Kenya Alliance Insurance Co. Ltd v Mutemi (Civil Appeal 15 of 2018)
[2024] KEHC 395 (KLR) (Civ) (26 January 2024) (Judgment)

Neutral citation: [2024] KEHC 395 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 15 OF 2018

JN NJAGI, J

JANUARY 26, 2024

BETWEEN

KENYA ALLIANCE INSURANCE CO. LTD ..... APPELLANT

AND

JOSHUA MBUVI MUTEMI ..... RESPONDENT

(Being an appeal arising from ruling and decree of Hon. K.I. Orenge, S.R.M, in Milimani CMCC No. 1480 of 2017 delivered on 15th December 2017)

JUDGMENT

1. The Respondent herein filed an application dated 31st July 2017 seeking that the Appellant`s/ Defendant`s defence filed on 12th April 2017 be struck out on the grounds that the same was frivolous, vexatious and was otherwise an abuse of the process of the court. The trial court in a ruling delivered on 15th December 2017 found that the defence was a sham and consequently struck it out with costs to the Respondent. The Appellant was aggrieved by the decision and lodged the instant appeal vide a Memorandum of Appeal dated 15th January 2018.

2. The grounds of appeal are that:

    a. The learned Magistrate erred in law and in fact in making a finding that the Appellant's defence did not raise triable issues and in proceeding to strike out the said defence;

    b. The learned Magistrate erred in law and in fact in holding that the Appellant had admitted that it was the insurer of the suit vehicle at the material time when in fact the Appellant had averred that it was not the insurer at the material time and had only insured the said vehicle way after the accident in issue had occurred;

c. The learned Magistrate erred in law and in fact in holding that the Appellant should have sought a declaration when without noting that the Appellant had denied the allegation that it was the insurer of the suit vehicle and as such could not have sought a declaration as envisaged in the said ruling;

d. The learned Magistrate misunderstood the defendant's case, the evidence that it had tendered and the provisions of the *Insurance Motor Vehicle Third Party Risks Act* (Cap 405);

e. The learned Magistrate erred in law and in fact in striking out the Appellant's defence when it clearly raised triable issues that merited consideration before the trial Court;

f. The learned Magistrate erred in law and in fact in failing to consider adequately or at all the submissions that had been made by the Appellant, the authorities that were tendered and in so doing he arrived at an erroneous decision.

3. The Appellant prays that this Court makes a finding that the Appellant's defence raised triable issues that merit determination by the trial Court. Consequently, that the Respondent`s Notice of Motion dated 31st July 2017 be dismissed with costs and the suit be remitted back to the Chief Magistrate's Court for hearing on merit.

4. The appeal was disposed of by way of written submissions.

Appellant`s Submissions

5. The Appellant submitted that its defence raises triable issues. They placed reliance on what constitutes a triable issue as stated by the Court of Appeal in *Kenya Trade Combine Ltd v Shah* Civil Appeal No. 193 of 1991 that:

> " .... 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 bonafide triable issues."

6. Counsel submitted that the defence raised the following issues;

(a) Whether the Defendant was the insurer of the motor vehicle registration No. KAT 311U as at 30th June 2013;

(b) Whether the policy number that was set out in the abstract belonged to KAT 311U; and

(c) Who had taken out cover over KAT 311U and for what period.

7. To buttress this position Counsel placed reliance in the following authorities; *Olympic Escort International Co. Ltd & 2 others v Parminder Singh Sandhu & another* [2009] eKLR, *Yaya Towers Limited v Trade Bank Ltd (in liquidation)* Civil Appeal No. 35 of 2000 and *D.T Dobie & Company Kenya Ltd v Joseph Mbaria Muchina & another* [2009] eKLR.

8. It was submitted that the Appellant had clearly demonstrated that it was not the insurer of motor vehicle Reg. No. KAT 311U as at 30/6/2013. Further that the policy number indicated in the abstract related to a different motor vehicle. Counsel submitted that a police abstract should not be taken as evidence of existence of policy insurance over a motor vehicle. He placed reliance in *Richard Makau*

Mugambi v Canon Assurance Co. Ltd and *Kenya Orient Insurance Co. Ltd v Farida Hemed* [2015] eKLR to support this position.

Respondent`s submissions

9. The Respondent on the other hand submitted that the Appellant is statutorily bound to satisfy claims against its insured as provided under section 10 (1) of the *Insurance (Motor Vehicles Third Party Risks) Act*. It was submitted that the Appellant had certain statutory defenses set out in section 10 (2) of the *Act* but opted not to rely on any of them.

10. The Respondent submitted that it was evident that the Defendant was insured by the Appellant at the time of the accident which was affirmed by the police abstract. Therefore, that the contention by the Appellant that it was not the insurer of the Defendant in the primary suit is a sham, a mere denial and an attempt to obstruct justice and embarrass the Respondent`s case by engaging in lengthy and unnecessary litigation which is an abuse of the court process

11. Counsel for the Respondent referred to a myriad of authorities to urge this court to dismiss the appeal with costs.

Analysis and determination

12. It is the duty of this court, as the first appellate court, to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, drawing its own conclusions from that analysis and bearing in mind that the court did not have an opportunity to hear the witnesses first hand - see the decision of the Court of Appeal *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR).

13. I have considered the pleadings and submissions filed herein and find that the gravamen of the Appellant's case in this appeal is that the trial magistrate erred in holding that the appellant's defence did not raise triable issues.

14. The power of the trial court to strike out pleadings is stipulated under Order 2 Rule 15(1) of the *Civil Procedure Rules* which provides as follows:

    (1) 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."

15. A pleading may only be struck out if the elements contained in Order 2 Rule 15(1)(a), (b), (c) and (d) of the *Civil Procedure Rules* are in existence. In the case of *D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & Another* [1980] eKLR it was held that:

> " The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof, before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage the court

ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits

> " without discovery, without oral evidence tested by cross-examination in the ordinary way". (Sellers, L.J. (*supra*).

As far as possible, indeed not at all, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks it right.

If an action is explainable as a likely happening which is not plainly and obviously impossible the court ought not to overact by considering itself in a bind summarily to dismiss the action. A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it.

No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.

On the other hand, if there is a point of law which merits a serious discussion the court should be asked to proceed under order XTV" rule 2."

16. The power to strike out pleadings is a discretionary power of the trial court. However, striking out of pleadings is a draconian tool which must only be deployed by courts with tremendous caution because a Litigant should never be driven from the seat of justice without being heard - see *Prafulla Enterprises Ltd v Norlake Investments Ltd*, Kisumu High Court Civil Case No. 145 of 1997; LLR 7412 (HCK). Whereas this power should be used sparingly and only in the clearest of cases, a balance must be struck between this principle and the policy consideration that a Plaintiff should not be kept away from his judgment by an unscrupulous defendant who files a defence which is a sham simply for the purpose of delaying the finalization of the case - see the case of *Kenya Commercial Bank v Suntra Investment Bank Ltd* [2015] eKLR.

17. This Court is alive to the principle that as an appellate court, interference with the exercise of judicial discretion by the trial court is limited. For this Court to intervene it must be satisfied either that the learned trial Magistrate misdirected himself in some matter hence arrived at a wrong decision or that it is manifest from the case as a whole that the learned Magistrate was clearly wrong in the exercise of its discretion and that as a result there has been miscarriage of justice. The Court of Appeal reiterated these principles in *Pithon Waweru Maina v Thuka Mugiria* [1983] eKLR where it was stated:

> " Thirdly the Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice. *Mbogo v Shah* [1968] EA 93."

18. The Appellant herein contended in its defence and in its replying affidavit that it was not the insurer of motor vehicle Reg. No. KAT 311U as at the date of the material accident on 30/6/2013. It further averred that the policy number that was set out in the police abstract did not belong to motor vehicle Reg. No. KAT 311U. In my view, all these averments require trial to establish the true position with regard to the insurer of the motor vehicle and the policy number of motor vehicle Reg. No. KAT

311U. The fact that the police abstract indicated the Appellant as the insurer of the motor vehicle was not prima facie evidence of existence of a policy insurance over a motor vehicle. That evidence is rebuttable. I therefore do not agree with the finding of the trial court that the Appellant's Statement of Defence comprised of generalised denials and that the defence was a sham. The defence in actual fact raises triable issues and ought to have been allowed to go for trial. It is trite law that triable issues are matters that need further interrogation of the court but are not necessarily matters that must succeed.

19. In this regard, I am persuaded by the decision of Ugandan Court in *Libyan Arab Bank v Intrepol Ltd* [1985] HCB as cited in *Corrugated Sheets Limited v Varsani Merchandise Limited* [2022] eKLR where the Court held:

> " In its written statement of defence, it was clear that the defendant denied being indebted to the plaintiff in the manner alleged by the plaintiff in the plaint. This was perfectly proper defence to raise against the plaintiffs claim which raised triable issues of fact and law fit for trial by this Court."

20. The upshot is that this court finds that the trial court erred in holding that the Appellant`s defence did not raise triable issues. There was no evidence that the same was frivolous, vexatious and was otherwise an abuse of the process of the court. In view of the foregoing, I am inclined to allow the appeal which I hereby do and order as follows:

    a. The Notice of Motion by the respondent/Plaintiff dated 31st July 2017 is dismissed and the ruling thereof of the trial court dated 15th December 2017 and all subsequent orders thereto are set aside.

    b. The suit is remitted back to the Chief Magistrate`s Court, Milimani, for hearing and determination on merit on priority basis.

    c. The Appellant to have the costs of the appeal.

    Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 26TH DAY OF JANUARY 2024

J. N. NJAGI

JUDGE

In the presence of:-

Mr Kiplangat for Appellant

Mr Kiptanui holding brief Mr Waiganjo for Respondent

Court Assistant – Amina

30 days right of appeal.