REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

(CORAM: R. MWONGO, J)

HIGH COURT CIVIL APPEAL NO. 21 OF 2017

AFRICA MERCHANT ASSURANCE CO LTD...............................APPELLANT

VERSUS

HERMAN KIARIE MWAURA..RESPONDENT

(Being an appeal from the Ruling of Hon P Gesora CM delivered on 30th September, 2016 in Naivasha CMCC No 105 of 2016)

AND

HIGH COURT CIVIL APPEAL NO. 22 OF 2017

AFRICA MERCHANT ASSURANCE CO LTD...............................APPELLANT

VERSUS

JANET NYOKABI WANJIKU..RESPONDENT

(Being an appeal from the Ruling of Hon P Gesora CM delivered on 30th September, 2016 in Naivasha CMCC No 104 of 2016)

JUDGMENT

Background

1. The two appeals subject of this Judgment were filed separately but share the same counsel. They also emanate from the same road traffic accident, and ruling of Hon P Gesora in the lower court. There was no formal consolidation of the matters, but I have, however, dealt with them concurrently in this judgment.

2. In the lower court, the plaintiffs in CMCC Nos 104 and 105 of 2016, namely, Janet Nyokabi Wanjiku and Herman Kiarie Mwaura, alleged that they were a pillion passenger on, and the rider of, motorcycle KMCW 263Z, respectively. The motorcycle was knocked down by motor vehicle registration number KAU 445L on 6th March 2013, causing them to suffer injuries and damage. The vehicle was insured by the Appellant. Each of the injured plaintiffs separately filed suit in CMCC Nos 757 and No 758 of 2013 ("the Primary Suits"), respectively.

3. In the Primary Suits, Janet Nyokabi was awarded damages of Kshs 1,845,490/-, and Herman Kiarie, was awarded damages of Kshs 2,726,797/-. When each of them was unsuccessful in executing their said judgments, they each filed suit in Naivasha CMCC Nos 104 and 105, respectively seeking declarations that the insurance company – the defendant in the suits subject to this appeal – was liable to satisfy the said judgments that were awarded in the Primary Suits.

Dismissal of defences

4. By notices of motion in CMCC Nos 104 and 105 of 2016, the applicants therein who are the respondents in these appeals, applied to the trial court to strike out the defences for being vexatious, frivolous and an abuse of the court process. The application in CMCC No 104/2016 was filed on 3rd May 2016, and that in CMCC No 105/2016 was filed on 29th April, 2016.

5. By consent, the parties agreed that the appellants do file an amended defences in both suits. The amended defences in both cases were filed prior to submissions being filed.

6. After hearing the application in CMCC 104 of 2013, the trial court in its ruling dated 30th September, 2016, struck out the suit and entered judgment in CMCC No 757 of 2013. Similarly, in CMCC No 105 of 2013, the trial court adopted its decision in CMCC No 104 of 2013 and also dismissed the defence and awarded costs to the plaintiff.

7. The trial court found that in the Primary Suits the preliminary proceedings were complied with, letters of demand were served on the defendants, summons were served, and statutory notices under the Insurance (Third Party Risks) Act were sent to the defendant's insurers.

8. Further, the trial court noted that the defendants insurer appointed counsel to act on his behalf and negotiations were instituted; that a compromise was reached where liability was apportioned in the ration of 80:20 in favour of the applicant herein; that parties agreed and filed written submission on quantum and finally judgment was entered in the Primary Suits; that the defendant lodged an appeal against the decision in the primary suits but after negotiations the defendant withdrew the appeal and parties committed themselves to negotiate on modalities on how to liquidate the decretal sum; and that part payments of the decretal sum were in fact made.

9. Although the respondent denied that, in the primary suit, the defendant there was not insured by them at the time the alleged accident occurred; and they denied having been served with any demand letter or statutory notice, the respondents stated that the payments of the decretal sum were in fact made in the mistaken belief that the defendant was insured by the applicant herein.

10. Finally, the trial court determined as follows:

> ***"the respondent herein is liable to compensate the applicant in the primary suit.***
>
> ***I accordingly strike out the suit herein and enter judgment in favour of the plaintiff/applicant…."***

11. It is the rulings in CMCC 104 and 105 that are the subject of the appeals herein.

12. The grounds of appeal in both appeals are as follows:

> *1. The learned magistrate erred in law and fact by failing to find that the issue of whether or not the defendant in the primary suit was insured by the appellant was a triable issue.*
>
> *2. The learned Magistrate erred in law and fact for solely finding in favour of the plaintiff on the allegation/ground that statutory notice had been served upon the defendant.*
>
> *3. The learned magistrate erred in law and fact by failing to consider the amended defence on record in arriving at his decision to strike out, and which raises a triable issue of the fact that the alleged insured was not under policy cover from the appellant at the time of the accident therein.*
>
> *4. The learned magistrate erred in law and fact by arriving at his finding without considering that the appellant's (defendant's) application to amend defence was never opposed by the plaintiff, and which raises triable issues.*
>
> *5. The learned magistrate erred in law and fact by failing to find that the amended defence raises serious triable issues by stating that the alleged policy number had not commenced at the time of the accident, being 6/3/2014 at 10.30 am.*
>
> *6. The learned magistrate erred in law and fact by failing to consider that the amended defence on record includes a counter-claim against the respondent (plaintiff), and which is a triable issue.*
>
> *7. The learned magistrate erred in law and fact in basing his decision solely on the allegation that the appellant was served with a statutory notice, and disregarding the defendant/appellant's denial on record.*
>
> *8. The learned Magistrate erred in law and fact by disregarding the defendant/appellant's evidence on record before arriving at the decision to strike out its defence on record.*
>
> *9.The learned Magistrate erred in law and fact by failing to take into consideration the principles stipulated in the Civil Procedure Rules (2010) before striking out a defence.*
>
> *10. The learned magistrate erred in law and fact by finding in favour of the plaintiff/respondent without considering the applicable principles established by statute.*

13. I have considered the documents availed in support of and against the application and all submissions and authorities cited by the parties. The key issue that arises for determination is whether there were triable issues in the appellants' defence which are capable of prosecution and cannot be categorized as non-starter issues.

Whether there were triable issues

14. As at the time when submissions in respect of the application to strike out were made or filed, the defence on record was the original statement of defence. The proceedings show that the application to amend the defence was admitted by consent on the date when the trial court gave directions for filing of submissions on the application to strike out. However, argued the appellant, the trial court in its ruling did

not make specific reference to the amended defence which was on record.

15. The appellant submitted that the amended defence raised at least three triable issues: a) that the defendant had denied having insured the plaintiffs raising the question of the authenticity of the insurance certificate; b) that the defendant was never served with a statutory notice; c) that the defendant had a counterclaim emanating from payments mistakenly made to the plaintiffs in the primary suits on the belief that they had insured the accident vehicle.

16. The trial court appears to have focused on the fact that the appellant, as the insurer named in the primary suits against the defendant, failed to adequately engage and challenge the issues now raised in the amended plaint. The trial court's approach was that all those issues had been resolved by the fact that in the primary suit, the appellant ought to have diligently exercised their subrogation rights and fully defended their position in the primary suit.

17. In the present suits, CMCC Nos 104 and 105, the plaintiffs were seeking a declaration that the fruits of their judgments in CMCC Nos 757 and 758 were properly payable by the appellants. They assert that the appellants had in fact already remitted some payments of the decretal sum to the plaintiffs, and cannot now deny or turn the clock back.

18. What were the subsisting facts at the time the application was made? The facts were clearly contained in the affidavit in support of the application to strike out. The story they tell is this: the applicants sued the defendant (Patrick Ndabi) for damages following the accident. A Police abstract presented in the primary suits showed that the defendant was insured by the appellant; a demand letter dated 23-10-2013 to the defendant copied to the appellant, was exhibited; a statutory notice to the appellant dated 8th November, 2013 under the Insurance (Third Party Risks) Act was exhibited, and it shows the appellant's receipt stamp on 11th November, 2013; a notice of change of advocates was then exhibited by which Sheth & Wathigo replaced Mr David Gichuki for the defendants.

19. The parties having agreed to apportionment of liability by consent, judgment was entered in the Primary suits. However, the defendant appealed against the judgments in High Court Civil Appeal Nos 59 & 58 of 2015 respectively in respect of CMCC No 758 and CMCC No 759; Memoranda of the filed appeals were exhibited showing that the subject of appeal was limited only to the quantum of damages awarded in the primary suits; the appeals were subsequently compromised and consents were then filed by which the defendant agreed to withdraw the appeals on the condition that they would pay auctioneer's fees and the decretal sums in agreed instalments; the consents were exhibited to the application for striking out.

20. Finally, letters exchanged between the Insurance Company – the Appellant herein – and the plaintiffs/applicant's counsel dated various dates in September, October and November, 2015, were exhibited. In them, the insurance company making reference to CMCC Nos 757 & 758 forwarded installment cheques to the plaintiff's counsel in settlement of the judgment debts and in fulfillment of the conditions of the consent pursuant to which the two appeals (HCCA Nos 59 & 58 of 2015) were withdrawn. The said letters were not marked without prejudice.

21. From these, I appreciate that in the primary suits the defendant had had the opportunity to fully prosecute their defence by way of subrogation. The judgments in the Primary suits still stand and the letters and cheques evidencing acceptance and payments towards the judgments constitute evidence from which the appellant in this appeal can hardly be taken to resile.

22. As I understand the appellants' submissions, they are essentially that, notwithstanding the evidence available regarding their involvement in the lower court cases, once the respondents chose to consent to, and not oppose, the filing of the amended defences, they opened themselves up to the new issues pleaded therein. The trial court therefore had no option but to consider the effect of those newly introduced issues vis-a-vis the application to strike out the defences, which raise triable issues.

23. I have carefully perused the applications filed by the appellants to amend the defences in both suits. The applications indicate that:

> ***"The draft amended defence attached herewith be deemed as duly filed and served"***

However, the defence attached is not in fact an amended defence. It is a replica of the initial nineteen (19) paragraph statement of defence originally filed. From this perspective, it is understandable why the respondent did not bother to oppose the so-called *"amended defence"*. What ultimately transpired is that when the appellant finally filed the amended defence, it was a version not similar to the draft amended defence, in that it had an additional eight (8) paragraphs including a counter-claim.

24. That aside, after the trial court had taken into account all the material available in the application, it explained its determination as follows:

> ***"The Insurance (Third Party Risks) Act Cap 405 requires that an insurer must exercise the right of subrogation and compensate a claimant for any loss suffered. This is especially so once a statutory notice is served upon the insurer. Once this is done and an insurer disputes its obligation in this regard, the insurer is required to file suit against the insured and obtain judgment repudiating liability on its part.***
>
> ***This was not done. On the contrary the defendant herein appointed counsel to defend its interests and those of its insured. This matter was compromised and part payment was made. … it is not believable that the respondent did not detect any anomaly up to this point…..I find and hold that the respondent herein is liable to compensate the applicant in the primary suit. I accordingly strike out the suit herein and enter judgment in favour of the plaintiff/applicant…."***

25. What must a court take into account when dealing with striking out under Order 2 Rule 15? The law on striking out was recently restated by the Court of Appeal in **Kivanga Estates Limited v National Bank of Kenya Limited [2017] eKLR** where the Court said:

"It is not for nothing that the jurisdiction of the court to strike out pleadings has been described variously as draconian, drastic, discretionary, a guillotine process, summary and an order of last resort. It is a powerful jurisdiction, capable of bringing a suit to an end before it has even been heard on merit, yet a party to civil litigation is not to be deprived lightly of his right to have his suit determined in a full trial. The rules of natural justice require that the court must not drive away any litigant from the seat of justice, without a hearing, however weak his or her case may be. The flip side is that it is also unfair to drag a person to the seat of justice when the case brought against him is clearly a non-starter. The exercise of the power to strike out pleadings must balance these two rival considerations.

Although the court exercises discretionary powers in striking out pleadings, because of its far reaching consequences, order 2 rule 15 of the Civil Procedure Rules, has established clear principles which guide the court in the exercise of that power in the following terms;

"15.(1) <u>At any stage</u> of the proceedings the court <u>may</u> order to be <u>struck out or amended</u> any pleading on the ground that—

a) it discloses no reasonable cause of action or defence in law; or

b) it is <u>scandalous</u>, <u>frivolous</u> or <u>vexatious</u>; 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 <u>to be stayed or dismissed or judgment to be</u> <u>entered</u> accordingly, as the case may be." (Our emphasis).

The language as highlighted demonstrates that, as a drastic measure in litigation, the remedy must be resorted to sparingly. It is only where a pleading cannot be salvaged by an amendment that the court will utilise this procedure, hence the use of the word "may". Order 2 rule 15 which retains word for word

26. The leading authority on this point is the famous Court of Appeal decision in **DT Dobie & Company (Kenya) Ltd vs Muchina(1982) KLR 1** where the Court went into great detail in an exposition on the subject, with Madan,JA (as he then was) stating:

"I would sum up. It is relevant to consider all averments and prayers when assessing under Order 6 rule 13 whether a pleading discloses a reasonable cause of action, and also the contents of any affidavits that may be filed in support of an application that a pleading is otherwise an abuse of the process of the court, for under subrule 13(2) as hereafter set out, while evidence by affidavit is not permitted in the case of the first application, it is permitted in the case of the second application. Sub rule (2) provides:-

"(2) No evidence shall be admissible on anapplication on subrule (l)(a) but theapplication shall state concisely thegrounds upon which it is made."

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 for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage the court ought not to deal with any merits of the case for that 'is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits "without discovery, without oral evidence tested by cross-examination in the ordinary way". (Sellers, L.J. (supra)).As far as possible, indeed not at all, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks it right.

If an action is explainable as a likely happening which is not plainly and obviously impossible the court ought not to overact by considering itself in a bind summarily to dismiss the action. A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it.

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."

27. In the **Kivanga Estates case**, the court highlighted the line of jurisprudence on the provisions for striking out by referring to previous cases under the old Civil Procedure Rules from which Order 2 Rule 15 was word for word replicated. The court stated:

"For instance in Co-Operative Merchant Bank Ltd. vs George Fredrick Wekesa Civil Appeal No. 54 of 1999 the Court summarized the principles 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....A Court may only strike out pleadings where they disclose no semblance of a cause of action or defence and are incurable by amendment."

See Yaya Towers Limited vs Trade Bank Limited (In Liquidation) Civil Appeal No. 35 of 2000 and DT Dobie & Company **(Kenya) Ltd vs Muchina(1982) KLR 1"**

28. How do the filed amended plaints in the lower court suits fare in light of the legal prescriptions indicated in the aforesaid authorities on striking out? As I see it, the amended plaint sought to do in the declaratory suits what the appellant had failed to do in the primary suits. For example, the appellant alleges in the amended plaint that:

> - it did not receive statutory notice of the accident; yet it constructively participated in the consents through its involvement by way of exercise of its subrogation right; - it did not receive statutory notice yet has not pleaded any fraudulent act in the stamping of the statutory notice with its official stamp; or contest its direct involvement in making payments in the primary suits pursuant to an agreement to withdraw the appeals in the primary suits;
>
> - it did not insure the defendant in the primary suits as at the time of the accident; yet as the issuer of the policy mentioned in the primary suit it held all documents relating to the insurance policy, and did not make that denial or raise any issue with the policy or allege fraud in connection therewith throughout the proceedings in the primary suits;
>
> - it was not liable to pay any part of the decretal sum and that the installment payments had been made by mistake; yet it did not raise that issue directly or indirectly through the defendant or counsel in the primary suits where the formal consents to make installment payments arose;
>
> - it sought to raise a counterclaim for the amounts paid in as installments of the decretal sum; yet it was constructively involved in the determination of apportionment of liability in the primary suits and has at no time denied that it appointed counsel on record for the defendant;

29. As pointed out by the trial magistrate, the appellant had an obligation to exercise its subrogation rights and to compensate a claimant especially once a statutory notice is served upon the insurer. These requirements are stated under **section 10(1) of the Insurance (Third Party Risks) Act**. The only exemptions in are contained in **Sub-section (2)** of **section 10** which provides as follows:

> ***"(2) No sum shall be payable by an insurer under the foregoing provisions of this section –***
>
> ***(a) in respect of any judgment, unless before or within thirty days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings; or***
>
> ***(b)in respect of any judgment, so long as execution thereon is stayed pending an appeal; or***
>
> ***(c) in connexion with any liability if, before the happening of the event which was the cause of the death or bodily injury giving rise to the liability, the policy was cancelled by mutual consent or by virtue of any provision contained therein, and either—***
>
> > ***(i) before the happening of the event the certificate was surrendered to the insurer, or the person to whom the certificate was issued made a statutory declaration stating that the certificate had been lost or destroyed; or***
> >
> > ***(ii) after the happening of the event, but before the expiration of a period of fourteen days from the taking effect of the cancellation of the policy, the certificate was surrendered to the insurer, or the person to whom the certificate was issued made such a statutory declaration as aforesaid; or***
> >
> > ***(iii) either before or after the happening of the event, but within a period of twenty-eight days from the taking effect of the cancellation of the policy, the insurer has notified the Registrar of Motor Vehicles and the Commissioner of Police in writing of the failure to surrender the certificate."***

30. The trial magistrate was of the view that once an insurer disputes its obligation, it is required to file suit against the insured and obtain judgment repudiating liability on its part.

31. In this case, by the time the primary suits concluded and the appeals were compromised, the all matters relating to the primary suits came to an end, and cannot be litigated afresh in the lower court in the suits subject of this appeal. Litigation must come to an end, and I agree with the trial court's position where, when referring to the appellant's supposed neglect to engage in the primary suits, it stated:

> ***"….it is not believable that the respondent did not detect any anomaly up to this point"***

32. The appellant cited the case of **Mary Adhiambo Onyango v Jubilee Insurance Co. Ltd [2007] eKLR,** where the court dismissed an application for striking out on the ground that triable issues had been raised in the defence. I note that in that case, there was no primary suit that had proceeded with the direct or tacit participation of the insurance company in the defence of the insured.

33. The submissions of the applicants in the trial court referred to the case of **Nathan Gitong Mungania v Intra Africa Assurance Co Ltd [2008]eKLR.** That case is more in tandem with the present case in that there, a judgment had been rendered and the applicant sought a declaration that the decretal sum was payable by the defendant insurance company. The defendant denied liability areguing, as in the present case, that it had not received the statutory notice or demand despite numerous correspondence showing that it engaged with defendant's counsel. There, Emukule, J found:

> ***"By raising the kind of Defence referred to herein the Defendant insurer is engaging in disgraceful, harmful and scandalous and vexatious proceedings, and the said defence is therefore a sham and a shell, a defence that is fictitious, untrue defense made in bad faith.***
>
> ***The proper response to such a sham defence is that which is prescribed by Order VI Rule 13(1) to strike it out, and having struck it out, the court, may either dismiss the suit or as in this case enter Judgment for the Plaintiff/Applicant."***

34. The above words of Emukule, J, I think, fairly well represent the view I hold in respect of the actions of the appellant in relation to their defence. I find that the defence is merely a shambolic defence intended to drag and delay the day of final reckoning due to the appellant's failure to adequately engage in the primary suits. As such I agree with the way in which the trial court exercised its discretion to strike out the defence and enter judgment against the appellant.

Disposition

35. For all the reasons given and in light of the foregoing discussion, I dismiss both of the appeals in respect of the Rulings of Hon P Gesora CM delivered on 30th September, 2016 CMCC Nos 104 and 105, with costs to the respondents.

Administrative directions

36. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Zoom/Teams video/tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Deputy Registrar/Executive Officer, Naivasha.

37. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.

38. Orders accordingly

Dated and Delivered via videoconference at Nairobi this 16th Day of July, 2020

RICHARD MWONGO

JUDGE

Delivered by video-conference in the presence of:

1. Ms Kawira h/b for Karanja for the Appellant

2. Ms Amboko for the Respondent

3. Court Clerk - Quinter Ogutu