



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 38 OF 2012

AFRICA MERCHANT ASSURANCE COMPANY LIMITED ... APPELLANT

V E R S U S

JOHN MURIITHI KIMATHIRESPONDENT

(Being an appeal from the Ruling and Decree of the Senior Resident Magistrate Hon. M. O. Kizito(SRM) dated 7th February 2012 in SRMCC No. 2218 of 2010)

JUDGMENT

1. This is an appeal against the Ruling delivered in Mombasa **SRMCC No. 2218 of 2010** delivered on 14th April 2011 when judgment was entered for **JOHN MURIITHI KIMATHI** the Respondent.
2. **AFRICA MERCHANT ASSURANCE COMPANY LTD**, the Appellant filed four (4) grounds of appeal against that Ruling.

BRIEF BACKGROUND

3. Respondent sued Appellant in Mombasa **SRMCC No. 2218 of 2010** seeking declaration that the Appellant was liable as the insurer of motor vehicle Registration No. KAX 853K owned by LAMECK ODEDE to pay the judgment of a suit filed by the Respondent against Odede. Respondent had pleaded that he obtained judgment in respect of special and general damages for Kshs. 253,900/- against Odede.
4. Appellant filed defence where it pleaded that it had only issued Odede with insurance for commercial purposes only which did not cover fare paying passengers such as the Respondent. Appellant in that defence denied that an accident occurred, denied Respondent obtained Judgment against Odede and denied receiving Statutory Notice before Respondent filed his suit.
5. Respondent filed an application, by Notice of Motion dated 28th July 2011, seeking the Appellant's defence to be struck out and judgment be entered as prayed. It is in the Ruling of that application, by which Respondent obtained judgment as prayed which aggrieved Appellant.

ISSUES FOR CONSIDERATION

6. The only issue to consider going by the grounds of appeal before Court is whether the Learned

Magistrate erred in striking out the defence and entering judgment for Respondent.

PARTIES SUBMISSIONS

7. Respondent submitted that whether or not the accident occurred was resolved in the case filed against Odede where according to Respondent the Police adduced evidence to that fact. That accordingly appellants are duty bound to settle the amount of the judgment against their insured Odede. Respondent also submitted that Appellant was served with the Notice dated 20th May 2010.
8. Appellant submitted that the summary judgment application should have failed because it wrongly cited Section 100 of Civil Procedure Act, which Section it was submitted was inapplicable to such an application. That the Learned Magistrate erred in not considering that Appellant had raised triable issues, such as the Appellant's denial that it had a passenger insurance and its denial that it was liable to satisfy judgment against Odede; and that the learned trial Court failed to consider Appellant's plea that it was not served with the Notice prior to the filing of the suit.

ANALYSIS

9. The jurisprudence on the law of entry of summary judgment was well stated in the case **PROVINCIAL INSURANCE CO. OF EAST AFRICA –Vs- KIVUTI [1995-1998]1 EA** where the Court of Appeal held-

“In an application for summary judgment even one triable issue, if bona fide, would entitle the Defendant to unconditional leave to defend.”

10. The other relevant cases are as follows here below-

“SHAH –Vs- PADAMSHI [1984]KLR where it was held-

- a. **Caution should be exercised in granting summary judgment as it is a drastic remedy involving the denial of the party against whom it is given his right to defend the claim made against him.**
- b. **In dealing with applications for summary judgment, if a triable issue is found to exist, the Court must order a trial even if the Court strongly feels that the Defendant is unlikely to succeed at the trial.”**

11. Regarding what constitutes triable issues, in **KENYA TRADE COMBINE LTD –Vs- SHAH, CIVIL APPEAL NO. 193 OF 1999**, the Court stated as follows-

“In a matter of this nature, all a Defendant is supposed to show is that a defence on record raises triable issues which ought to go for trial. We should hasten to add that in this respect a defence which raises triable issues does not mean a defence that must succeed. The Defendant is at liberty to show, by whatever means he chooses, whether by defence, oral evidence, affidavits or otherwise, that his defence raises bona fide triable issues. (See DEDAN KING'ANG'I THIONGO V MBAI GATUMA, Civil Appeal No. 292 of 2000 and BANQUE INDOSUEZ V D J LOWE & CO LTD, Civil appeal No. 79 of 2002. Where bona fide triable issues have been disclosed, the Court has no discretion to exercise in regard to the Defendant's right to defend the suit. (See MOMANYI V HATIMY & ANOTHER (2003)2 EA 600). That is precisely the reason why the Defendant is entitled to unconditional leave to defend.”

12. I now examine what was before the Magistrate to try and determine whether Appellant should have been given unconditional leave to defend the suit.

13. What I have found very striking is that there is no pleading that is the Plaintiff in regard to the case filed against Odede. More importantly Respondent relied on handwritten judgment against Odede which judgment he sought by the declaratory suit judgment to be entered against Appellant. There is not even an extracted decree. What proof then was before the learned trial Magistrate that a suit existed against Odede? In my view since Appellant denied the accident occurred and also denied that a case was filed against Odede it was essential that Respondent produce proof of both. Respondent did not. Respondent failed in that regard to satisfy that burden of proof.

14. Appellant denied receiving the Notice required under Section 10(1) and (2) (a) of the Insurance (Motor Vehicle Third Party Risks) Act Cap 405-

“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. (underlining mine)

15. Respondent produced before Court in evidence a Notice addressed to Appellant but which was sent by Registered Post. Now, in view of Appellant's denial that it received that Notice, the Learned Magistrate should have given Appellant leave to defend the suit. This is particularly because it is the provisions of Section 10 of Cap 405 which obligate an Insurance Company to bare the judgment of their insured. So any denial of service of the Notice under Section 10 Cap 405 should have been given sufficient attention by the Learned Magistrate before striking out defence and entering judgment.

16. It is because of the above findings that I hold that the Appellant's appeal must succeed.

17. In the end I make the following orders-

a. The Appeal does succeed and accordingly the judgment entered in Mombasa SRMCC No. 2218 of 2010 on 7th February 2012 is hereby set aside and is substituted with an order dismissing the Notice of Motion dated 28th October 2011 with costs to Appellant.

b. The Appellant is also awarded costs of this appeal.

DATED and DELIVERED at MOMBASA this 3RD day of MARCH, 2015.

MARY KASANGO

JUDGE