



REPUBLIC OF KENYA



**Madison Insurance Company Ltd v Maera (Civil Appeal 2 of 2023)
[2024] KEHC 347 (KLR) (Appeals) (26 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 347 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
APPEALS
CIVIL APPEAL 2 OF 2023
AN ONGERI, J
JANUARY 26, 2024**

BETWEEN

MADISON INSURANCE COMPANY LTD APPELLANT

AND

ESTHER KEMUNTO MAERA RESPONDENT

*(Being an appeal from the ruling by Hon. E. WANJALA (P.M)
in Milimani CMCC No. 2715 of 2020 delivered on 5/3/2021)*

JUDGMENT

1. The trial court struck out the appellant's defence and entered judgment against the appellant with costs.
2. The appellant has appealed to this court on the following grounds;
 - i. The learned magistrate erred in law and in fact in failing to consider the defendant's evidence by way of submissions on record.
 - ii. The learned magistrate erred in law and in fact in failing to find that the defence on record
 - a. Discloses reasonable cause of action or defence in law.
 - b. It is not scandalous, frivolous or vexatious.
 - c. It does not prejudice, embarrass or delay fair trial of the action.
 - d. It is not an abuse of the process of the court.



- iii. The learned magistrate erred in law and in fact in failing to appreciate the holdings in the various authorities on striking out the pleadings in the appellant/defendant's written submissions.
 - iv. The learned magistrate erred in law and in fact in striking out the defence and entering ruling in favour of plaintiff as prayed for in plaint.
3. The parties filed written submissions which I have considered. The Appellant submitted that the Trial Court should have considered the Defence on record since the same raises triable issues and that it discloses a reasonable cause of action.
 4. The Appellant relied on the case of *Kenya Trade Combine Ltd vs N.M Shah* [2001] where the Court stated that;

“In a matter of this nature, all that 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.”
 5. The Respondent opposed the appeal and submitted that the Trial Court was justified in striking out the Appellant's statement since it contained mere denials and the same was filed in a declaratory suit against the Appellant after the Appellant had been served with the mandatory notice under the *Motor Vehicle Third Party Risks Act* and after the Original Suit had been determined on merit.
 6. The Respondent relied on the case of *Kivanga Estates Limited vs National Bank of Kenya Limited* [2017] eKLR where the Court held as follows;

“... striking out a pleading is a draconian act, which may only be resorted to, in plaint cases... whether or not a case is plain is a matter of fact. A court may only strike out pleadings where they disclose no semblance of a cause of action or defence and are incurable by amendment.”
 7. The Respondent also relied on Section 10(1) of the *Insurance (Motor Vehicle Third Party Risks) Act* Cap 405 which states as

“(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.

Provided that the sum payable under a judgment for a liability pursuant to this section shall not exceed the maximum percentage of the sum specified in section 5(b) prescribed in respect thereof in the Schedule.”
 8. This being a first appeal the duty of the first appellate court is to reevaluate the evidence adduced before the trial court and to arrive at its own conclusion whether to support the finding of the trial court.
 9. The issues for determination in this appeal are as follows;



- i. Whether the appellant's defence raised a trial issue.
 - ii. Whether the trial court was right in striking out the appellant's defence.
 - iii. Whether the appeal should be allowed.
10. On the issue as to whether the appellant's defence raised trial issues, the law requires that a triable issue is not necessarily one that would succeed but which merits to be heard.
 11. The appellants maintained that they had not insured the motor vehicle at the time of the accident and that merits to be heard at the trial.
 12. I find that the trial court was not right in striking out the defence.
 13. No party should be condemned unheard or be driven away from the seat of justice no matter how hopeless their pleadings.
 14. In the case of *Oryx Energies Kenya Limited v Mastermind Kenya Limited* [2017] eKLR, Justice Grace Nzioka held as follows relying on the cases of *James Kimani Kabogo vs Kenya Commercial Bank Ltd & Another* (2014) eKLR, and *Samuel Ndungu Mukunya vs Nation Media Group Ltd & Another* 2012 eKLR;

“...the Court has held that the striking out of pleadings by the Court should be exercised cautiously and with a lot of restraint. The power to strike out pleadings must be exercised sparingly, and only in clear, obvious and plain cases. Thus the pleadings must be prima facie hopeless in the eyes of a reasonable prudent man in the given circumstances. This is informed by the fact that, the Defendant should not be denied the right to ventilate the defence. It is a constitutional right under Article 48 and 50 of the *Constitution* of Kenya. The right to be heard, is thus a basic requirement of natural justice, that a person must not be condemned unheard and that a litigant should not be driven away from the seat of justice. As such, a defence that raises even a single triable issue should be allowed to proceed to a full hearing, whether it succeeds or not.”

15. I allow the appeal and direct that the appellant's defence be reinstated and the case be heard interpartes.
16. The costs of the appeal to abide the hearing of the suit.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 26TH DAY OF JANUARY, 2024.

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A. N. ONGERI
JUDGE

