REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 178 OF 2011

INVESCO ASSURANCE CO. LTD……APELLANT

VERSUS

ANNETTE WATAKA……RESPONDENT

(An Appeal from the Judgment and Decree of the Resident Magistrate Honourable J. A OWITI (RM), in Eldoret CMCC No. 228 of 2011, dated and delivered on 17.10.2011)

JUDGMENT

1. The respondent in this appeal was the plaintiff in Eldoret CMCC No. 228 of 2011. She had sued the appellant as the insurer of Motor vehicle registration No. KAR 618 U seeking a declaratory order directing the appellant to pay her the sum of Kshs.201,500 plus costs of Kshs.47,250 in satisfaction of a decree issued against the appellant's insured in Eldoret CMCC No. 18 of 2007.
2. It was the respondent's case that having been awarded the aforesaid sums as general damages and costs in CMCC No. 18 of 2007 as a result of injuries sustained in an accident involving a motor vehicle insured by the appellant, and having served the appellant with a statutory notice under ***Section 10*** of the ***Insurance (Motor vehicle Third party Risks) Act*** Chapter 405 of the Laws of Kenya (hereinafter Cap 405), the appellant was statutorily bound to settle her claim.

3. The appellant filed a statement of defence on 12th August, 2011 denying the respondent's claim. The respondent then moved the lower court in an application dated 17th August, 2011 seeking to have the appellants defence struck out and judgment entered in her favour. The application was allowed in a ruling delivered on 17th October, 2011 by Honorable *J. Owiti*, Resident Magistrate. The appellant was aggrieved by the decision of the learned trial magistrate hence this appeal.
4. In the memorandum of appeal filed on 4th November, 2011, the appellant raised eight grounds of appeal which can be summed up as follows:-

i. That the learned trial magistrate erred in law and fact by striking out the appellant's defence without proper legal basis or justification.
ii. That the trial magistrate erred in law and fact in finding that the appellant was served with the statutory notice when that was not the case.

iii. That the trial magistrate erred in law and fact in failing to find that the appellant's defence raised triable issues to warrant a hearing even when issues involving fraud had been pleaded.
iv. That the learned trial magistrate erred in law and fact by entering judgment in favour of the respondent against the appellant at an interlocutory stage.

5. The parties agreed that the appeal be prosecuted by way of written submissions: those of the

appellant were filed on 3rd May, 2015 while those of the respondent were filed on 10th November, 2016. The submissions were highlighted before me on 12th April, 2016 by learned counsel *Mr. Oribo* who held brief for *Mr. Omwenga* for the appellant and *Mr. Omondi* who represented the respondent.

6. In its submissions, the appellant gave conflicting positions regarding whether it was still relying on ground No. 3 in its memorandum of appeal in which it had challenged the trial court's finding that the appellant had been properly served with a statutory notice by the respondent. In its written submissions when indicating how it intended to argue the appeal, the appellant indicated that ground number 3 had been abandoned. However, in the body of the submissions, the appellant revisited the issue and asserted that service of the statutory notice had been disputed in paragraph 4 of its defence and that this was a triable issue which required to be proved in a hearing.

7. The appellant also submitted that it had pleaded fraud on the part of the respondent in paragraph 8 of its defence as the reason for its failure to settle her claim and that the learned trial magistrate erred in his holding that the allegations of fraud could only be investigated by the criminal investigation department and not by the court and that in the absence of orders from the High Court stopping the proceedings, the court was entitled to hear and determine the suit the allegations of fraud notwithstanding; that the trial magistrate was wrong in disregarding evidence contained in a supporting affidavit sworn by the appellant's legal officer to the effect that *Hon. Lessit J* in HCC No. 318 of 2008 had issued conservatory orders in favour of the appellant owing to fraudulent claims that had allegedly been filed against it and granted it time to screen all its claims; that the allegations of fraud as pleaded in its defence constituted a triable issue which entitled it to be given an opportunity to defend the suit.
8. On her part, the respondent invited this court to dismiss the appeal as in her view, the appellant's statement of defence did not raise any triable issue. The respondent submitted that in her affidavit sworn in support of the application,she had availed evidence to confirm that she had served the appellant with a statutory notice within the time stipulated under ***Section 10 (2)*** of Cap 405 and that therefore want of notice was not a defence available to the appellant; that the fraud pleaded by the appellant was in relation to a policy of insurance allegedly obtained by the respondent through fraudulent means and that considering the nature of the claim made against the appellant in the suit, this could not have amounted to a triable issue; that the defence filed by the appellant did not have any substance and was properly struck out.

9. I have carefully considered the grounds of appeal, the rival submissions made by the advocates on record for the parties and the authorities cited. I have also perused the record of the lower court including the pleadings filed in CMCC No. 228 of 2011 (hereinafter the declaratory suit). Having done so, I find that the only issue that arises for my determination is whether the statement of defence filed by the appellant in the declaratory suit contained any triable issue that would have entitled the appellant the benefit of defending the respondent's claim in a full trial. Put differently, the question that this court must answer is whether the learned trial magistrate erred in striking out the appellants defence and entering summary judgment in favour of the respondent.

10. The respondent's application which resulted in the impugned ruling was premised on ***Order 2 Rule 15 (1) (b) (c)*** and ***(d)*** of the ***Civil Procedure Rules 2010*** which provides that:-

"(i) 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,***

and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be".

11. Under the above provision, it is clear that the court has discretion to strike out pleadings on any of the aforesaid grounds and may order that the suit be stayed or dismissed or may enter judgment depending on the relief that most suits the ends of justice having regard to the circumstances of each case.

    It is now settled law that striking out pleadings is a draconian measure which courts should employ very cautiously and sparingly and only in the clearest of cases. This would be in cases where the pleadings in question are beyond redemption or put simply hopeless. This would be in cases where the plaint does not disclose any cause of action or the defence does not raise any triable issue which is what is generally referred to as a sham defence.

12. The Court of Appeal in ***Crescent Construction Co. Ltd V Delphis Bank Ltd Civil Appeal No. 146 of 2001 (2007) eKLR*** restated the above legal position with regard to the court's power to strike out pleadings when it stated as follows:-

> ***"However, one thing remains clear, and that is that the power to strike out a pleading is a discretionary one. It is to be exercised with the greatest care and caution. This comes from the realization that the rules of natural justice require that the court must not drive away any litigant however weak his case may be from the seat of justice. This is a time-honoured legal principle. At the same time, it is unfair to drag a person to the seat of justice when the case purportedly brought against him is a non-starter"***

    The court in the ***Crescent Construction Co. Ltd*** case when stating that it would be unfair to drag a person to the seat of justice when the case brought against him was a non-starter was referring to a situation where a plaint does not disclose a cause of action. The same argument would apply where the defence is a sham and does not raise any triable issue. In such a case, it would be unfair to drag the plaintiff through the motions of a trial. I therefore agree with my brother *Gikonyo J* when he stated in ***Saudi Arabian Airlines Corporation V Sean Express Services Ltd Milimani HCC No. 79 of 2013 (2014) eKLR*** that ***" …. In case of a defence, the court must be convinced upon looking at the defence that it is a sham; it raises no bonafide triable issue worth a trial by the court. And a triable issue need not be one which will succeed but one that passes the SHERIDAN J Test in PATEL v E.A. CARGO HANDLING SERVICES LTD. [1974] E.A. 75 at P.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."***

    It is also important to point out that a statement of defence does not need to have several triable issues for the defendant to be given an opportunity to take it to full trial. It is sufficient if only one bonafide triable issue is raised. See: ***Ramji Megji Gudka Ltd V Alfred Morfat Omundi Michira & 2 Others [2005]eKLR***

13. Having laid out the general principles that should guide a court in deciding whether or not to strike out a plaint or a defence, I will now turn to the instant case. In this case, the learned trial magistrate struck out the appellant's defence after finding that though the appellant had denied being served with a statutory notice, there was affidavit evidence tendered by the respondent to confirm that it had been served with the statutory notice through registered post within the time lines limited by ***Section 10(2)*** of the Cap 405***;*** It is also evident from the impugned ruling that the learned trial magistrate also considered that since there was a judgment entered in favour of the respondent in CMCC No. 18 of 2007, the appellant was obligated under ***Section 10(1)*** of Cap 405 to settle the decree therein.
14. I wish to start by observing that from the affidavits filed in the application before the trial court, it was not disputed that the appellant had insured the motor vehicle involved in the accident in which the respondent was injured and that she had obtained a judgment in a suit filed against the appellant's insured awarding her general damages for injuries sustained in that accident together with costs and interest.
15. There is therefore no doubt that the appellant was under a statutory duty to satisfy the judgment

obtained by the respondent against its insured in view of the provisions of ***Section 10*** of Cap 405 which states as follows:-

> ***10(1) "If, after a 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 (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 cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.***
>
> ***(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 fourteen 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……***

16. The liability under ***Section 10 (1)*** is also subject to the provisions of ***Section 10 (4)*** which provides that;

> ***"No sum shall be payable by an insurer under the foregoing provisions of this section if in an action commenced before, or within three months after, the commencement of the proceedings in which the judgment was given, he has obtained a declaration that, apart from any provision contained in the policy he is entitled to avoid it on the ground that it was obtained by the non-disclosure of a material fact, or by a representation of fact which was false in some material particular, or, if he has avoided the policy on that ground, that he was entitled so to do apart from any provision contained in it……"***

17. I have perused the statement of defence filed by the appellant and the replying affidavit sworn on its behalf by its legal officer *Carolyne Shavi Limo* on 20th September, 2011. Though the appellant denied service of the statutory notice, when served with evidence annexed to the respondents supporting affidavit confirming service of the said notice through registered post, the appellant in the replying affidavit sworn on its behalf did not deny that the address through which the notice was sent as shown in the certificate of posting belonged to it. Indeed, as correctly submitted by *Mr. Omondi*, it is noteworthy that the address in the certificate of posting is the same address that was used by the appellant's legal officer in her replying affidavit. The notice and the certificate of posting are dated 20th January, 2007 while the suit was filed four days prior on 16th January, 2007. I am thus unable to fault the learned trial magistrate in her finding that the appellant was properly served with the statutory notice within the timelines specified in ***Section 10(2)*** of Cap 405 and that the appellant's denial that the statutory notice had not been served in the manner envisaged under Cap 405 amounted to a mere denial which did not raise any triable issue.

18. Regarding the allegation of fraud, I find that the learned trial magistrate misdirected herself when she held that the issue of fraud raised against the respondent could only be investigated by the criminal investigations department and not by the court. There was no legal basis for such a finding. Allegations of fraud if properly raised in a defence are serious allegations that ought to be investigated by the court and should automatically entitle the defendant the benefit of a full trial. However, the above misdirection is not one which would justify the interference of this court with the trial magistrate's final decision as a perusal of paragraph 8 of the defence shows that the

claims of fraud were pleaded against the plaintiff (now the respondent) and not the appellant's insured. In the suit, the respondent had not sought to enforce any claim premised on a contract of insurance with the appellant. She was merely seeking to have the appellant settle a decree issued in her favour against the appellant's insured as it was statutorily enjoined to do under Cap 405. The contract of insurance was between the appellant and the defendants in the primary suit whose existence was not denied by the appellant. In the circumstances therefore, I fail to see how the allegations of fraud against the respondent would have affected the respondent's claim in the declaratory suit. Such allegations would only have been relevant if they were made in the primary suit and not in the declaratory suit. In the context of this case, I find that the pleadings of fraud in the appellant's statement of defence did not constitute a bonafide triable issue that would have entitled the appellant to have the suit proceed to full trial.

19. The circumstances would have been different if the allegations of fraud had been made against the appellant's insured. I say so because if the appellant's insured had fraudulently obtained the policy of insurance in question, the appellant would have been entitled to avoid or cancel the policy and subject to complying with the provision of ***Section 10 (4)*** of Cap 405 reproduced earlier in this judgment, it would have been exempted from satisfying the decree issued in the primary suit against its insured. A pleading that its insured had fraudulently obtained the policy of insurance in question would have constituted a bona fide triable issue which would have justified a full trial to enable the appellant adduce evidence to substantiate the alleged fraud and to demonstrate whether or not it had obtained a declaration that it was entitled to avoid the policy on grounds that it was obtained through non-disclosure of material facts or a representation of fact which was false in some material particulars.

    The claim that there were conservatory orders issued by *Hon. Lesiit J* in HCC No. 318 of 2008 on matters related to fraud was not substantiated as the said orders were not availed to the lower court. Though there was an indication that the same had been annexed as "PG2" to the affidavit sworn by *Paul Gichuhi* on 24th May 2011, this was not the position as I have looked at the said affidavit and it does not contain any such annexture.

20. As the appellant had not pleaded in its defence that it had obtained orders staying execution in the primary suit or that it had obtained a declaratory judgment as contemplated under ***Section 10 (4)*** of Cap 405 and considering what I have stated earlier regarding the allegations of fraud and denial of service of the statutory notice, it is my finding that the appellant's defence did not raise a single triable issue that would have merited a full trial. Given the foregoing, it is my considered view that the learned trial magistrate correctly exercised her discretion in striking out the appellant's defence as there was nothing in the defence to take to full trial. Sustaining such a defence would only have served the purpose of prejudicing the respondent by unduly delaying the fair trial of the suit which would have violated the overriding objective as stipulated in ***Section 1 A*** and ***1 B*** of the ***Civil Procedure Act*** and ***Article 159*** of the ***Constitution*** which advocates for the just and expeditious disposal of cases.
21. Having struck out the defence, the learned trial magistrate properly exercised her discretion as she was entitled to do under ***Order 2 Rule 15*** of the ***Civil Procedure Rules*** by entering judgment for the respondent against the appellant as prayed.

    In the result, I do not find merit in this appeal. It is accordingly dismissed with costs to the Respondent.

C.W GITHUA

JUDGE

DATED, SIGNED and **DELIVERED** at **ELDORET** this 5th day of May 2016

In the presence of:

Mr. Oribo holding brief for Mr. Omwenga for the appellant

Mr. Omondi for the Respondent

Ms Naomi Chonde Court Clerk.