



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CIVIL APPEAL NO. 51 OF 2015

KENYA ORIENT INSURANCE CO. LTD.....APPELLANT

=VRS=

VELONICAH KWAMBOKA NYABERI.....RESPONDENT

[Being an Appeal from the Judgement and Decree of Hon. J. Mitey (RM) delivered on 5th November 2013 in KEROKA SRM CC NO. 99 OF 2013 between Kenya Orient Insurance Co. Ltd =VRS= Velonicah Kwamboka Nyaberi]

JUDGEMENT

The plaintiff/respondent sued the defendant/appellant for general and special damages resulting from a road traffic accident that occurred on 8th October 2009 vide KEROKA SRMCC NO. 34 of 2010 against the insured Isaack Adams Subo and Mose Vincent Ongati and on 7th June 2011 the plaintiff obtained judgement against the insured Isaack Adams Subo and Mose Ongati for Kshs. 66,500/= being general damages and costs assessed at Kshs. 43,065/=.

The decretal amount outstanding as of the date of filing the suit was Kshs. 128,185/= inclusive of interest of Kshs. 18,620/=. That decree was drawn for the decretal sum on 26th June 2013.

On 5th June 2013 the plaintiff brought another suit vide KEROKA SRM CC NO. 99 OF 2013 seeking the recovery of the Kshs. 128,185/= being the decretal sum plus costs in KEROKA SRM CC NO. 34 OF 2010 from the defendant (the appellant herein).

The defendant filed his statement of defence traversing all the allegations in the plaint and putting the plaintiff to strict proof. Vide a notice of motion application dated 16th July 2013 the plaintiff prayed inter alia that the defendant's defence be struck out. The learned trial magistrate delivered her ruling on 5th November 2013 and struck out the defence hence this appeal.

The appellant filed their memorandum of appeal on the 22nd November 2013. They raised the following grounds: -

- “1. That the Learned trial Magistrate erred in law and fact in striking out the appellant's statement of Defence.**
- 2. That the Learned trial Magistrate erred in law and in fact in striking out the Appellant's Defence without addressing her mind that the same raised serious triable issues.**
- 3. That the Learned trial Magistrate erred in law and in fact by failing to find the Appellant's statement of defence raised triable issues which could not be determined in a summary manner.**
- 4. That the Learned trial Magistrate erred in law and in fact in only considering paragraph 3 of the Appellant's Replying affidavit sworn by one Sarah Weru instead of considering the whole of the said Replying Affidavit.**
- 5. That the Learned trial Magistrate erred in law and in fact by failing to find that summary dismissal should only be applied in the clearest of all cases and that if a party raises an issue that cannot be answered by way of an affidavit the matter should go to full hearing.**
- 6. That the Learned trial Magistrate erred in law and fact in allowing the Respondent's application which was brought under the wrong provisions of the law.**
- 7. That the Learned trial Magistrate erred in law and fact in failing to find that the Appellant had repudiated the insurance policy did not extend to the respond herein.**

8. That the learned trial Magistrate erred in law and fact in failing to find that the Respondent herein could not seek to enforce any judgement that she might have obtained against the insured who had been insured by the appellant herein on the basis of the policy since she was not contemplated by the policy.

9. That the learned trial Magistrate erred in law and in fact in failing to take into account considerations of which she should have taken account.

10. That the learned trial Magistrate erred in law and fact in failing to consider the appellant's submissions in support thereof.

11. That the learned trial Magistrate erred in recording the proceedings in a scanty, unorthodox and unconventional manner rendering it incoherent and difficult to comprehend or to be given any meaning.

12. That the learned trial Magistrate erred in law and fact by over relying on the Respondent's submissions and legal authorities which were not relevant and without addressing her mind to the circumstances of the case, relevant law applicable and the legal authorities which were availed by the appellant.

13. that the learned trial Magistrate's decision albeit, a discretionary one was plainly wrong.

The parties agreed that the appeal be dispensed by way of written submissions and both complied. The appellant's submissions were filed on the 1st November 2016 and those of the respondent were filed on the 10th May 2017.

The appellant submitted that the magistrate erred by striking out the defence as the respondent had not proved any of the grounds set out in Order 2 Rule 15 of the Civil Procedure Rules 2010, and further that the defence raised triable issues which should have been allowed to proceed to trial. It was counsel's submissions that the respondent's application did not meet the threshold for striking out pleadings and that the appeal should be allowed. Counsel relied on the following: -

1. **KCB v Suntra Investment Bank Ltd [2015] eKLR.**

2. **Transcend Media Group Ltd v Independent Electoral and Boundaries Commission [2015] eKLR.**

3. **Saudi Arabian Corporation v Sean Express Services Ltd [2014] eKLR.**

Counsel for the respondent submitted that the trial magistrate was properly guided in striking out the appellant's statement of defence as it did not disclose any triable issues. It was Counsel's submission that the respondent's application was brought under the correct provisions of the law being Order 2 Rule 15 (1) (b) (c) and (d) of the Civil Procedure Rules and Sections 1A, 1B, 3A and 63 of the Civil Procedure Act. He further submitted that the primary suit proceeded to full trial and the appellant was fully notified of every step before the institution of the suit and that the appellant's defence never raised any defences covered under Section 10 (2) of Cap 405 Laws of Kenya. He prayed that the appeal lacks merit and should be dismissed with costs to the respondent. He relied on:-

1. **Orbit Chemical Industries Ltd vs Attorney General [2006] eKLR.**

2. **Anne Wambui Maina vs United Insurance Co. Ltd [2005] eKLR.**

3. **Civicon Ltd vs Richfiled Engineering Ltd [2009] eKLR.**

4. **Nairobi HCC CA No. 164 of 2002 Madison Insurance Co. Kenya Ltd vs Justus Ongera.**

5. **Willie Mwaniki Njue vs Stephen Njiru Mbogo [2007] eKLR.**

6. **Anne Chepkorir Atuya vs Harun Komen [2007] eKLR.**

The issue before this court arises from a declaratory suit. The appellant herein filed a defence which was struck out. The law on striking out of pleadings is well outlined in **Order 2 Rule 15 of the Civil Procedure Rules**. The grounds for striking out the defence were raised by the respondent in their application. The appellant's defence was that the respondent never served him with a statutory notice. The trial magistrate made a finding that the appellant was served with a statutory notice. A perusal of the record reveals that the statutory notice was indeed served upon the appellant on the 15th December 2009. The police abstract obtained by the respondent also shows that the appellant was the insurer. I agree with the trial magistrate's finding in regard to Section 10 of the Insurance (Motor Vehicle Third Party Risks) Act Cap 405 Laws of Kenya that the appellant herein is liable to satisfy the decree in the primary suit. The statutory notice having been duly served the appellant's defence did not raise any triable issues and I find that the trial magistrate did not err in law or fact in striking out the defence. This appeal has no merit and is accordingly dismissed with costs to the respondent.

It is so ordered.

Dated, signed and delivered at Nyamira this 4th day of October 2018

E. N. MAINA

JUDGE