do justice to the parties who come before it. Where a party moves the court to summarily dismiss any suit, no such order should be given unless it appears that such a suit is so hopeless that it discloses no reasonable cause of action, and so weak so as to be beyond redemption. Equally, where a party moves to strike out a defence, the court must be satisfied that such a defence does not raise any triable issue and in this case, a triable issue is not necessarily one that should succeed, but one which should be subjected to interrogation by evidence and subjected to cross-examination.

In adversarial proceedings such as the ones that exists in our jurisdiction, where parties have complied or partially complied with the

requirement of procedure and expressed the wish to have their day in court, they should always be given an opportunity to be heard. In the present case, the appellant at the earliest opportunity informed counsel for respondent that the accident was never reported to them. The statement of defence also alluded to the fact that at the time of the accident, there existed no cover relating to the subject motor vehicle and that no statutory notice was issued or served upon the appellant. Most importantly however, was whether or not the appellant was bound to satisfy the decree issued against the alleged insured under Section 10 of Cap 405 Laws of Kenya.

In deciding against the appellant the trial court relied heavily on the police abstract to determine that the appellant had insured the said motor vehicle. It is instructive to note however that it is the same court which observed as follows,

**“The said policy had a commencement and expiry date (but the copy was not clear). .....I am convinced that the information in the police abstract is correct and the defendant insured vehicle was insured by the defendant herein.”**

The foregoing statement in the ruling is to say the least contradictory. If the court could not determine the commencement and expiry date, it was not possible to be emphatic that the appellant indeed insured the vehicle in question. The statement of defence at paragraph 6 stated as follows,

**“The defendant avers that there was no cover issued by it at the time of the accident herein and further avers that no statutory notice was issued to it and /or served upon it and will at the hearing put the plaintiff to strict proof thereof.”**

Clearly, that is a serious triable issue and, with particular reference to the observation by the court itself, was a matter to be tested during a full trial. In view of the orders that shall follow here under I do not deem it necessary to delve any deeper into what transpired, save to state that the striking out of the appellants defence, and the entry of the judgment in favour of the respondent against the appellant cannot be sustained.

It follows this appeal should be and is hereby allowed. It is directed that the lower court file shall be remitted for hearing on merit by a different magistrate of competent jurisdiction after full compliance with the relevant rules of civil procedure. Each party shall bear their own costs.

**Dated and delivered at Nairobi this 7<sup>th</sup> day of May, 2020.**

**A.MBOGHOLI MSAGHA**

**JUDGE**

This judgment has been delivered in the absence of the parties and transmitted electronically, after due notice and in line with Article 159 of the Constitution as read with Section 1 B (e) of the Civil Procedure Act, which compliment Order 21 Rule 1 of the Civil Procedure Rules.