REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 195 OF 2014

JUBILEE INSURANCE COMPANY LIMITED…….APPELLANT

VERSUS

DANIEL MAINGI MUCHIRI…….....…RESPONDENT

(An appeal from the original ruling and order of Hon. T.S. Nchoe delivered on 7th May, 2014)

JUDGMENT

1. The Respondent filed a motion dated 10th February, 2014 seeking to strike out the Appellant's defence and that judgment be entered in his favour as sought in the plaint. The reasons advanced were that judgment was entered in his favour against the Appellant's insured in Milimani CMCC No. 369 of 2003. That prior to the commencement of CMCC No. 369 of 2003, the Appellant was served with statutory notice in accordance with section 10 of the Insurance (Motor Vehicle Third Party Risks) Act Cap 405 Laws of Kenya to which the Appellant neither responded nor raised diversionary issues raised in its defence. He further stated that the Defendant's defence was not accompanied by affidavit, list of witnesses, written statements and copies of documents to be relied upon as required under Order 7 Rule 5 of the Civil Procedure Rules.

2. To that application the Appellant filed grounds of opposition dated 13th February, 2014. The grounds were that the Respondent had not disclosed any ground to merit the granting of the orders sought in the application, that the nature of relief sought calls for an inquiry at a hearing and not at the interlocutory stage, that there is a reasonable defence to the claim which ought to be ventilated at trial, that the proceedings herein seeks to enforce a decree in a suit filed in violation of the law on Limitation of Actions Act and that an entry in a police abstract is not proof of cover under the Insurance Act especially when there is a specific denial thereof.

3. This pronouncement of the magistrate verbatim in determination of the application was as follows:-

> *"...I note that the statement of defence is not accompanied by an affidavit or any statements and documents. No oppose has been instituted against the order of Hon. Andayi in CMCC NO. 369/03. I find that the statement of defence consists of mere denials and allow the application as prayed."*

4. It is the said ruling that the Appellant has appealed against on the following grounds:-

> *i. That the learned magistrate erred in both fact and law in holding that the defence as filed does not disclose a reasonable defence.*
>
> *ii. That the learned magistrate erred in both fact and law in inferring the existence of a certificate*

of Insurance as between the Appellant and the Respondent yet there was no evidence on record to support such a finding.

iii. That the learned magistrate erred in law and fact in inferring that the Appellant was under statutory duty to justify judgment in Nairobi CMCC No. 369 of 2003 yet there was no evidence of existence of a certificate of insurance as between the Appellant and the Respondent.

iv. That the learned magistrate exercised his discretion wrongly in striking out the Appellant's defence.

v. That the learned magistrate erred in law and fact in failing to be guided by decisions cited by the Appellant which were binding on him.

vi. That the learned magistrate erred in failing to uphold the emerging jurisprudence sanctioned by Article 159 of the Constitution of Kenya,2010 and sections 1A and 1B of the Civil Procedure Act, Cap 21 Laws of Kenya.

vii. That the learned magistrate erred in allowing the Respondent's application dated 10th February, 2014 brought under Order 2 Rule 15 of the Civil Procedure Rules, 2010 when in fact he had no jurisdiction to grant the orders sought.

viii. That the learned magistrate erred in law in allowing the Respondent's application dated 10th February, 2014 yet the basis of which the declaration was sought had a jurisdictional issue as far as limitation is concerned.

5. There being no submissions on record from both parties in respect of this appeal. I shall thereby re-consider the application and the grounds in opposition thereto.

6. The power to strike out pleadings has been held to be employed only as a last resort and even then only in the clearest of cases. Since the enactment of Section 1A and 1B of the Civil Procedure Act, Sections 3A and 3B of the Appellate Jurisdiction Act and Article 159 of the Constitution, courts strive to sustain rather than to strike out pleadings. It follows that no pleading should be struck out unless it is so hopeless and plainly discloses no reasonable cause of action and is so weak beyond redemption. To have succeeded in this application, the Respondent must have demonstrated that the defence was frivolous and vexatious or that it may prejudice, embarrass a fair trial. Ringera J (as he then was) in **Mpaka Road Development Limited v. Kana (2004) 1 E.A. 124** stated as follows:-

"A pleading is frivolous if it lacks seriousness. If it is not serious then it would be unsustainable in court. A pleading would be vexatious if it annoys or tends to annoy. Obviously it would annoy or tend to annoy if it was not serious or it contained scandalous matters which are irrelevant to the action or defence. In short, it is my discernment that a scandalous, frivolous or vexatious pleading is ipso facto vexatious."

7. Black's Law Dictionary defines triable issues as "***subject or liable to judicial examination and trial***." It is for this court therefore to determine whether the defence raise reasonable defence.

8. The Respondent in his application raised issues that judgment was issued against the Appellant's insured, that the Appellant was served with statutory notice but it failed to respond to it and that the Appellant had failed to comply with mandatory provisions under Order 7 Rule 15. These are issues which required response on oath. In fact the Appellant did not controvert the allegation that it was served with statutory notice and that it failed to comply with the aforesaid mandatory provisions. The failure to file a replying affidavit in contention of a fact amounts to an admission of facts on the Applicant's application. This was the holding in the case of **Kennedy Otieno Odiyo & 12 Others v. Kenya Electricity Generating Company Limited [2010] eKLR where it was held as follows:-**

"The respondents only filed grounds of opposition to the application reproduced elsewhere in

this ruling. <u>Grounds of opposition addresses only issues of law and no more.</u> <u>The grounds of opposition aforesaid are basically general averments and in no way respond to the issues raised by the application in its supporting affidavit. Thus what was deponed to was not entered nor rebutted by the Respondents. It must be taken to be true.</u> In the absence of the replying affidavit rebutting the averments in the applicant's supporting affidavit, means that the respondents have no claim against the applicant.

In this regard, the court held in <u>Kipyator Nicholas Kiprono Biwott Vs George Mbuguss and Kalamka Ltd Civil Case No. 2143 of 1999</u>

..... From the facts and the law I have analyzed in this case, I do find the Defendants have no defence to this suit..... having filed no replying affidavit to rebut the averments in the plaintiffs affidavit in support of the application. I, therefore have no alternative but to strike out paragraphs 3, 4, 5, 6 and 10 of the defence and enter judgment for the plaintiffs on liability....”

9. In assessing whether or not the defence raises reasonable defence. I note that while the Appellant contended that the Plaintiff did not comply with the statutory requirements attendant to the issuance of the reliefs sought, the Appellant was vague and did not plead the exact statutory requirement that was being referred to. It must be noted that pleadings ought not be vague rather they should be drafted with an objective of not ambushing the other party. To my mind this was a general traverse that does not amount to a sufficient defence. Further to this, the Appellant did not in opposition to the motion demonstrate that it was coming within any exceptions to the contract of insurance. The Appellant has not also demonstrated that the judgment sought to be executed against it was stayed pending appeal. I therefore find that the Defendant's defence raises no triable issues at all. There is no reasonable defence demonstrated. The statement of defence is frivolous and vexatious.

10. In the circumstances, I find no merit in this appeal and uphold the ruling and order of Hon. T.S. Nchoe delivered on 7th May, 2014.

Dated, Signed and Delivered in open court this 17th day of July, 2015.

J. K. SERGON

<u>JUDGE</u>

In the presence of:

..... for the Appellant

.....for the Respondent