**Direct Line Assurance Company Limited v Ngure (Civil Appeal 100 of 2022) [2024] KEHC 7875 (KLR) (27 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7875 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KIAMBU**

**CIVIL APPEAL 100 OF 2022**

**S MBUNGI, J**

**JUNE 27, 2024**

**BETWEEN**

**DIRECT LINE ASSURANCE COMPANY LIMITED ..... APPELLANT**

**AND**

**ESTHER WAMBUI NGURE ..... RESPONDENT**

***(Being an appeal from the Ruling of Hon. I.F Koome delivered on 11th May 2022 in Limuru Senior Principal Magistrate's Court CMCC Civil Case No. 582 of 2021)***

**RULING**

1. This appeal arises from the Ruling of Hon. I.F Koome (RM) delivered on 11th May, 2022 in Limuru Senior Magistrate's Court Civil Case No. 582 of 2021 which was enforcing judgment delivered in Limuru civil Case No. E219 of 2021.

2. The appellant herein (Direct Line Assurance Company Limited) having being dissatisfied with the ruling of the Resident Magistrate I.F Koome in Limuru Civil Case No. 582 of 2021 delivered on 11th May 2022, appealed against the ruling seeking the following orders: -

    a. That the appeal be allowed with costs.

    b. That the ruling and order dated 11th May, 2022 and consequent orders made be set aside.

    c. That the appellants statement of defence dated 25th January, 2022 be reinstated.

    d. That the lower court file to be placed before a different Magistrate vested with jurisdiction for further directions and disposal of the suit at the earliest opportunity.

3. The appellant's appeal against the whole ruling were on 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 circumstance did not call for 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 sand analyzing the merits of the case without first hearing the parties.

vi. That the learned trial Magistrate erred on facat and in law in disregarding the provisions of Section 5 of the insurance (motor vehicle third party risks) act and disregarding that the judgment in Limiru CMCC No. E219 of 2021 was irregular as pleaded as a defence in the statement of defence, the appellants replying affidavit in response to the respondent's application to strike out the defence.

vii. That the learned trial magistrate erred in law and in fact in failing to appreciate or take into consideration the appellants' entire submissions and especially the submission that the respondent filed Limuru CMCC No. E219 of 2021 against the appellants insured who was deceased as at the time of filing the said case as such the said suit was a non- starter and nullity ab initio.

4. The parties agreed to dispose off the appeal by way of written submissions. The respendent filed. The appellant did not file despite being given ample time to file and even the court reminding them via email dated 26th June, 2024.

5. Therefore, the court wrote the ruling without the benefit of the appellants submissions

6. I have read the proceedings, pleadings, ruling and submissions filed by the respondent.

7. The appellants grounds of appeal can be condensed into three main grounds-

i. Whether the appeal is fatally defective and liable for being struck out for failure to include the decree appealed from in the record of appeal.

ii. Whether the trail court erred by allowing the respondent's notice of motion application dated 28th January, 2022.

iii. Whether the appellant tendered any defence as required by section 10 of the *insurance (motor vehicle third party risks)* ac cap 405 to avoid liability.

**Determination**

**Ground 1**

8. The respondent submitted that the appellant failed to include original order appealed from the record of appeal, supplementary record of appeal and further supplementary record of appeal.

9. He argued that the order/decree is a primary document that must be in the record of appeal. The decree or order is the trial court's decision.

10. An appeal can only be against a decree or an order and not against a judgment or ruling

11. In the case of *Salama Beach Hotel Limited and 4 others VRS Kenyariri and Associates advocates and 4 others (2016)* eKLR, the court of appeal while dealing with a similar matter held as follows;

> In this case, two main omissions are readily noticeable. The first glaring defect is with regard to the memorandum of appeal which suggests that the appeal is against the order of the High Court of Kenya at Malindi (Honorable Justice Chitembwe) dated 26th June 2015 in High Court Civil Case No. 20 Of 2015). However, a cursory perusal of the record of appeal shows that the order impugned in the memorandum of appeal is indeed missing in the record. The same appears not to have been extracted and included in the record. The consequences of this can be found in the decision of Chege versus Suleiman (1988) eKLR, which echord the traditional position that failure to extract an impuged order renders the appeal fatally defective, with the only remedy being to strike it out. Counsel for the respondents were proper, having been perused and approved by this court's deputy registrar before they wound up before us. With respect, no legal provision allows for the exercise of this court's discretion in such a manner, besides, the fate of an appeal anchored on a non-extracted order has not changed, not even with the advent of the new liberal approach afforded by the overriding objective and *the constitution*; which encourages dispensation of justice without undue regard to procedural technicalities. As held in Floris Pierro and another VRS Giancarlo Falasconi ( as the administrator of the estate of Santuzza Billioti alias Mei Santuzza) (2014) e KLR; an appeal that fails to include the extracted order and or decree appealed from is incurable and the only recourse available is to strike it out, as the order or decree appealed from is a primary document in terms of rule 87(1) (h) of this court's rules and must form part and parcel of the record of appeal. In that case, the court delivered itself thus: -
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> > "…. The order embodies the court's decision. If it is not included, the court of appeal will be at a loss in determining what the high court determined. It cannot be the business of this court to tooth-comb the judgment or ruling so as to decipher the decision of the court below. That decision must be embodied in the order and or decree. Accordingly, failure to include the court order or decree would render the record of the appeal to be fatally defective and liable to be struck out. In any event an appeal can only be against a decree or an order and not against a judgment or ruling. In the premises, we take the view that it would sere the overriding objective to strike to the appeal suo moto. Indeed, as indicated by this court in the case of Mohamed Aden Abdi VRS. Abdi Nuru Omar and 2 others (2007) e KLR; even in the face of a time barred application which is accordingly dismissed, the court nonetheless retains the inherent power to strike out the appeal where a record of appeal fails to contain one or more of the primary documents. In this case, no attempt was ever made under Rule 88 of the rules to either file a supplementary record of appeal availing the missing impugned order or to seek leave to do so. In the premises, the client's application and appeal are anchored on quicksand. They are accordingly struck out".

12. From the above authority, it is clear that failure to include a decree or an order appealed against is fatal. This is enough ground to have the appeal struck off. I have gone through the records I have not seen any decree or an order appealed against. Therefore, the appeal is fatally defective. It is hereby struck off.

13. Although I have struck the appeal it is necessary to check whether it had merit or not.

14. Order 2 Rule 15 of the *CPR* gives the court the power to strike out the proceedings it provides: -

    a. It discloses no reasonable cause of action or defene in law.

    b. Its scandalous, frivolous or vexatious; or

    c. It may prejudice, embarrass or delay the fair trial of the action; or

    d. It's otherwise an abuse of the court process and may order the suit be stayed or dismissed or judgment to be entered accordingly as the case may be.

15. I have read the ruling of the lower court; the learned trial magistrate after considering all the material placed before him did a detailed ruling; he considered section 10 (4) of *Cap 405* laws of Kenya which provides Section 10 (2) provides as follows: -

    No sum shall be parable by an insurer under the foregoing provisions of this section-

    a. In respect of any judgment, unless before or within fourteen days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings; or

    b. In respect of any judgment, so long as execution thereof is stayed pending an appeal; or

    c. In connection with any liability if, before the happening of the event which was the cause of the death of bodily injury giving rise to the liability, the policy was cancelled by mutual consent or by virtue of any provision contained therein, and either-

        i. Before the happening of the event the certificate was surrendered to the insurer, or the person to whom the certificate was issued made a statutory declaration stating that the certificate had been lost or destroyed; or

        ii. After the happening of the event, but before the expiration of a period of fourteen days from the taking effect of the cancellation of the policy, the certificate was surrendered to the insurer, or the person to whom the certificate was issued made such a statutory declaration as aforesaid; or

        iii. Either before or after the happening of the event, but within a period of twenty- eight days from the taking effect of the cancellation of the policy, the insurer has notified the registrar of motor vehicles and the commissioner of police in writing of the failure to surrender the certificate.

16. He also rightfully arrived into a finding the issue whether the insured was deceased at the time the primary suit was filed or there was no proper service were issues which could have been canvassed at

that level or on appeal or on review but not in the declaratory suit, he relied on the case of *Madison insurance company limited versus Justus Ongera (2004)* eKLR.

17. For the appellant to escape from paying the respondent as ordered in the primary suit was by bringing itself under the provisions of Section 10 (4) of the *Cap 405* laws of Kenya of which it has not

18. Therefore, in a nutshell I find that the learned trial magistrate correctly found that the appellants defence raised no triable issue and he was right to strike it off.

19. Therefore, the appeal has no merit and is hereby dismissed, costs of appeal to the respondent.

    Right of appeal 30 days.

**DATED AT KAKAMEGA THIS 27TH DAY OF JUNE, 2024.**

Signed by: -

**HON JUSTICE S MBUNGI**

**JUDGE**

**Delivered in the presence/absence of: -**

Appellant-

Respondent-

Court Assistant-