REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 131 OF 2018

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

VERSUS

FESTUS CHEROP KIPLANGAT AND KAYAB KOSGEY RICHARD

(suing as the legal representative on behalf

of the estate of Elias Kimosop Kaino-deceased).....RESPONDENTS

***(Being an appeal from the ruling and order of Hon. C. Obulutsa (CM) delivered on 21/9/2018 in Eldoret CMCC no. 446/2018 between Festus Cherop Kiplangat and Kayab Kosgey Richard (suing as the legal representative on behalf of the estate of Elias Kimosop Kaino-dcd) v. Fidelity Shield Co. Ltd*)**

JUDGMENT

1. The background of this appeal is that **FESTUS CHEROP KIPLANGAT AND KAYAB KOSGEY RICHARD (suing as the legal representative on behalf of the estate of Elias Kimosop Kaino-deceased)** (the respondent) sued the appellant's insured **Rift Valley Railways Ltd** in his capacity as the owner and/or driver or agent of a motor-vehicle registration no**. KBT 394E Ford Ranger**, which he was driving. The suit was contested, and the same proceeded to hearing and judgment was entered in favor of the respondents for a sum of **Ksh. 1,660,000/-** as general damages and costs of **Ksh.251.910/-** making a total of **Ksh. 1,911,910/-** plus interest.

2. The respondents contended that **FIDELITY SHIELD INSURANCE CO. LTD** the insurer (appellant) was statutorily bound to settle the claim whose insured held policy no. **P.C 583/086868**, but the insured refused to pay the sum. The respondents thus filed a declaratory suit for the court to compel the appellant to pay the said sum. The appellant filed its defence stating that it was not served with the requisite statutory notices under the **Insurance (Motor Vehicle Third Party Risk Act) Cap 405 Laws of Kenya** and thus was not bound to pay any sum.

3. The respondents then filed an application to have the appellant's defence struck out and judgment entered in their favor with costs. The court allowed the respondents' application and the defence was struck out. The appellants were dissatisfied with the said ruling and filed this instant appeal raising the following issues:

a) the trial magistrate erred in law and fact in striking out the defence without taking into consideration issues raised,

b) the court adopted wrong principles in striking out the defence, the appellant was condemned unheard yet the defence raised weighty issues for determination,

c) the trial court failed to hold that the appellant had not insured the suit motor-vehicle and no statutory notice was issued to the appellant to satisfy the conditions fro striking out the defence and

d) that the court erred to hold that no notice of institution of suit was issued as required under section **10 cap 405 Laws of Kenya.**

4. The appellant prays that the court order made on **21/9/2018** striking out the defence be set aside and judgment made thereof be set aside, the defence be reinstated and the matter be listed for hearing to be heard on merit and the costs of the appeal be awarded to them.

5. In response, the respondents filed a reply stating that the trial magistrate appropriately directed himself on the law as the defence did not raise any triable issue and it was a waste of judicial time. The appellant was appealing on the ruling for stay delivered on 13.3.2019 and the judgment orders delivered on the 21.9.2018 to which no appeal has been preferred. The appellant was served with the notices which were duly stamped as received, but they chose not to defend the primary suit which proceeded by way of formal proof. That in any event, the appellant had partly satisfied or paid half of the decretal sum thus the appeal lacks substance.

The appeal was canvassed through written submissions

6. The appellant in its submissions urges this court to analyse and re-assess the evidence on record and reach its own conclusion bearing in mind that it did not see nor hear the witnesses testify as held in **Selle v. Associated Motor Boat Co. (1968) EA 123**. In striking out pleadings, the court is urged not to look at the merits of the case, as was held in **UAP Insurance v. Lameck Bororio Mwenye(suing as the legal representative of Brian Lameck Momanyi-dcs) (2019) eklr.** In addition the same was restated in ***Saudi Arabian Airlines Corporation v. Preminum Petroleum Co. Ltd v. Polypipes Ltd & Anor*** **(2018)eklr** where the judges held as:

> ***"Therefore, the power to strike out a suit or defence should be used sparingly and only on the clearest of cases where the impugned pleading is 'demurer or something worse than a demurer' beyond redemption and not curable even by an amendment. Thirdly, in case of a defence, the court must be convinced upon looking at the defence, that it is a sham, it raises no bona fide triable issue worth a trial by the court. And a triable issue need not be one which will succeed but one which passes the Sheridan*** **J test in Patel vs E.A Cargo Handling Services Ltd. [1974] EA 75 at page 76, (Duffus P.) that:**
>
> > ***"……. A triable issue …. is an issue which raises a prima facie defence and which should go to trial for adjudication. Therefore, on applying the test, a defence which is a sham should be struck out straight away."***

7. The appellant summarized their submission in two grounds as follows:

> **i. Whether in accordance with the principles of striking ou pleadings, the learned magistrate was right to strike out the appellant's statement of defence**
>
> **ii. Whether by striking out the appellant's statement of defence, the learned magistrate gave due regard to Article 50 of the Constitution of Kenya.**

8. The court went into the merits of the case when in his ruling he stated that the insured and insurance had been served with the statutory notice contrary to the **D.T. Dobie case(supra).** The defence raised issues for determination as to whether the appellant was the insurer to the subject motor-vehicle and whether the notices were served. It is contended that this alone was enough for the matter to proceed to full hearing.

9. Further the appellant implores this court to consider that the right to be heard is enshrined under article 50 of the constitution in line with the principle of natural justice, and the appellant was condemned unheard by the defence being struck out.

10. Respondents points out that the trial court was guided by order 2 rule 15 of the Civil Procedure Rules to strike out the defence. The principles were settled in the court of appeal decision in **Blue shield Insurance company v. Joseph Mboya Oguttu(2009) eklr,** as follows:

> ***"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"***

That the court therefore properly directed itself since the defence was based on mere denials. **See also D.T Dobie and Company(Kenya) ltd v. Muchina(1982)klr**

11. The respondent reiterates that the appellant is appealing on the ruling yet they had paid half the decretal sum as they were not appealing against the judgment and the outcome of this appeal would not reduce the decreed amount or order for a fresh trial. In **Great Insurance Company of India Ltd v. Lilian Everlyne Cross and Anor[1966]EA 90** the court interpreted **section 10 of the Insurance Motor Vehicle Third Party Risks Act) as:**

> ***" 10(1) if , after 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 of this act(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 may have avoided,, the policy, the insurer shall pay to the persons entitled to the benefit of the judgment any sum payable there under in respect of the liability."***

12. The court was urged to dismiss the appeal in the interest of justice.

13. The issues for determination is whether the court did err to strike out the defence.

14. The respondent had filed the application to strike out the appellants defence on 13.6.2018. In his supporting affidavit it was averred that the parent suit was filed in 2017, the appellant was served with the notices, annextures of the same were attached. The legal officer to the appellant swore a replying affidavit stating that there were no sufficient reasons as to warrant dismissal of the defence as they denied liability to indemnify the plaintiff as they had not been served with the notices and there was no documentary proof to show they were the insurers and their defence was arguable.

15. The said application was brought under order **2 rule 15(1) (c) and (d) and order 51 rule 1. Order 2 rule 15(1) (c)**provides as follows:

> **(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,

16. The court under the above law has the power to strike out but the same has to be made with caution. The appellant herein avers that they were not served with the statutory notices, the respondents in their supporting affidavit indicated the defendant prior to instituting the primary suit was served with summons to enter appearance and the notices. This matter proceeded without the appellant raising any issue untiljudgment was delivered. The appellant only came to raise this issues in their defence after they had been served with a plaint seeking to enforce declaratory orders.

17. In Nai HCC No. 79/2013, **Saudia Arabia Airlines Corporation v. Premium Petroleum Co. Ltd** the court held as follows on striking out pleadings:

"I need not reinvent the wheel on the subject of striking out a defence. A great number of decisions have now settled the legal principles which should guide the court in determining whether to strike out a pleading. Except, I can state comfortably that these principles now draw, not only from judicial precedent, but from the principles of justice enshrined in the Constitution, especially article 47, 50 and 159. The first guiding principle is that, every court of law should pay homage to its core duty of serving substantive justice in any judicial proceeding before it, which explains the reasoning by Madan JA in the famous DT Dobie case that the court should aim at sustaining rather than terminating suit. That position applies mutatis mutandis to a statement of defence and counterclaim. Secondly, and directly related to the foregoing Constitutional principle and policies courts should recognize the act of striking out a pleading (plaint or defence) completely divests a party of a hearing, thus, driving such a party away from the Judgment seat; which is a draconian act comparable only to the proverbial drawing of the 'sword of Damocles'. Therefore, the power to strike out a suit or defence should be used sparingly and only on the clearest of cases where the impugned pleading is 'demurer or something worse than a demurer' beyond redemption and not curable even by an amendment. Thirdly, in case of a defence, the court must be convinced upon looking at the defence, that it is a sham, it raises no bona fide triable issue worth a trial by the court. And a triable issue need not be one which will succeed but one which passes the Sheridan J test in Patel vs E.A Cargo Handling Services Ltd. [1974] EA 75 at page 76, (Duffus P.) that:-

"A triable issue is an issue which raises a prima facie defence and which should go to trial for adjudication. Therefore, on applying the test, a defence which is a sham should be struck out straight away."

18. The Court of Appeal in **D.T.Dobie &Co/ Ltd v. Joseph Mbaria 7 Anor(1980)eklr**, the court held as follows:

"The power to strike out any pleading or any part of a pleading under this rule is not mandatory, but permissive and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending pleading." Rayer Carl Zeiss Stiftung v. Keeler Ltd. and Others (No. 3) (1970) Ch. D. 506.

If there is a sufficient substratum of fact to be implied, the offending paragraph in a pleading ,will not be struck out. Kemsley v. Foot and Others, (1952) A.C. 345."

19. The respondent in his submission averred that the primary suit was not defended by the appellant irrespective of them being served with the notices. The appellant denied service, and the matter therefore proceeded to formal proof and judgment was delivered. The defence therefore is a prima facie evidence that it had merit and raised a triable issue. The issues raised by the appellant on service are critical that the respondents had to answer in evidence.

20. The respondent had submitted that the appellant had paid half of the decretal sum thus there is no substratum in this appeal. There is however no evidence presented in support and in my considered view, although the court has a power to strike out a pleading once the issue on service was raised the trial court ought to have exercised its discretion cautiously.

21. Consequently, I hold and find that the appeal has merit and is allowed in the following terms:

a) The appellant prays that the court order made on 21/9/2018 striking out the defence be set aside

b) The judgment entered be and is hereby set aside,

c) The defence be and is hereby reinstated

d) The matter be listed for hearing to be heard on merit

e) Each party bears its own costs of the appeal

E-Delivered and dated this 5th day of May 2020 at Eldoret

H. A. OMONDI

JUDGE