Directline Assurance Co Ltd v Chepkemoiyot & another (Civil Appeal E381 of 2020) [2024] KEHC 2055 (KLR) (Civ) (29 February 2024) (Judgment)

Neutral citation: [2024] KEHC 2055 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E381 OF 2020

JN NJAGI, J

FEBRUARY 29, 2024

BETWEEN

DIRECTLINE ASSURANCE CO LTD .... APPELLANT

AND

MARY CHEPKEMOIYOT .... 1ST RESPONDENT

JOSEPH KIPNGENO CHERUIYOT .... 2ND RESPONDENT

(Being an appeal from the Ruling of E. Wanjala (Miss), SRM, in Nairobi MCC Civil Suit No.9114 of 2019 delivered on 3/12/ 2020)

JUDGMENT

1. The Respondent herein had filed a declaratory suit against the Appellant seeking for a declaration that the Appellant was bound to satisfy the decree in Nairobi CMCC No.6944 of 2016 in the sum of Ksh.6,137,569.50/= with costs and interest. The Appellant filed a defence in which it averred that the suit was in violation of section 5 (b) (iv) of the *Insurance (Motor Vehicle Third Party Risks) Act* Cap 405 Laws of Kenya which provides that the maximum amount an insurance company should pay per claim by one person is Ksh.3,000,000/=. That the amount claimed by the Respondent was above the limit provided for under the Act and therefore not payable. The Respondent further denied that it was the insurer of the motor vehicle in issue.

2. The Respondent then filed an application dated 29th June 2020 seeking to strike out the defence on the ground that the defence was a sham, has no defence to the claim under the *Insurance (Third Party Risks) Act* and did not raise triable issues. In a ruling delivered on 3/12/2020, the trial court found in favour of the Respondent and held that the defence did not raise triable issues. The court thereupon struck out the defence. The Appellant was aggrieved by the ruling and filed the instant appeal.

3. The grounds of appeal are that:

    1. The Learned Magistrate erred in law by failing to ground the court's decision to strike out the Appellant's Statement of Defence on any of the basic principles for striking out a statement of defence outlined in the hallowed case of *DT Dobie vs Muchina* (1982) KLR1 and thereby rendering determination which was arbitrary in the circumstances.

    2. The Learned Magistrate erred in law and in fact by disregarding the replying affidavit filed by the Appellant in response to the Respondent's aforesaid application and thereby rendering decision without consideration of material facts which effectively condemned the Appellant unheard.

    3. The Learned Magistrate erred in law and in fact by failing to consider the issues raised in the Appellant's replying affidavit dated 8th October 2020 filed in response to the Respondent's application which clearly indicated that the suit before the court warranted full trial.

    4. That the learned Magistrate erred in law in making a finding to the effect that the Appellant was liable to the Respondent for the sums which were above the policy limit and that the Appellant could subsequently recover the same from the insured.

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

Appellant`s Submissions

5. The Appellant submitted that the trial court erred in its finding that the appellant`s defence did not raise a triable issue. It was submitted that an Insurance company is not bound to pay more than the Ksh.3 million provided for under the Act and that any amount over and above that figure is payable by the insured. The Appellant in support of that proposition relied on the case of *Georgina Wangari Mwangi v David Mwangi Muteti* (2014) eKLR where the court held that:

> Counsel for the defendant raised issue with the *Insurance (Motor vehicle Third Party Risks) (Amendment) Act 2013* saying it limited the courts from awarding the plaintiff over Shs. 3 million. My understating of these provisions is that the limitation is on the amount the insurance pays in respect of "Third Party Risks". The party who has been sued here is not the Insurance Company but the defendant. Whatever the award will be the Insurance company would only pay upto Shs. 3 million. The curb is therefore not on the courts but on the payment by the Insurance company.

6. The Appellant cited other cases where similar views were expressed – *CIC General Insurance Group Ltd v Gerald Ochoki* (2020) eKLR, *Gateway Insurance Company Limited v Jamila Suleiman & another* (2018) eKLR, *Gitu Geoffrey & another v Britam General Insurance Co. Ltd & another* (2020) eKLR, *Africa Merchant Assurance Company Ltd v William Muriithi Kimanru* (2016) eKLR, *Xplico Insurance Company Ltd v Mary Nthambi Mutua* (2019) eKLR and *Kenya Orient Limited v Zachary Nyambane Omagwa* (2021) eKLR.

7. The Appellant submitted that the principles established in these cases is that an insurance company is only bound to pay a maximum of Ksh.3 million as established by the Act and anything over and above that figure being recoverable from the insured. For example, in the case of *Kenya Orient Limited v Zachary Nyambane Omagwa* (*supra*) the court stated that:

    18. I however agree with the Appellants that the amount of Kshs.3, 000, 000, paid is the maximum amount payable by the insurer under the *Insurance (Motor Vehicle 3rd Party Risks) Act* and the

Respondent cannot compel the Appellant to pay more than the prescribed amount under the Act.

19. In Civil Appeal no. 34 of 2016, Justice Majanja held as follows;

> "The insurer is not obliged to pay any amount above Kshs. 3,000,000.00 nor can the decree-holder recover more than that and they have no basis for denying the claim."

20. If there is any additional amount to be paid, then the same should be recovered from the insured. In *Law Society of Kenya v Attorney* NBI Petition No. 148 of 2014 [2016]eKLR, Justice Onguto held that

> " In the end, I hold that the Principal Act does not exclude compensation to affect proprietary rights. It only limits who pays how much by apportioning a maximum of Kshs. 3,000,000/- to be paid by the insurer and the additional sum if any by the insured."

8. In *Gateway Insurance Co. Ltd v Jamila Suleiman & another* (*supra*), the court stated that:

65. My understanding of the said section is that in respect of a claim by one person the insurer's liability ought not to exceed Kshs Three Million. In other words, the Court may only enter judgement against the insurer up to a maximum of Kshs Three Million. That however does not mean that a person who is entitled to file a declaratory suit against the insurer but to whom an award has been given exceeding Kshs Three Million is thereby prevented from filing a suit against the insurer. He can do so but his entitlement as against the insurer cannot exceed Kshs 3,000,000.00

66. In the premises a judgement of up to Kshs 3,000,000.00 is not a nullity.

67. Accordingly while I find no merit in the other grounds, I find that judgement ought not to have been entered against the Appellant for a sum exceeding Kshs 3,000,000.00. To that extent this appeal succeeds and the judgement in the sum of Kshs.3,053,276.75 is hereby set aside and is substituted with a judgement in the sum of Kshs 3,000,000.00 which sum is inclusive of costs and interests, if any.

9. The Appellant submitted that whether an insurance company can pay over and above the amount stated by statute is a triable issue. The Appellant in this respect relied on the decision in the case of Directline Assurance Company Limited v Ndundu Kithonga (Suing as the Personal Representative of the Estate of Betty Mutindi (Deceased) 2021 eKLR where the court held that:

29. In my considered view, the Appellant denied liability to any amount that was in excess of what the Statute provided. The Respondent answered that the Trial Court's discretion to increase the amount beyond the Kshs. 3 million limit. That contestation in my view, revealed that there was a triable issue which entitled the Appellant to be heard before being condemned. It is only to that extent, that this court finds that the Trial Court fell into error by finding that the draft defence failed to disclose a triable issue.

See also Xplico Insurance Co. Ltd v Mary Nthambi Mutua (supra).

10. The Appellant faulted the trial court for ignoring the precedents of superior courts as cited above in holding that the Appellant`s defence did not raise triable issues.

11. The Appellant further submitted that the power to strike out suits is discretionary that should not be used in plain and obvious cases. In this respect the Appellant cited the case of *DT Dobie & Company Kenya Limited v Muchina*, Civil Appeal No. 37 of 1978 where it was held that:

> 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.

12. It was further submitted that refusal by the trial court to hear the Appellant on its defence infringed on its right to access justice under Article 48 of *the Constitution* and the right to be heard under Article 50 of *the Constitution*. The Appellant urged this court to allow the appeal.

Respondent`s submissions

13. The Respondents submitted that the trial court was correct in holding that the appellant`s defence did not raise triable issues. That the trial court followed the Court of Appeal decision in *Justus Mutiga & 2 others v Law Society of Kenya & another* (2018) eKLR where the Court held that the insurance company is obligated to pay the full compensation to the insured as awarded by the trial court and pursue the excess amounts from the insured.

14. The Respondents submitted that in the case of *Africa Merchant Assurance Company Ltd V William Muriithi Kimaru* (*supra*) that was cited by the appellant), Majanja J. held that the maximum amount an insurance Company can pay under the Act is Ksh.3 million. That the learned Judge in that case declined to set aside the order striking out the Appellant`s defence as the amount the decree holder can recover from the insurance company is provided for by the *Act*. Counsel argued that this means that a defence of statutory limit of 3 million is not a triable issue.

15. It was submitted that the same holding was reached in the case of *Xplico Insurance Company v Mary Nthambi Mutua* (*supra*, also cited by the appellant) where the court said that trying an issue of statutory limit of Ksh.3 million will not achieve the overriding objective of the *Civil Procedure Act* which is to facilitate the just, expeditious, proportionate and affordable resolution of disputes.

16. The Respondents submitted that the referred to authorities vindicated the trial court`s decision striking out the defence. They urged the court to dismiss the appeal with costs.

Analysis and Determination

17. This being a first appeal, the duty of the Court is as stated by the Court of Appeal in *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR

> This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.

18. I have considered the grounds of appeal, the record of the lower court and the rival submissions by the respective advocates for the parties. The issue for determination is whether the trial court erred in striking out the appellant`s defence.

19. 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."

20. 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."

21. 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.

22. The point of contestation in this matter is section 5(b) of Cap 405 that provides that a policy of insurance in terms of that section shall not be required to cover –

    iv) liability of any sum in excess of three million shillings, arising out of a claim by one person.

23. The trial Magistrate in striking out the Respondent's defence in this case stated that from the authorities that were referred to her nothing barred a court from making an award of compensation beyond the statutory limit of 3 million set by Section 5(b) of Cap 405. However, that in *Justus Mutiga & 2 0thers v Law Society of Kenya* (2018) eKLR, the Court of Appeal held that an insurance company was obligated to pay the full compensation to the injured third party and subsequently pursue the excess amount from the insured. The Magistrate thus held that the appellant`s statement of defence did not respond to the Respondent's claim and accordingly struck it out with costs.

24. The learned Magistrate misunderstood the import of the decision of the Court of Appeal in the *Justus Mutiga case*. The court in that case was categorical that the Act had capped the amount payable by an insurance company to Ksh.3 million and the excess is recoverable from the insured. Nowhere did it say that the insurance company could pay over and above the cap of 3 million and claim the excess from the insured. The Court held as follows:

    30. We do not understand the schedule to curtail the court's duty and mandate to assess the evidence before it and award whatever amount of damages which in the court's view suffices to compensate the victim of the accident. What in our considered view is anticipated by the amendment is to put a ceiling or cap to the amount recoverable from the insurance company, but it does not fetter the court from awarding more than Ksh.3 million. What this would mean is that any compensation awarded by the court in excess of Ksh.3 million would be recoverable from the insured and not from the insurance company.

25. The position that an insurance company cannot pay more that the 3 million capped by the Act has been upheld in myriad of authorities as cited above by the appellant. The trial court erred in holding that the Appellant was obligated to pay more than Ksh.3 million which they could recover from the insured. The finding is not legally tenable. The Court of Appeal decision was binding on the learned Magistrate and was obligated to follow it.

26. The second issue is whether a claim from an insurance company of an amount over and above the cap of Ksh. 3 million is a triable issue. The Appellant argued that that is a triable issue while the Respondent argued that it is not. The Respondents cited the case of *Africa Merchant Assurance Company Ltd v William Muriithi Kimaru* (*supra*) where Majanja J. declined to set aside the order striking out the appellant`s defence as the amount the decree holder can recover from the insurance company is provided for by the *Act*. Counsel argued that this means that a defence of statutory limit of 3 million is not a triable issue.

27. In view of the express provisions of the law and the Court of Appeal decision in *Justus Mutiga case* capping the amount an insurance company can pay an insured at Ksh.3 million arising out of a claim by one person, I am of the considered view that the issue is not one that should go for trial as the same is provided for by the law and is therefore not a triable issue.

28. The upshot is that the holding of the trial Magistrate that the appellant`s defence did not raise triable issues is upheld, save that the Appellant is not liable to compensate the Respondent any sum in excess Ksh.3 million. The appeal is dismissed with each party ordered to bear its own costs to the appeal.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 29TH FEBRUARY 2024

J. N. NJAGI

JUDGE

In the presence of:

Mr. Mwenda holding brief Dr. Kamau Kuria for Appellant

Mr. Kaburu for Respondents

Court Assistant – Amina

30 days Right of Appeal.