



REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CIVIL APPEAL NO. 10 OF 2018

XPLICO INSURANCE CO. LTD.....APPELLANT

-VERSUS-

MABLE IRUSA KHAMINYA.....RESPONDENT

(Being an appeal from the whole of the Ruling delivered by the Honourable S. Ogot Resident Magistrate on the 22nd December 2017 in Limuru CMCC No. 136 of 2017)

JUDGMENT

1. This Appeal arose from the judgment in a declaratory suit filed by the Respondent against the Appellant in the primary suit, Limuru CMCC No. 255 of 2016. The Respondent was awarded Kshs.3,900,000/= and costs of Kshs.151,580/= on the 28th April 2017 being compensation for injuries she sustained in a traffic accident while a passenger in the Appellant's vehicle.

2. The Respondent filed a suit against the insurer of the vehicle premised under the provisions of **Section 5 of the Insurance** (Motor vehicles third Party Risks) Cap 405 Laws of Kenya, being **Limuru CMCC No.136 of 2017**.

The Appellant denied liability and filed a statement of defence dated the 4th October 2017 denying liability.

3. Soon thereafter on the 10th October 2017 the Respondent filed an application seeking that the defendant's defence be struck out and judgment be entered for the plaintiff.

Upon interpartes hearing of the application the trial magistrate struck out the defence on the 22nd December 2017.

This ruling is the subject of this appeal.

4. The grounds preferred are that the trial magistrate erred in law and fact by failing to appreciate that the appellant's defence raised trial issues worthy of being determined in an interparty hearing, that the trial court applied wrong principles of law in arriving at the decision and erred in law in holding the appellant liable to satisfy the decretal sum which was more than the statutory limit provided under Chapter 405.

5. The Legal principles that underpin the issues raised in this appeal are

(1) Order 2 Rule 15 of Civil Procedure Rules striking out pleadings

(2) Order 36 rule 1(a) (summary judgment)

(3) Section 10(d) of Cap 405 Laws of Kenya and

(4) Section 5(b) (iv) of the Cap 405.

6. I have considered the plaint and the statement of defence filed by the appellant.

The appellant denied the occurrence of the subject accident as well as the policy cover for the accident vehicle Reg. No. KAY 286J.

It further denied liability to settle the judgment passed in Limuru CMCC No.255 of 2016 and put the plaintiff to strict proof.

7. Issues for determination

1. Whether the Appellant's defence in the primary suit raised any trial issues.

2. Whether the Appellant was under an obligation to settle and satisfy judgment in the primary suit under the provisions of Cap 405 Laws of Kenya.

8. I have considered parties submissions, the pleadings and the trial court's ruling.

Order 2 rule 15 Civil Procedure Rules (CPR) empowers a court to strike out a defence if it discloses no reasonable cause of action or defence in law, is scandalous or frivolous or an abuse of the court. Further under **Order 36 of CPR** the court may enter summary judgment if it finds the statement of defence raises no trial issues or is scandalous.

9. In the Replying affidavit and submissions to the application dated 10th October 2017 and upon which the defence was struck out, issues were framed for the court's determination among them the validity of the insurance policy and whether the appellant was liable to satisfy the judgment in view of the policy statutory limit.

These are the same issues for determination in this appeal.

10. The appellant's submissions are that there were trial issues that ought to have been determined in a trial not in a summary procedure and cited several authorities with a conclusion that an order for striking out was not available in the circumstances.

Citing **Section 10(2) Cap 405** it was submitted for the Respondent that as the insurer had not voided the policy, it was under an obligation to settle the decree in the primary suit Limuru CMCC No.255 of 2016.

11. The Respondent further submitted that the appellants defence did not comply with provisions of **Order 3 Rule 2 CPR** in that at the time no list of witnesses, witness statements and documents had been filed and therefore it was safe to state that it consisted of mere denials. Citing the case **Dr. Murry Watson –vs- Rent –A- Plane Ltd & 2 others Nbi HCCC No. 2180 of 1994**, it was urged the said defence lacked seriousness and tended to annoy as being vexatious, and so the appellant was not entitled to defend the suit – **Gupta –vs- Continental Builders Ltd (1976-81) I KAL 809**.

12. I have also considered the trial magistrates ruling. In summary, it does not analyse the statement of defence as filed. I get the impression that the trial magistrate was in a hurry to finalise with the suit in summary procedure thus went out of her way to determine the merits of the whole suit instead of confining herself to the issues raised in the defence.

13. I say so because the magistrate took her time to analyse the meaning and import of the provisions of Cap 405 – duty of Insurer to satisfy judgments against insured persons, implications of failure by an insurer to avoid an insurance policy but failed to interrogate the pertinent issues raised in the defence to determine whether they were triable.

14. In the case **D.T Dobie & Co. (K) Ltd –vs- Muchina (1982) KLR** the principles that a court ought to consider before striking out a pleading were stated thus

“A 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 reasonable cause of action -- at this stage the court ought not deal with the merits of the case as that is a function solely reserved for the trial judge at the trial --- as possible there should be no opinion expressed upon the application ...”

15. The above summarises my re-evaluation of the trial magistrates findings and conclusions.

Summary procedure is intended to give a quick conclusion to a case that maybe delayed by a sham defence, that exhibits no triable issues.

16. A defence is said to raise a reasonable defence if that defence raises a *prima facie* triable issue – **Equatorial Commercial Bank -vs- Jodam Engineering Works Ltd (2004) e KLR**.

A trial issue as defined by the Court of Appeal in **Olympic Escort International Co. Ltd** is one that is *bona fide*, but that need not succeed upon hearing.

That court further rendered that

“.... it is trite that a triable issue is not necessarily one that the defendant would ultimately succeed on. It only need be bona fide.”

17. Even when a defense raises one trial issue, it ought to be sustained until that issue is tried and determined. The appellant had for instance questioned the validity of the policy cover over the suit vehicle, as well as the decretal sum and the statutory limit under **Section 5(b) (iv) of the Act (Cap 405)**.

18. It is trite that a party ought not be driven out of the seat of justice by being barred from being heard by summary procedure - striking out his pleading. This procedure has been said in a myriad of judicial authorities to be draconian and ought to be resorted to in very clear circumstances – **Francis Kimani Kariuki –vs- Intra Africa Assurance Co. Ltd (2008) e KLR**.

19. Accordingly and for the aforesated reasons, I find the appeal merited. It is allowed.

The ruling of the trial magistrate dated **22nd December 2017** is set aside with the result that the declaratory suit in **Limuru CMCC No.136 of 2017** is reinstated for hearing. It shall be set down for hearing at the Chief Magistrate's court at Limuru before any other magistrate.

20. The Appellant shall have costs of the Appeal.

Dated and signed at Nakuru this 27th Day of March 2019.

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J.N. MULWA

JUDGE

Dated, signed and delivered at Kiambu this 10th Day of April 2019.

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C. MEOLI

JUDGE