



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 296 OF 2010

CFC LIFE ASSURANCE LIMITED.....APPELLANT

VERSUS

DAVID GITHUMBI THANDE.....RESPONDENT

(An appeal from the original ruling and order of Hon. A.K. Ndungu delivered on 2nd July, 2010 in Milimani CMCC No. 2753 of 2009)

JUDGMENT

1. David Githumbi Thande, the Respondent herein filed a suit against CFC Life Assurance Ltd, the Appellant before the Chief Magistrate's court, Milimani vide the plaint dated 9th June, 2008. In the aforesaid plaint, the Respondent sought for judgement in the following terms.

- a. *A declaration that under the terms of the policy issued, the Plaintiff is entitled to be paid for accidental permanent total disablement and the Defendant should forthwith pay the said amount;*
- b. *Costs of the suit; and*
- c. *Interest on (a) and (b)*

2. The appellant entered an appearance and filed a defence against the suit. The Respondent thereafter filed the summons dated 22.10.2008 in which he sought for the Appellant's defence to be struck out and for an entry of summary judgment for kshs.2,422,250/-. The application was heard and allowed by Hon. A. K. Ndungu learned Senior Principal Magistrate. Being aggrieved, the Appellant preferred this appeal.

3. The appellant put forward a total of 23 grounds of appeal which are summarised to the following four grounds:

- I. *The Learned Magistrate gravely erred in law and in fact by failing to appreciate that parties are bound by their pleadings and that there was no prayer in the Plaint dated 9th June 2008 seeking the sum of kshs. 2,422,250.00 or at all.*
- II. *The Learned Magistrate gravely erred in law and in fact by failing to appreciate at all the Applicant's defence raised several triable issues that ought to be canvassed in a full trial.*
- III. *The Learned Magistrate erred in law and in fact in ignoring the provisions of Section 23 (1) of the Evidence Act, Cap 80 of the Laws of Kenya on the status of without prejudice communications in proving liability in civil cases.*
- IV. *The Learned Magistrate erred in striking out the Defendant's statement of defence dated 22nd July 2008 filed in court on 24th July 2008.*

4. When the appeal came up for hearing, learned counsels recorded a consent order to have the appeal disposed of by written submissions.

5. I have re-evaluated the case that was before the trial court. I have also considered the written submissions filed by both sides. It is the submission of the Appellant that the trial magistrate erred when he awarded the Respondent kshs.2,422,250/= yet the aforesaid amount was never pleaded for in the plaint as a liquidated sum. The Appellant further argued that there was need to tender evidence to prove the claim. The Respondent was of the contrary view that the Respondent had specifically prayed to be paid compensation in terms of the insurance policy which was annexed to the affidavit filed in support of the application for summary judgement.

6. After a careful consideration of the rival submissions over this ground, it's clear to me that the Respondent did not specially plead to be paid in the plaint the liquidated sum of kshs.2,422,250/= but simply sought for compensation in terms of the Insurance policy. With respect, I agree with the appellant's submissions that the learned senior principal magistrate erred when he failed to appreciate that the Respondent's claim was not a liquidated claim when he made an order entering summary judgement. In my view there was need to tender evidence to interrogate the terms of the Insurance contract.

7. In the second ground of appeal, it was argued by the appellant that its defence had raised several triable issues hence it should not have been struck out. The appellant questioned the genuinity of the proposal forms it had filled. The Appellant further challenged the sort of benefits which were due to the Respondent thus raising doubts which could only be settled by way of a trial. The question which was to be settled is whether the Respondent was entitled to be paid under unit II or Unit III. The Respondent on the other hand is of the view that there were no bonafide triable issues which would go for trial. In my humble view, I think the Appellant had raised serious triable issues in its defence hence it was erroneous for the trial magistrate to strike out the defence. The Appellant should have been given a chance to ventilate its case in a trial rather than being shut out.

8. Having come to the conclusion that the two grounds of appeal suffices to dispose of this appeal, I think there is no need to consider the other grounds of appeal.

9. In the end, the appeal is allowed. The orders striking the appellant's defence and entering summary judgement are set aside and are substituted with an order dismissing the chamber summons dated 22nd October 2008. The appellant's defence is restored. The suit to be heard substantially by another magistrate other than Hon. A. K. Ndungu.

10. The Appellant to have costs of the summons and those of this appeal.

Dated, Signed and Delivered in open court this 2nd day of September, 2015.

J. K. SERGON

JUDGE

In the presence of:

.....for the Appellants.

..... for the Respondents.