CIC General Insurance v Maingi (Civil Appeal E372 of 2023)
[2024] KEHC 8464 (KLR) (Civ) (27 June 2024) (Judgment)

Neutral citation: [2024] KEHC 8464 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E372 OF 2023

DKN MAGARE, J

JUNE 27, 2024

BETWEEN

CIC GENERAL INSURANCE ..... APPELLANT

AND

FLORENCE MUKONYO MAINGI ..... RESPONDENT

JUDGMENT

1. This is an appeal against ruling and order emanating from the decision of S.A. Opande, Principal Magistrate given on 19th April, 2023 in Milimani E3819 of 2022. The Appellant was the defendant in the court below.

2. The impugned decision was on an application to strike out the defence filed by the defendant in respect of the duty to settle a decree in Milimani HCCC 239 of 2017.

3. The Appellant filed 7 grounds of appeal as follows; -

    i. That the learned trial magistrate erred in law and in fact in striking out the Appellant's Defence.

    ii. That the learned trial magistrate failed to appreciate the issues that were raised in the Appellant's defence and demonstrated via an affidavit that had been in court.

    iii. That the learned trial magistrate fell into an error in law when he ruled that the issues that had been raised in the Appellant's replying affidavit ought to have been raised in the primary suit.

    iv. That the learned trial magistrate failed to appreciate the nature of the suit that was before him and in narrowing down the issues for determination to a question of whether there was a valid policy of insurance.

v. That the learned trial magistrate erred in law and fact in failing to appreciate that the dispute before court was whether the Appellant had satisfied the decree that had been passed in Milimani HCC No. 239 of 2017 and whether interest can accrue on funds that had been paid to the Respondent.

vi. That the learned trial magistrate misapprehended the law relating to striking out of pleadings and in so doing he arrived at an erroneous decision.

4. The Appellant was sued via a plaint dated 25th July, 2022 regarding an accident on 15th September, 2014, involving motor vehicle registration number KAT 505 C. The said vehicle was said to have been insured by the Appellant. The court in Nairobi Cmcc 5591 of 2015 –delivered judgment on 7th October, 2016 as follows;-

a. Liability 80:20

b. Special damages 464,000/=

c. Loss of user 3,000 per daily from the date of accident until payment in full.

5. The amount was said to be within the capped 3,000,000/= for insurers. The amount payable as at 17th November, 2017 was 5,253,535/=.

6. The said amount was reduced on 27th July, 2021 vide HCCA 239/2017 as follows: -

a. Special damages 464,000/=

b. Loss of user 1,872,000/=

7. An amended decree was issue for a sum of Kshs. 2,094,500/= but the Appellant had paid a total of Ksh. 2,092,500/=. The Respondent purported that there was a guarantee. However this had been litigated upon to conclusion.

8. The Respondent sought the entire Kshs. 1,563,883/= from the Appellant as due and owing. The defendant stated that a decree was issued and paid on 19th March, 2018. They stated that the award of interest after the date the decree was issued is unconscionable.

9. The Respondent filed an application dated 23rd August, 2022. They thus sought to strike out the defence. The Appellant indicated that they are not bound to settle amended decree after a previously extracted decree. The court struck out the defence. Without any justification the court ordered the application is allowed as prayed.

Analysis

10. This is a fairly straight forward appeal. The question sustaining is whether there is a triable issue raised. The Appellant posits there is a triable issue. On my part I note that there are 4 triable issues, raised even by the Respondent: -

a. The decree was settled in 2018. What is the basis of interest after 19th March, 2018? They stated that a claim for 3,161,083 was due. This was false. The amount due was not that amount as the High Court had set aside the decree that gave rise to 5,253,582.63/=. Further, there was payment. The interest on the principal amount entered by the High Court, ceased on 19th March, 2018. There is no room for interest on nonexistent decree. The decree as extracted is false and cannot be a basis of the suit.

b. Secondly, the court notes that there is interest upon interest. The same must specifically be granted on the court at 6%. There is no such award in the decree. Section 26 of the *Civil Procedure Rules* provides as follows:

> " Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit. (2) Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the court shall be deemed to have ordered interest at 6 per cent per annum."

c. Thirdly whereas the Appellant may be bound to settle the decree, a dispute as to the exact amount due must be settled in the lower court, by dint of order 22 Rule 2 which states as follows;-

> " (1) Where any money payable under a decree of any kind is paid direct to the decree-holder or the decree is otherwise adjusted in whole or in part to the satisfaction of the decree-holder, the decree- holder may certify such payment or adjustment to the court whose duty it is to execute the decree, and the court shall record the same accordingly. (2) The judgment-debtor also may inform the court of such payment or adjustment, and apply to the court to issue a notice to the decree-holder to show cause, on a day to be fixed by the court, why such payment or adjustment should not be recorded as certified; and if, after service of such notice, the decree-holder fails to show cause why the payment or adjustment should not be recorded as certified, the court shall record the same accordingly."

11. As the matter stands there is no valid decree capable of enforcement. It was plainly wrong for court to strike out a defence that raises very many triable issues. This was not the normal evasive defence. The defence meets the standards set out in the case of *Raghbir Singh Chatte v National Bank of Kenya Limited* [1996] eKLR, where the Court of Appeal stated as doth: -

> " The main object of this rule and r.14 is to bring the parties by their pleadings to an issue, and indeed to narrow them down to definite issues, and so diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing (per Jessel M. R. in Thorp v Holdworth (1876) 3 Ch. D. 637). This object is secured by requiring that each party in turn should fully admit or clearly deny every material allegation made against him. Thus, in an action for a debt or liquidated demand in money, a mere denial of the debt is wholly inadmissible", (underling supplied).
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> I will also add that the crucial deficiency of a general denial which I have already described, also applies to the evasive, inconsistent and contradictory alternative general traverse in the appellant's defence. This was that if the respondent had extended any overdraft facilities without stating the amount involved, to the appellant which was moreover, denied, then

the same and here again, without stating how and when, had been paid. Such a spurious pleading in the alternative cannot give any merit to the defence and so also makes it one which discloses no reasonable defence for all purposes including that of 0 6 r 13(1)(a)."

12. The fourth issue was that the decree sought to be enforced was set aside by the court. There is no decree dated 7/10/2016. The decree in situ, is the one given in the High Court in HCCA 239/2017. This replaced the decree given on 7/10/2016. Thus the decree at page 17 was set aside. The proper practice was to file the judgment of Hon. Justice J.K. Sergon on 29th July, 2021 and extract a decree that accords to Kshs. 1,868,800. The rate of interest was also differentiated as follows:-

    a. Special damages - Kshs. 371,200/= being 80% of 450,000/= was to attract interest from the date of filing suit.

    b. Interest on Kshs. 1,497,600 being 80% of Kshs. 1,872,000/= which was to attract interest from the date of judgment in the lower court, this is 7th October, 2016.

13. Setting aside the decree equally set aside the award on costs. I have not seen re-assessment of the said costs. In view of the reached awards by the High Court, interest on the decree should be calculated at court rates (12%) up to and including 19th March, 2018, having regard to the High Court decision. This is done in the primary suit and not the declaratory suit.

14. Once the terms of the decree are settled, only then can the defence raised by Appellant be questioned. As of now the decree is irregularly loaded with interest without regard to the fact that a sum of Kshs. 2,092,500/= was paid on 19th March, 2018 and does not attract interest.

15. Without ascertaining the amount due, the defence filed raised triable issues. What constitutes a triable issue is settled. In the case of *Desbro (Kenya) Limited v Polypipes Limited & another* [2018] eKLR, Justice J.A. Makau held as doth: -

> " There are myriads of authorities on the subject of striking out pleadings. In the case of Jubilee Insurance Company Limited v Grace Anyona Mbinda [2016] eKLR, the Honourable court quoted with authority the celebrated case of Saudi Arabian Airlines Corporation V Premium Petroleum Company Ltd [2014] eKLR where this court held that:
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> > "I need not re-invent the wheel on the subject of striking out a defence. A great number of judicial decisions have now settled the legal principles which should guide the Court in determining whether to strike out a pleading. The power to strike out a suit or defence should be used sparingly and only on the clearest of cases where the impugned pleading is "demurer of something worse than a demurer" beyond redemption and not curable by even an amendment. Thirdly, in case of a defence, the court must be convinced upon looking at the defence, that it is a sham; it raises no bona fide triable issue worth a trial by the court. And a triable issue need not be one which will succeed but one that passes the Shedridan J Test in Patel V E.A. Cargo Handling Services LTD. [1974] E.A. 75 at p. 76 (Duffus P.) that "... a triable issue... is an issue which raises a prima facie defence and which should go to trial for adjudication." Therefore, on applying the test, a defence which is a sham should be struck out straight away."

16. Even one triable issue is enough. The court thus erred in striking out the defence without considering the issues raised in the defence. In the circumstances, appeal is merited and I allow the same. The Appellant shall have costs of Kshs. 165,000/=.

Determination

a. In the end thereof, I dismiss the application dated 23rd August, 2023, with costs of Kshs. 20,000/= to the Appellant.

b. The defence is reinstated. The defendant is granted leave to defend the suit in the lower court.

c. The matter in the court below to proceed before a court other than Hon. S.A. Opande, Principal Magistrate.

d. This judgment be served on the Hon. S.A. Opande by the Deputy Registrar of this court.

e. The funds deposited be released to M/s Munene Wambugu & Kiplagat Advocates for onward transmission.

f. This file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 27TH DAY OF JUNE, 2024.

Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of: -

Mr. Kiplagat for Appellant

No appearance for Respondent

Court Assistant – Jedidah