REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT KISUMU

Civil Appeal 262 of 2003

BLUE SHIELD INSURANCE COMPANY LTD …….APPELLANT

AND

JOSEPH MBOYA OGUTTU …….RESPONDENT

(Appeal from the ruling and order of the High Court of Kenya at Nairobi (Mr. Justice I.C.C. Wambilyangah) dated 18th July, 2003

in

KISII HCCC NO. 15 OF 2003)

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JUDGMENT OF THE COURT

The respondent in this appeal *Joseph Mboya Oguttu* was involved in an accident which took place on 19th September 1999 at about 5.00 p.m. at Kotieno junction along Oyugis – Kisii road. His motor vehicle registration number KAB 023H collided with motor vehicle registration number KAG 818L owned by Juma Construction Company Limited. He was severely injured and his vehicle was extensively damaged. He filed Civil Case No. 25 of 2001 in the High Court at Kisii against Juma Construction Company Limited and in a judgment dated and delivered on 3rd December 2002, the respondent was awarded Ksh.1,098,354/= as damages for pain and suffering and loss of amenities together with special damages and cost of future operations. He was also awarded costs of the case and interest on general damages from the date of judgment and on special damages from the date of filing of the suit at Court rates. The defendant in that suit, Juma Construction Company Limited, did not appeal against that decision. We may also say that it did not put up much fight as its advocate withdrew midstream and so part of the hearing proceeded *ex parte* as the judgment of the superior court shows.

Armed with that judgment, the respondent moved for a declaratory suit and filed Civil Case No. 15 of 2003 in the same Court, against the appellant Blue Shield Insurance Company Limited seeking judgment against the appellant as follows:-

"***(a) Declaration that the defendant is oblidged to satisfy the decree against the defendant's insured, which decree remains due and payable in favour of the plaintiff.***

(b) Payment of the decretal sum due in respect of KISII HCCC No. 25 of 2001, which remains unpaid to date.

(c) Costs and interest at Court rates.

(d) Any such further and/or other relief as the Honourable Court may deem fit and expedient so to grant."

That claim was in a plaint dated 23rd January, 2003 filed on the same date. At paragraph 3, of that plaint, the respondent described Juma Construction Company Limited as the appellant's insured as he stated that the appellant insured the motor vehicle belonging to Juma Construction Company Limited. Paragraph 4 of that plaint states:-

"***At the material times of the accident motor vehicle registration number KAG 818L, was insured by the defendant under Policy Cover No. BS11/080/000176/99 covering such persons and/or classes of persons specified, in respect of which any injuries or deaths caused by or arising out of the use of the said motor vehicle and that the said accident was a liability covered by the said policy within the meaning of section 5 of Cap 405 Laws of Kenya."*** *(underlining supplied).*

And paragraphs 6, 7 and 8 of the plaint state:-

"***6. Consequent to the aforesaid Judgment and subsequent Taxation of the plaintiff's Bill of Costs, a decree has now been drawn for the said sum of Ksh.1,235,224/=.***

7. The plaintiff contends that the said decree is respect of (sic) liabilities covered by the said policy, that is Policy No. No (sic) BS11/080/00176/99 and has been obtained against the defendant's insured and hence the defendant herein is oblidged pursuant to the provision of section 10 of Cap 405, Laws of Kenya to pay the plaintiff the total decree in respect of KISII HCCC No. 25 of 2001, herein.

8. The plaintiff further contends that the requisite statutory notice under section 10(2) of Cap 405 Laws of Kenya, was duly issued to the defendant vide her last known address, C/o P.O. Box 49610, NAIROBI."*(underlining supplied)*

The appellant filed defence against that plaint on 7th February 2003. In that defence, the appellant denied liability under the provisions of Insurance (Motor vehicles Third Party Risks) Act Chapter 405 Laws of Kenya in that the claim included a liability that is not required to be covered under the provisions of ***section 5 (b)*** of the Act. It went on in that defence and stated at paragraphs 7, 8 and 9 as follows:-

"***7. Without prejudice to the foregoing and in further answer to paragraph 3 of the plaint the defendant denies that it was at any material time the insurer of Juma Construction Company Limited or their alleged motor vehicle registration number KAG 818L. The defendant specifically denies that it issued Insurance Policy number BS11/080/000176/99 under the Insurance (Motor vehicles Third Party Risks) Act to Juma Construction Company Limited or at all and puts the plaintiff to strict proof thereof.***

8. The defendant does not admit the contents of paragraphs 5, 6, 7, 8 and 9 of the plaint and puts the plaintiff to strict proof thereof.

9. Alternatively, without prejudice to the foregoing and in further answer to paragraph 7 of the plaint the defendant denies that the plaintiff, before or within 14 days after commencement of proceedings in KISII HCCC No. 25 of 2001, gave notice of the bringing of the proceedings as required by section 10(2) of Cap 405, by reason of which the defendant is not liable to satisfy the said judgment."

After the close of the pleadings and without any amendments to the plaint or to the defence, the respondent moved to the Court by way of Chamber Summons dated and filed on 24th February, 2003, brought pursuant to ***Order V1 rule 13 (1) (b) (c)*** and ***(d)*** of the Civil Procedure Rules and ***section 3, 3A*** and ***63 (a)*** of the Civil Procedure Act. It sought in that Chamber Summons two orders apart from an order for costs. The two orders it sought were that:-

"***(1) The Honourable Court be pleased to order struck out the defendant's/respondent's statement of defence filed in Court on the 7th day of February 2003.***

(2) Consequent to striking out the respondent's statement of defence, judgment be entered in favour of the plaintiff/applicant in terms of the plaint."

The grounds in support of the application were that the defence did not raise any triable issues; that the defence is scandalous, frivolous and vexatious; that it may otherwise prejudice, embarrass or delay the fair trial of the action in Court; that the appellant was the insurer of the motor vehicle KAG 818L which occasioned the accident giving rise to the decree sought to be enforced; that the policy of insurance issued by the appellant covered the subject liability in terms of ***section 5 (b)*** of Chapter 405; that the statutory notice required in such matters was duly issued to the appellant vide registered post on 8th March 2001, which was within fourteen (14) days as required by law; and that the appellant duly defended the original suit in which the award sought to be executed was made and even referred the respondent for a second medical examination. The application was further supported by an affidavit sworn by the respondent. The appellant, in response to that application, filed grounds of opposition. At paragraph 5 of the grounds of opposition, the appellant stated as follows:-

"***5. The defence filed on behalf of the defendant discloses the following issues for determination:-***

(a) There is no valid suit filed by the plaintiff against the defendant under the provisions of the Insurance (Motor vehicles Third Party Risks) Act, Chapter 405 of the Laws of Kenya as the claim includes a liability that is not required to be covered under the provisions of section 5 (b) of Cap 405.

(b) The defendant was not at any material time the insurer of Juma Construction Company Limited or their alleged motor vehicle registration number KAG 818L.

(c) The defendant did not issue insurance policy number BS11/080/000176/99 under the Insurance (Motor Vehicle Third Party Risks) Act to Juma Construction Company Limited.

(d) The plaintiff did not, before or within 14 days after commencement of proceedings in KISII HCCC No. 25 of 2001, gave (sic) notice of the hearing of the proceedings as required by section 10 (2) of Cap 405, by reason of which the defendant is not to satisfy the said judgment."

After those grounds were filed, the application came up for hearing, but the record shows that the hearing was adjourned at the request of the respondent who wanted to file further affidavit so as to introduce additional evidence. That further affidavit was filed on 10th April 2003. Of note is that the further affidavit annexed a copy of Insurance Certificate No. BS11/080/02/000176/99 which the deponent alleged was obtained from Oyugis Police Station as the one that was found displayed on the suit motor vehicle of Juma Construction Company Limited. There were other exhibits annexed to the affidavit of the respondent one of which was a copy of the notice allegedly served upon the appellant pursuant to ***section 10 (2) (a)*** of the Insurance (Motor vehicle Third Party Risks) Act, Cap 405 Laws of Kenya. We will discuss that notice later in the judgment.

The application by way of Chamber Summons seeking striking out of the statement of defence was placed before the superior court (Wambilyangah J. (as he then was)) who after hearing it fully allowed it, in a ruling delivered on 18th July 2003, struck out the statement of defence and entered judgment for the plaintiff as prayed in the plaint and awarded interest and costs. In doing so, the learned Judge addressed himself *inter alia* thus,

"***I have already highlighted the salient features of the plaintiff's case and they certainly show that his case is water-tight, and the one which was purportedly filed is definitely sham which I hereby strike out and dismiss with costs. There shall be judgment for the plaintiff as prayed in this plaint with interest and costs."***

The appellant was aggrieved by that ruling and hence this appeal before us premised on fourteen grounds which are:- that the learned Judge erred in finding that the defence did not raise any triable issues; that the learned Judge in finding that the appellant was the insurer of the subject motor vehicle failed to consider the appellant's contention that it was not the insurer of the same vehicle; that the learned Judge failed to consider that a claim for material damages is not a claim that falls under Chapter 405 Laws of Kenya; that the learned Judge erred in finding that a statutory notice was issued whereas there was no admissible evidence in support of that finding; that the learned Judge erred in failing to appreciate that there was no proper evidence to support the respondent's contention that the statutory notice was properly served; that the learned Judge considered irrelevant matters and failed to consider relevant matters; and that the ruling delivered by the learned Judge did not conform to the mandatory provisions of ***Order 20 rule 4*** of the Civil Procedure Rules.

Before us, Mr. Omariba, the learned counsel for the appellant raised, on the main, three points which he felt were issues that needed to be ventilated at a full hearing and which demonstrated that the defence filed by the appellant in the superior court was not scandalous, frivolous and vexatious, nor could it otherwise prejudice, embarrass or delay the fair hearing of the trial. These were, in a nutshell that the policy number upon which the claim was based was not issued by the appellant; that there was no evidence of the service of the policy, and that the notice allegedly issued pursuant to ***section 10 (2) (a)*** of Cap 405 Laws of Kenya, was neither a valid notice nor was it served as required by law; and lastly that the claim that was granted by the learned Judge of the superior court included matters that would not be the subject of the award under the Insurance (Motor vehicle Third Party Risks) Act, Cap 405 Laws of Kenya as they were not confined to personal injuries on the respondent but covered damages that were outside the ambit of the Act. Mr. Kimanga, the learned counsel for the respondent, on the other hand was firm that the learned Judge was plainly right as indeed the statement of defence did not raise any triable issues as it was not, in any case, in dispute that the appellant was served with the relevant notice and engaged an advocate, one Siganga to represent its interests in the suit that was for claim for damages and according to him the notice required by law was served and was a proper notice. He submitted further that in any case the appellant never challenged the facts in the superior court by way of a replying affidavit and that being so, the appellant could not in law challenge matters of fact, such as whether the notice was served upon it or not. He urged us to dismiss the appeal.

We have considered the record, the grounds of appeal, the submissions by the learned counsel for the parties, the ruling by the learned Judge of the superior court and the law. The application that was before the learned Judge of the superior court was an application seeking to dispose of the entire case by way of striking out a pleading namely the statement of defence, on grounds that it was scandalous, frivolous, vexatious and could otherwise prejudice, embarrass or delay fair trial of the action. At the base of it, it was seeking striking out a pleading and entering judgment in terms spelt out in the plaint. The principles guiding the Court when considering such an application which seeks striking out of a pleading is now well settled. Madan J.A. (as he then was) in his judgment in the case of ***D.T. Dobie and Company (Kenya) Ltd vs Muchina*** (1982) KLR 1 discussed the issue at length and although what was before him was an application under ***Order 6 rule 13 (1) (a)*** which was seeking striking out a plaint on grounds that it did not disclose a reasonable cause of action against the defendant, he nonetheless dealt with broad principles which in effect covered all other aspects where striking out a pleading or part of a pleading is sought. It was held in that case inter alia as follows:-

"***The power to strike out should be exercised after the Court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial Judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial Judge in disposing the case."***

We too would not express our opinion on certain aspects of the matter before us. In that judgment, the learned Judge quoted Dankwerts L.J in the case of ***Cail Zeiss Stiftung vs Ranjuer & Keeler Ltd and others*** (No.3) (1970) ChpD 506, where the Lord Justice said:-

"***The power to strike out any pleading or any part of a pleading under this rule is not mandatory; but permissive and confers a discretionary jurisdiction to be exercised having regard to the quality and all***

the circumstances relating to the offending pleading."

We may add that like Madan J.A, said, the power to strike out a pleading which ends in driving a party from the judgment seat should be used very sparingly and only in cases where the pleading is shown to be clearly untenable.

In the case before us, the respondent, in the application he filed Court set out to demonstrate beyond peradventure that the defence filed was scandalous, frivolous, and vexatious, and/or that it would prejudice, embarrass or delay the fair trial of the action. The learned Judge had to be satisfied that the defence was indeed untenable before he could strike it out. He felt so and did strike it out.

We have, on our own, considered as we have stated, the pleadings as we must do, this being a first appeal – see ***Selle vs Associated Motor Boat Co. Ltd and others*** (1968) EA 123. The plaint is the starting point. It based its claim on a policy which it stated was No. BS11/080/000176 issued to Juma Construction Company Limited. That plaint, as we have stated has not been amended. The defence to that is that the appellant specifically denied that it issued any Insurance Policy with that number. The statutory notice for institution of suit, a copy of which was allegedly served upon the applicant, sets out the policy but with a gap in between "*080*" and "*000176/99*", so that, it read BS11/080/ /000176/99. In the Certificate of Insurance allegedly issued by the appellant to cover the vehicle that caused the accident, the Policy number is ***BS11/080/02/000176/99*** *(underlining ours)*. As if that is not enough, in the affidavit in support of the application for striking out the defence, the number of that policy is stated at paragraph 5 as No. BS11/080/000176/99, yet in the further affidavit prepared with leave of the Court as we have stated above, the same respondent now talks of policy certificate number BS11/080/02/00176/99 without discounting what he said in his supporting affidavit. The defence, in the light of all these inconsistencies cannot in our view be termed scandalous, frivolous or vexatious. We do not see a defence to such obligations as one which may prejudice, embarrass or delay fair trial. That line of defence was raised in the grounds of opposition as well. Whereas we do not say such a defence will necessarily succeed, as that is not our role here, we nonetheless are of the view that it warrants allowing the case to go for a full trial so as to allow parties, the opportunity to adduce proper evidence and test it in cross-examination.

Secondly, there is the question of whether the notice issued pursuant to ***section 10 (2) (a)*** of Cap 405 was valid and, if valid whether it was indeed served as required by the provisions of the law. The section provides:-

"***(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 hearing of the proceedings."***

The respondent says he served the notice of institution of suit. There is a copy of a letter annexed to the affidavit which was addressed to the claims Manager of the appellant company and which stated that the notice was enclosed together with summons to enter appearance, plaint and affidavit for service upon the appellant. That letter was sent by post. Subsequently, the appellant instructed an advocate – Mr. Siganga to appear for it in the HCCC No. 25 of 2001. That is why the learned Judge concluded that the appellant had notice for the institution of the case and we cannot begrudge the learned Judge that finding. All that needed clarification was, whether the relevant notice that was allegedly so served was a proper notice. We note that the notice too did not cite the proper number of the insurance policy. That being the case, we are not surprised that the said advocate did not proceed further with the hearing as it was not clear under which policy the claim was premised. There was need to have that question ventilated.

The third point raised in the defence and in the grounds of opposition to the application for striking out defence was that the insurance cover was not in the name of Juma Construction Company Limited. We have seen another name in the triplicate copy of the certificate and that defence cannot be termed scandalous, frivolous and vexatious. One would need to investigate the connection of the name in the certificate, which is "*John Waluke"*, and Juma Construction Company Limited and their respective connections with the offending motor vehicle.

Lastly, the award sought to be enforced, as we have stated, was for the entire sum of Ksh.1,098,354/= together with costs. That amount was awarded in respect of general and special damages. The judgment of Commissioner of Assize P.K. K.A. Birech states that the special damages were claimed on both loss of motor vehicle and medical expenses incurred. That amounted in total to Ksh.248,354/=. The superior court (Wambilyangah J. (as he then was) in his ruling entered judgment for the full amount. The appellant in his defence which was struck out stated at paragraph 4 that the claim was not valid as the claim included a liability that was not required to be covered under the provisions of ***section 5 (b)*** of Cap 405. ***Section 5 (b)*** states:-

"***5. In order to comply with the requirements of section 4, the policy of insurance must be a policy which***

(a) …….(not relevant)

(b) Insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of, or bodily injury to any person caused by or arising out of the use of the vehicle on a road."

Again, without in any way deciding on the issue, we are of the view that whether the ruling should have ignored the defence that the entire award given by Commissioner Birech, incorporated part of the decree which was in respect of loss of respondent's motor vehicle is not a matter that could be ignored. That defence was not, as far as that aspect was concerned scandalous. It was certainly not frivolous, and vexatious. It could not delay or prejudice the fair trial of the suit. It was a matter that called for investigation for if it were to succeed; the claim could have been reduced considerably.

We think we have said enough to indicate that this appeal must succeed. In law, only one issue raised in defence, if it constitutes a genuine defence and not necessarily a successful defence, would warrant a full hearing. Here there are more than one issue. Guided by the general principles enunciated by Madan JA (as he then was) in the case of ***D.T. Dobie*** above, we are of the view that, had the learned Judge of the superior court considered the allegations in the plaint and the allegations in the statement of defence, he would have come to a different conclusion on the matter that was before him. It would appear to us with respect that he did not and hence we have to disturb his decision. We allow the appeal, set aside the ruling of the superior court delivered on 18th July, 2003 and order that the suit i.e. Civil Case No. 15 of 2003 do proceed to full hearing. The appellant will have the costs of the appeal and of the Chamber Summons dated 24th February, 2003.

Dated and delivered at Kisumu this 17th day of July, 2009.

E. O. O'KUBASU

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JUDGE OF APPEAL

P. N. WAKI

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR