



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 29 OF 2019

PATRICK MAKUMI KARANJA.....APPELLANT

-VERSUS-

AFRICA MERCHANT ASSURANCE COMPANY LIMITED.....RESPONDENT

(Being an appeal against the ruling and order delivered by Honourable M. Obura (Mrs.)

(Senior Principal Magistrate) on 22nd January, 2019 in CMCC NO. 7782 OF 2018)

JUDGMENT

1. Patrick Makumi Karanja, the appellant in this instance, instituted the suit before the Chief Magistrate's Court vide the plaint dated 29th August, 2018 seeking special damages in the sum of Kshs.496,699.50/ plus costs of the suit against the respondent.
2. The appellant pleaded that he had previously instituted CMCC NO. 6422 OF 2010 ("*the primary suit*") against Benson Litunya Lasa and Julius C. Ndare ("*the defendants*") arising out of the road traffic accident that occurred on 20th August, 2010 involving the motor vehicle registration number KAT 592P ("*the subject motor vehicle*") owned by the defendants and insured by the respondent, and that he sustained injuries as a result of negligence on the part of the defendants.
3. The appellant pleaded that judgment was eventually entered in his favour in the sum of Kshs.993,399/ on 29th June, 2018 and that the respondent was to cater for 50% of the said sum, amounting to Kshs.496,699.50/.
4. According to the appellant, the respondent has since neglected and/or failed to pay the amount owed to the respondent, hence the current suit.
5. The respondent entered appearance and filed the statement of defence dated 21st September, 2018 denying the appellant's allegations.
6. Soon thereafter, the appellant lodged the Notice of Motion dated 16th October, 2018 seeking to have the respondent's defence struck out with costs and for judgment to be entered in his favour as prayed in the plaint.
7. In opposing the Motion, the respondent put in a replying affidavit, following which the parties filed and exchanged written submissions.
8. Eventually, the Motion was dismissed by the trial court through its ruling delivered on 22nd January, 2018.
9. The appellant has now moved this court by way of the appeal against the above ruling. His memorandum of appeal dated 24th January, 2019 features the grounds hereunder:

i. THAT the learned trial magistrate erred in law and in fact by failing to appreciate the provisions of the law under the Insurance (Motor Vehicle) Third Party Risks Act (Cap. 405) Laws of Kenya.

ii. THAT the learned trial magistrate erred in law by failing to determine whether the respondent had complied with the law availing itself to the provisions of Section 10(2) and (4) of the Insurance (Motor Vehicle) Third Party Risks Act (Cap. 405) Laws of Kenya.

iii. THAT the learned trial magistrate erred in law by failing to appreciate and/or correctly interpret the judicial authorities

referred to in the appellant's submissions.

10. This court issued directions to the parties to file written submissions on the appeal. From the record, it is apparent that only the appellant filed written submissions. There is evidence on record to show that the respondent was informed of this court's directions in good time by the appellant, yet it did not comply.

11. In that case, the appellant submitted *inter alia*, that the trial court did not consider that the subject motor vehicle in the primary suit was insured by the respondent or that the respondent was duly served with a statutory notice in respect to the primary suit.

12. The appellant also urged this court to adopt the analysis in **John Karanja Njenga v Invesco Assurance Co. Limited [2017] eKLR** where the High Court allowed the appeal on the basis that the trial court had not considered that the respondent in that case had failed to comply with the provisions of Section 10(2) and (4) of the Insurance (Motor Vehicle) Third Party Risks Act.

13. I have considered the appellant's submissions on the appeal. I have likewise reconsidered the application and the material placed before the trial court for consideration. It is noted that the three (3) grounds of appeal concern themselves with the question as to whether the trial court's analysis over the respondent's liability arising out of the purported insurance policy cover was proper.

14. The record shows that the appellant's Notice of Motion essentially rides on the position that owing to the insurer-insured relationship subsisting between the respondent and the defendants in the primary suit, the respondent was obligated to pay 50% of the decretal amount determined on appeal vide the judgment entered on 14th November, 2017 in High Court Civil Appeal No. 153 of 2013 (Kamau Kiarie & 2 others-vs-Lukas Kilonzo & 2 others).

15. Further to the above, the appellant maintained that the respondent was served with a statutory notice upon filing of the primary suit, hence the allegations to the contrary set out in its defence are not only a sham but are scandalous, frivolous and vexatious.

16. In her replying affidavit *Lynda Arudo*, Legal Officer at the respondent company, averred that the respondent's defence raises triable issues since it denies having ever insured the defendants and/or the subject motor vehicle relating to the primary suit.

17. The deponent also stated that the respondent has never admitted liability, neither was the judgment in question entered against it or any of its insured.

18. Moreover, it was the deponent's assertion that the respondent was never issued with a statutory notice within the meaning of Section 10(2) (a) of the Insurance (Motor Vehicle) Third Party Risks Act.

19. In the end, the trial court found that the disputed insurance relationship as well as the disputed contents of the police abstract are triable issues hence it would not be in the interest of fairness to have the defence struck out at the early stage.

20. The court in **Patel v EA Cargo Handling Services Ltd [1974] EA 75** defined a 'triable issue' in a defence as an issue which gives rise to a prima facie defence and which ought to go to trial for further adjudication.

21. The courts have as a matter of practice been wary of striking out a party's pleadings at the summary stage unless it is clear without a doubt that such pleadings do not raise any triable issues or are a mere sham.

22. The courts have also appreciated that where a party's pleadings raise any triable issues, such a party ought to be given the opportunity of defending its pleadings. This reasoning was adopted in **Continental Butchery Limited v Nthiwa [1978]KLR** where the Court of Appeal rendered itself thus:

"If a bona fide triable issue is raised the defendant must be given unconditional leave to defend but not so in a case in which the court feels justified in thinking that the defences raised are a sham."

23. In the present instance, I have reconsidered the material placed before the trial court and note that no clear evidence was tendered to establish that the respondent was at all material times the insurer of the defendants' subject motor vehicle in the primary suit, be it a certificate of insurance or an insurance policy document. In any case, the police abstract availed in the primary suit does not clarify the position on this subject.

24. The service of the statutory notice dated 13th October, 2010 alleged to have been issued to the respondent is disputed.

25. It therefore follows that the above issues can only be properly adjudicated at the trial. I am satisfied that the respondent's defence raises triable issues.

26. The upshot is that the appeal is found to be without merit, it is therefore dismissed with costs to the respondent.

Dated, Signed and Delivered at Nairobi this 15th day of November, 2019.

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J.K. SERGON

JUDGE

In the presence of:

.....for the Appellant

.....for the Respondent