



REPUBLIC OF KENYA



**KENYA LAW**  
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**Directline Assurance Company Limited v Nzioka (Civil Appeal  
E257 of 2022) [2024] KEHC 6140 (KLR) (Civ) (30 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6140 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E257 OF 2022**

**HI ONG'UDI, J**

**MAY 30, 2024**

**BETWEEN**

**DIRECTLINE ASSURANCE COMPANY LIMITED ..... APPELLANT**

**AND**

**DANIEL NZIOKA ..... RESPONDENT**

*(Being an appeal from the Ruling of Hon. P. Muholi (Mr.) Principal Magistrate  
in Nairobi Milimani CMCC No. E9259 of 2021, delivered on 11th March, 2022)*

**JUDGMENT**

1. Directline Assurance Company Limited the appellant is the defendant in the lower court case, while Daniel Nzioka the respondent is the plaintiff.
2. The Appeal is in respect of the Notice of Motion dated 20<sup>th</sup> August, 2021, filed by the respondent's advocates on 8<sup>th</sup> September, 2021. It was heard by way of written submissions and a ruling delivered virtually on 11<sup>th</sup> March, 2022 allowing the said application and dismissing the suit.
3. It is the said ruling that is the subject of this Appeal dated 23/02/2023 which has raised the following grounds:
  - i. That the learned magistrate erred in law and fact by striking out the Appellant's Statement of Defence and thus denying the Appellant a chance to canvass their Defence on full trial.
  - ii. That the learned trial magistrate erred in law and fact by striking out the Appellant's Statement of Defence when the same was not vexatious, scandalous and raised triable issues in law.



- iii. That the learned trial magistrate erred in law and fact in failing to consider and appreciate the Appellant's replying affidavit in response to the respondent's application to strike out the Defence.
  - iv. That the learned trial magistrate erred in law and fact in taking a draconian measure by striking out the appellant's Statement of Defence when the circumstances did not call such a measure
  - v. That the learned trial magistrate overlooked the Appellant's replying affidavit, and misconstrued the legal principles for striking out pleadings, thereby taking an improper course of striking out the Appellant's Statement of Defence in the presence of triable issues and analyzing the merits of the case without first hearing the parties
  - vi. That the learned trial magistrate erred on fact and in law in disregarding the provisions of section 5(b)(i) of the Insurance (Motor Vehicle Third Party Risks) Act which were pleaded as a Defence in the Statement of Defence, the Appellant's replying affidavit to the respondent's application to strike out the Defence.
  - vii. That the learned trial magistrate erred in law and fact in failing to appreciate or take into consideration the Appellant's submissions or at all.
4. The Appeal was canvassed by way of written submissions.

#### **The appellant's submissions**

5. The submissions were filed by Cootow Advocates and are dated 9<sup>th</sup> April, 2024. Counsel relied on the grounds of appeal and wished to argue the grounds altogether. He submitted that the principles that guide the court in exercising discretion to strike out pleadings are well settled in the case of *Misort Africa Ltd vs Ps National Treasury and Planning & another* [2020] eKLR where the court cited the case of *Job Kwach vs Nation Media Group Ltd* which held that for the court to grant summary judgment, it must ensure that the defendant has not raised any triable issues in the statement of defence, the affidavit in opposition to the application for summary judgment, or in any other manner. A triable issue is any matter that would require further examination by the court during a full trial. According to Black's Law Dictionary, a "triable" issue is subject to judicial examination and trial. It does not need to be an issue that would succeed, but just one that warrants further intervention by the court.
6. Counsel referred to pages 11 to 14 of the record of appeal citing paragraph 10 of the statement of defence which stated in response to paragraph 9 of the Plaintiff, that the defendant was not liable to satisfy any judgment and/or decree emanating from Milimani CMCC No. 7724 of 2018 as the Plaintiff was an employee of the alleged insured and is entitled to claim under the policy under section 5 of CAP 405 of the Laws of Kenya. Further that the general exception clause states that the defendant is not liable for any claim arising during a person's employment either by the insured or any other person claiming to be indemnified under the policy. Counsel argued that the trial court had a duty to look at the replying affidavit filed by the appellant which was sworn on 14<sup>th</sup> September, 2021 by one Kelvin Ngiro.
7. That in paragraph 5 of the appellant's replying affidavit, the appellant stated that the respondent is not entitled to claim under the policy as per section 5 of Cap 405 of the Laws of Kenya. The appellant cited section 5(b)(i) of the *Insurance (Motor Vehicles Third Party Risks) Act*, Cap 405 of the Laws of Kenya which provides that insurers are not required to cover liability for death or bodily injury arising from and in the course of the employment of a person insured by the policy. He argued that the respondent's employment as a conductor/loader on motor vehicle registration KAE 846H is confirmed in the appellant's investigation report marked "PW1," dated 19<sup>th</sup> June, 2019. Counsel contended that the appellant's submissions indeed raised substantial triable issues that warrant proceeding to trial. He



placed reliance on the Court of Appeal case of Kenya Trade Combine Ltd vs M Shah (Civil Appeal No. 193 of 1999) (unreported) which held that in a matter of this nature, the defendant just needs to show that the defence on record raises triable issues that should go to trial and it is important to note that a defence raising triable issues does not guarantee success.

8. Counsel argued that there were several issues raised in the defence but the main one was whether the respondent was a third party within the meaning of the definition of the Insurance (Motor Vehicle Third Party Risks) Act Chapter 405 of the Laws of Kenya to entitle the Respondent to bring the proceedings under Chapter 405 of the Laws of Kenya. It is trite that one triable issue is sufficient to have the matter proceed to trial. In this instant case he urged that the appellant raised several issues that justify taking the entire suit to a full trial. These issues could not be resolved summarily because evidence needed to be adduced and the respondent needed to be cross-examined regarding his employment status with the appellant's insured.
9. Counsel relied on the Black's Law Dictionary 8<sup>th</sup> Edition on page 2435 defining an issue as a point in dispute between two or more parties and argued that there existed a dispute that would require evidence and/or documents produced by either party to be tested during the trial and achieved through the summary determination of the suit through the respondent's application.
10. In conclusion, counsel humbly submitted that this Honourable Court has to administer justice fairly, promote equal access to justice and grant the appellant an opportunity to defend the suit by allowing the Appeal as prayed in the Memorandum of Appeal.

#### **The respondent's submissions**

11. These were filed by Musili Mbithi & Associates and are dated 23<sup>rd</sup> February, 2024. Counsel came up with two issues for determination namely; whether the learned trial magistrate applied the correct principles of law and available facts in finding the appellant's statement of defence not raising any triable issue hence being a candidate for striking out. Further whether the learned magistrate applied the correct principles of law and available facts in finding and declaring the appellant statutory bound to satisfy the judgment and decree in Nairobi CMCC No. 7724 of 2018.
12. On the first issue, counsel referred to pages 18 to 24 of the record of the appeal which gave a detailed background of the declaratory suit in the supporting affidavit sworn by the respondent Daniel Nzioka. From the supporting affidavit and the annexed documents, he urged that it is not in dispute that indeed on 9<sup>th</sup> December, 2017 the respondent was involved in a road traffic accident while travelling as a passenger onboard motor vehicle registration number KAE 846H, and sustained serious bodily injuries. That the appellant's advocates had issued a statutory notice to the respondent before filing the primary suit according to section 10(12)(a) of the *Insurance (Motor Vehicles Third Party Risks) Act* Cap 405 Laws of Kenya. The respondent then instituted a suit in Nairobi CMCC No. 7724 of 2018 and judgment was entered in his favour against the appellant's insured in the sum of Kshs. 1,693,989/68 with costs and interest, but the decree has not been settled despite demands and notices.
13. Counsel further argued that when the appellant filed the statement of defence, it denied insuring motor vehicle registration number KAE 846H. It also denied issuing policy number 001385 in respect to the subject motor vehicle, and denied that it was obliged to pay the Plaintiff as claimed. Referring to the record of appeal at pg 18 paragraph 4 of the supporting affidavit he submitted that it clearly shows the appellant as the insurer of the subject motor vehicle at the time of the accident. He placed reliance on section 9 of Cap 405.
14. Counsel submitted that the policy documents serve as a contract between the insurance company and the motor vehicle owner. He pointed out that the certificate of insurance, displays the policy number,



the name of the insurance company, and the period covered which must be visibly seen on the motor vehicle. Further that in the event of an accident, the police must inspect the vehicle for a valid insurance sticker and a valid driver's license. Failure to provide these documents may result in imposing legal charges against the driver and motor vehicle owner for violating mandatory laws.

15. Counsel further submitted that the details displayed on motor vehicle registration number KAE 846H were given to the police officers as required under section 9(2) of Cap 405 which led to the police abstract being filled. Even when the appellant was served with relevant notices, it did not raise any queries as regards its insured. It did not bother to point out the allegation regarding it not being the insurer of the motor vehicle in question.
16. On the second issue, counsel argued that the learned trial Magistrate noted that the appellant was served with a statutory notice and a demand letter on 20<sup>th</sup> August, 2018 by way of physical service. The appellant stamped a copy to ascertain receipt and did not deny the documents annexed to the supporting affidavit showing it was informed of the primary suit. Reference was made to page 23 of the record of appeal which shows that the appellant never filed a repudiation claim despite being served with notices and letters demanding payment. There is no evidence of repudiation because they were not the insurers or the defendants in the primary suit. The appellant was aware of the proceedings based on the notification annexed to the affidavit, but there is no evidence that they notified the respondent that they were not the insurers of the defendants.
17. Counsel relied on section 5 of the Insurance (Motor Vehicle Third Party Risks) Act and submitted that the respondent claimed that he was a passenger onboard the insured's vehicle and it shows that he was covered by the policy under the said Act. He placed reliance on the case of Corporate Insurance Co. Ltd vs Violet Nabwire Ouma [2019] eKLR, Civil Appeal 63 of 2013 where it was held that section 10 of the Insurance (Third Party Motor Vehicle Risks) Act elaborates that the insurer must fulfill judgments against the insured, but can avoid this obligation under section 10(4) of the Act by obtaining a declaration before the commencement of legal action has been obtained or within three months of its commencement of such legal action. There is a proviso however which the insurer must satisfy to benefit from the declaration.
18. He argued that despite having been notified of the intention to sue through a statutory notice served as per the law, the appellant did not file any proceedings to repudiate liability and as such it is bound by section 10(1) of the *Insurance (Motor Vehicles Third Party Risks) Act* Cap 405 to satisfy the claim. Counsel relied on the case of APA Insurance Limited vs Theodora Atieno Okal [2012] eKLR in support of that.
19. Counsel submitted that the issues raised by the appellant did not constitute arguable triable issues in light of the evidence placed before the trial court as they were vexatious. He placed reliance on the case of J P Machira vs Wangethi Mwangi & another Civil Appeal No. 179 of 1997 in support of that. In conclusion, he urged this court to dismiss the Appeal.

### **Analysis and determination**

20. This is a first appeal and this court has a duty to re-evaluate and re-consider the evidence on record and arrive at its own conclusion. It has to bear in mind that it did not see nor hear the witnesses and hence give an allowance for it. See *Selle V Associated Motor Boat Company Ltd* [1968] EA 123 and *Kenya Posts Authority V Kuston (Kenya) Ltd* [2009] 2 EA 212.
21. I have carefully considered the evidence on record, the grounds of appeal, both parties' submissions, and the law. I find two issues falling for determination namely:



- i. Whether the appellant's statement of defence raised triable issues and whether it was right for the learned trial magistrate to strike it out.
  - ii. Who should bear the costs of the appeal?
22. On the first issue, I refer to the case of County Government of Trans Nzoia vs Manaseh Distributors & Wholesalers Limited [2024] KEHC 389 (KLR) where the court found a triable issue to exist if there is a dispute in the facts, which dispute can only be resolved after ventilation in a full hearing. It also cited the famous case of Job Kilach vs Nation Media Group Ltd, Salaba Agencies Ltd & Michael Rono [2015] eKLR, where the Court of Appeal posited summary judgment as follows: -

“ Before the grant of summary judgment, the court must satisfy itself that there are no triable issues raised by the defendant, either in his statement of defence or in the affidavit in opposition to the application for summary judgment or in any other manner. What then is a defence that raises no bona fide triable issue? A bona fide triable issue is any matter raised by the defendant that would require further interrogation by the court during a full trial. The Black's Law Dictionary defines the term “ triable ” as, “ subject or liable to judicial examination and trial ”. It therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the Court. ”

23. In the instant case, the respondent has instituted a suit against the appellant's insured in Nairobi Milimani CMCC No. 7724 of 2018 where judgment was entered in favour of the respondent against the appellant's insured in the sum of Kshs. 1,403,550/= plus the costs of the suit and interest. The respondent went ahead and filed a declaratory suit against the appellant in Nairobi Milimani CMCC No. E9259 of 2021 seeking orders for the appellant to satisfy the judgment and decree in Nairobi Milimani CMCC No.7724 of 2018. The respondent filed an application seeking to have the statement of defence struck out for being scandalous, frivolous and/or vexatious. He further sought orders to have the appellant held liable to satisfy the Judgment and decree.
24. The ruling delivered by the learned trial magistrate on 11<sup>th</sup> March, 2022 stated that there was evidence that the appellant was notified of the accident having been served with the notices and the respondent who was an employee took no steps to repudiate the claim and/or even indicated in the statutory notice that they were not liable in any way. The learned trial magistrate's view was that the appellant did not bother when it was served with statutory notices, and it was only raising it at this point to dissuade the court. The learned trial magistrate relied on Order 2 Rule 15 of the Civil Procedure Rules and Saudi Arabia Airlines Corporation vs Premium Petroleum Company in support of his argument.
25. This court has perused the record of appeal and looked at the appellant's replying affidavit to the application and statement of defence finding that both pleadings raised triable issues. Also, when parties file their pleadings, they are bound by them and the case to support this argument is Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -

“ .....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....



...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”

26. The learned trial magistrate should have given the appellant an opportunity to prove its case as whoever alleges must prove under section 107 of the *Evidence Act* Chapter 80 Laws of Kenya. Also, the learned magistrate had no reason to strike out the pleadings and the suit in its entirety because he did not give audience to the appellant to defend its case. The duty of the trial court was to hear both parties and then conclude the case. This court has noted that the learned trial magistrate failed to hear the appellant’s case however weak it was as justice should be fair across all parties. Instead the trial court directly dismissed and struck out the suit in its entirety. This court is guided by the case of Japhet Nkubitu & Another Vs Regina Thirindi [1998] eKLR where the Court of Appeal relied on section 107 of the *Evidence Act* as who alleges must prove and the burden lies on the party that requires to prove.
27. I also refer to the case of Meya Agri Traders Ltd v Elgon House (2010) [2023] KECA 574 (KLR) where the Court of Appeal noted that the court is mandated to adhere to the pleadings and their accompanying documents. Essentially, the pleadings should be capable of raising triable issues on their own. Parties are bound by their pleadings, and anything not in the pleadings cannot be tried during the hearing of the case. Also see Raghbir Singh Chatte vs National Bank of Kenya Limited [1996] eKLR.
28. In UAP Provincial Insurance Company Limited vs Lenny M Kivuti [1997] eKLR when dealing with a statement of defence the court stated:

“In an application for summary judgment even one triable issue, if bona fide, would entitle the defendant to have unconditional leave to defend. See Kundanlal Restaurant v Devshi & Company [1952] 19 E.A.C.A. 77. Also see Hasmani v Banque du Congo Belge [1938] 5 E.A.C.A. 89.”
29. Further in the case of Kenya Trade Combine Ltd vs N M Shah [2001] eKLR, this Court stated thus:

“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.”
30. In Meya Agri Traders Ltd v Elgon House (supra) the court stated that the respondent’s application for striking out the appellant’s statement of defence was pegged on grounds that the claims were admitted and there were no triable issues for consideration by the Court. The court disagreed with the trial court’s findings and held that the defendant’s statement of defence raised triable issues, even if the defendant admitted to some of the plaintiff’s allegations.
31. After weighing the evidence all the material herein and the law I find that the trial court did not appreciate the triable issues raised by the appellant to defend itself. It failed to give a proper fair hearing which cannot be allowed to stand. I am inclined to interfere with the ruling of the learned trial magistrate which I hereby set aside.
32. The upshot is that the Appeal has merit and is allowed. Let the matter CMCC 9259/2021 be remitted back to the Nairobi Chief Magistrate’s court for hearing and determination before a competent court besides Hon. P. Muholi (Mr) Principal Magistrate.
33. Costs in the cause.
34. Orders accordingly



**DELIVERED VIRTUALLY, DATED, AND SIGNED THIS 30<sup>TH</sup> DAY OF MAY, 2024 IN OPEN COURT AT NAKURU.**

**H. I. ONG'UDI**

**JUDGE**

