



**Kenya Orient Insurance Limited v Mavune (Civil Appeal
47 of 2023) [2024] KEHC 7859 (KLR) (27 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7859 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL 47 OF 2023
DAS MAJANJA, J
JUNE 27, 2024**

BETWEEN

KENYA ORIENT INSURANCE LIMITED APPELLANT

AND

ABDULRAHMAN SALIM MAVUNE RESPONDENT

*(Being an appeal from the Ruling and Order of Hon. J.B. Kalo, CM dated 23rd
February 2023 at the Magistrates Court at Mombasa in Civil Case No. E951 of 2022)*

JUDGMENT

1. This an appeal by the Appellant against the ruling of the Subordinate court dated 23.02.2023 (“the Ruling”) where it allowed the Respondent’s application dated 08.08.2022 by striking out the Appellant’s defence and entering judgment for the Respondent as prayed for in the plaint. The appeal is grounded in the memorandum of appeal dated 24.02.2023.
2. It is common ground that on 17.06.2022, the Respondent filed suit in the subordinate court claiming that by a policy of insurance No. MSA/0700/262840/2019/(TPO) issued by the Appellant as an authorized insurer within the meaning of the *Insurance Motor Vehicle (Third Party Risks) Act* (Chapter 405 of the Laws of Kenya) (“the *Act*”) to one Mary Wamboi Njoki, the Appellant agreed to insure her for a specified period in respect of any liability for death or bodily injury to any person caused by or arising out of the use on the road of motor vehicle registration number KAU D Nissan (“the motor vehicle”) as required by a policy of insurance under the *Act*. That on or about 10.01.2021 while the Respondent was traveling on board motor cycle Registration Number KMEU K and on reaching Waa area along the Ukunda- Likoni Road, the Appellant’s insured’s driver, servant and/or agent so negligently and/or carelessly drove, controlled and/or managed the motor vehicle that it lost control knocked the motor cycle and as a result, the Respondent sustained serious injuries and suffered loss and damage.



3. The Respondent averred that by a statutory Notice dated 19.10.2021, through his Advocates, he notified the Appellant of the aforesaid accident and the Respondent's intended claim against the Appellant's said insured for recovery of general and special damages as required under section 10 (2) of the Act. On 13.04.2022, the Respondent claimed that judgment was entered for the Respondent against the Appellant's insured in KWALE SRM No. E205 OF 2021; Abdulrahman Salim Mavune v Mary Wamboi Njoki for the sum of Kshs, 661,032.00 plus costs and interest, which the Respondent claimed the Appellant was statutorily bound to settle under section 10 of the Act. The Respondent's claim was thus for the total sum of Kshs. 760,032.00 plus costs and interest. On 01.07.2022 the Appellant filed a defence generally denying the claim or that it had insured the motor vehicle as claimed. Without prejudice, the Appellant stated that the said insurance was fraudulent and a forgery and that it was not issued with the said statutory notice as provided by the Act and that even if the notice was served, it would have no effect as the Appellant had not insured the motor vehicle at the time of the accident.
4. The Respondent then filed the application dated 08.08.2022 stating that the defence was scandalous, frivolous, vexatious and/or it is otherwise an abuse of the process of court and thus sought for it to be struck out and judgment entered for him as prayed. The Respondent asserted that the Appellant was the insurer of the motor vehicle and that judgment was entered against the insured in Kwale Srm No. E205 OF 2021 which judgment remained unsatisfied and that the Appellant was bound by statute to settle the decretal sum. Thus, the Respondent averred that the Appellant had no defence. In response to the application, the Appellant deponed and restated that it never issued any insurance to the motor vehicle and that no suit has ever been filed by the Respondent that is capable of holding the Appellant liable. It reiterated that the Respondent did not serve a statutory notice before or within the 14 days after filing the primary suit as the said notice annexed was neither for the primary suit Kwale Srm No. E205 Of 2021 as alleged. The Appellant stated that its defence raises triable issues as it questions whether the Appellant had insured the motor vehicle and if in the affirmative, whether the cover was as per the Act, whether the statutory notice was served pursuant to the Act, whether there was fraud and/or forgery and what were the costs of the primary suit Kwale Srm No. E205 of 2021.
5. The Subordinate Court in the Ruling stated that the defence was frivolous and vexatious as the Appellant stated that it did not insure the motor vehicle which was not the case as per the police abstract annexed and that the Appellant had no triable issue. It thus struck out the defence and entered judgment in favour of the Respondent as prayed in the plaint hence the present appeal.
6. The court is being called upon to determine whether the trial magistrate was wrong to strike out the Appellant's defence for not disclosing a triable issue. This was a discretionary decision and this court, as the appellate court, will not interfere with that decision unless it is satisfied that the trial court in exercising its discretion has misdirected itself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of its discretion and that as a result there has been an injustice (see *Mbogo v Shah* [1968] EA 93 and *United India Insurance Co. Ltd and Others v East African Underwriters (Kenya) Ltd* NRB CA Civil Appeal No. 36 of 1983 [1985] eKLR).
7. It is trite law that striking out a pleading is a drastic action and the court should exercise great circumspection before doing so. The court should not strike out a claim unless it is hopeless and cannot be salvaged by any amendment (see *D T Dobie & Company (K) Ltd v Muchina* [1982] KLR 1). In deciding whether to strike out the suit, the Court is required to examine the pleadings; the Plaint and Defence together with depositions in support of and in opposition to the application to strike out in order to determine whether there is a triable issue.



8. In the introductory part, I summarized the issues which the Appellant stated had raised defence points which included whether the Appellant had insured the motor vehicle and if in the affirmative, whether the cover was as per the Act, whether the statutory notice was served pursuant to the Act, whether there was fraud and/or forgery and what were the costs of the primary suit Kwale Srm No. E205 Of 2021.
9. I have considered the Ruling alongside the facts placed before the court and I take the following view of the matter. In the primary suit giving rise to the declaratory suit, the Appellant's insured, Mary Wamboi Njoki positively deponed that she was the insured in an application to set aside judgment. This averment together with the fact that it paid costs puts to sleep the claim that the Appellant was not the insurer notwithstanding the contents of the police abstract. Further, from the statutory demand required to be served under section 10(2) of the Act the same was duly served as evidenced by the demand letter and notice dated 15.10.2021 and 19.10.2021 respectively. These were received by the Appellant on 28.10.2021. In light of all these facts, the Appellant's defence was a bare denial.
10. I find the trial magistrate came to the correct conclusion. The Appellant's defence is without merit. The Appellant's appeal is dismissed. The Appellant shall pay costs of the appeal assessed at Kshs. 20,000.00.

SIGNED AT NAIROBI

D. S. MAJANJA

JUDGE

DATED AND DELIVERED AT MOMBASA THIS 27TH DAY OF JUNE 2024.

OLGA SEWE

JUDGE

