Case Number:	Civil Appeal 123 of 2020
Date Delivered:	22 May 2020
Case Class:	Civil
Court:	High Court at Machakos
Case Action:	Judgment
Judge:	George Vincent Odunga
Citation:	Madison Insurance Company Limited v Augustine Kamanda Gitau [2020] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	Hon. M Opanga - SRM
County:	Machakos
Docket Number:	-
History Docket Number:	Civil Case 67 of 2018
Case Outcome:	Appeal allowed.
History County:	Machakos
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CIVIL APPEAL NO 123 OF 2018

MADISON INSURNCE COMPANY LIMITED................APPELLANT

-VERSUS-

AUGUSTINE KAMANDA GITAU...RESPONDENT

(Being an Appeal from the Ruling delivered by Honourable M Opanga Senior Resident Magistrate, Kangundo delivered on the 11th September, 2018 in PMCC No. 67 of 2018)

BETWEEN

AUGUSTINE KAMANDA GITAU..PLAINTIFF

-VERSUS-

MADISON INSURNCE COMPANY LIMITED............RESPONDENT

JUDGEMENT

1. This is an appeal arising from the decision of **Honourable M Opanga Senior Resident Magistrate, Kangundo** made on the 11th September, 2018 in PMCC No. 67 of 2018 (the declaratory suit). In that case the Respondent herein sued the Appellant seeking a declaration that the Appellant was obliged to satisfy the decree in Kangundo CMCC No. 64 of 2017. According to the Respondent at all material times the Appellant was the insurer of motor vehicle registration no. KMEB 238M vide policy number HQS/708/037860/2009, COMM. 3.3.2017, EXP. 2.9.2017 which policy was valid as at 5th April, 2017 when the said vehicle was involved in an accident. As a result of the said accident, the Respondent instituted Kangundo CMCC No. 64 of 2017 (the original suit) in which judgement was delivered in favour of the plaintiff therein and a decree ensued. It was pleaded that the Appellant herein was the insurer of the defendant in the said original suit but failed to satisfy that decree hence the declaratory suit.

2. In its defence, the Appellant herein denied that it insured the said vehicle and that the said insurance policy was valid as at the time of the said accident. It was further pleaded that the owner of the said vehicle was a stranger to the Appellant and that it had no record whatsoever of having insured the owner of the said vehicle and having issued the said policy. It therefore averred that the alleged insured had no insurable interest with the Appellant. On without prejudice, the Appellant denied the happening of the alleged accident as well as the existence of the original suit and its outcome. It averred that the Defendants in the said suit, **Philip Maina** and Auto Industries Limited were strangers to it and had no contractual and/or policy relation and/or insurable interest with it at the material times to the said suit hence it had no legal obligation to indemnify the Respondent herein in respect of the claims arising from the original suit. It was further denied that the Respondent served any demand or notice of intention to sue hence no reasonable cause of action was disclosed

3. Irked by this defence, the Respondent applied vide his Motion on Notice dated 9th May, 2018 seeking to have the said defence struck out and judgement entered against the Appellant as prayed in the plaint. According to the Respondent, on 5th April, 2017 he was lawfully a pillion passenger on motor cycle reg. no. KMEB 238M when as a result of the negligence of his rider, the said motor cycle lost control and his motor vehicle reg. no. KBW 797X leading to serious injuries by the Respondent. He accordingly instituted the said original suit. It was his case based on the copy of the OB abstract that the damages arising from the said accident were

covered by the terms of the Appellant's policy number HQS/708/037860/2009, COMM. 3.3.2017, EXP. 2.9.2017. He also averred that the Appellant was vide a statutory notice dated 28th April, 2017 notified of the fact of the filing of the original suit and was served with a hearing notice when the matter proceeded to formal proof on 5th December, 2017 which gave rise to the decree extracted on 5th April, 2018 whose sum stood at the time in the sum of Kshs 2,045,321/= plus costs of Kshs 172,730.25 totalling Kshs 2,218,051.25. The Appellant however failed, refused and/or neglected to settle the said decree despite several demands.

4. The Respondent contended that the defence filed by the Appellant was baseless and fraudulent and was only meant as delaying tactic and that the same is unfounded, a sham with no triable issues hence is an abuse of the process of the court hence ought to be struck out as being frivolous and vexatious.

5. In its response to the application, the Appellant insisted that its defence raised viable triable legal questions which needed to be addressed at a full hearing. It reiterated that the persons sued in the original suit was strangers to it. According to it, the motor cycle in question belonged to Joyinc Solutions Limited as per a Sale Agreement dated 3rd march, 2017 which was prior to the date of the alleged accident on 5th April, 2017 and it exhibited a copy of the said agreement. It further stated that according to an officer of the said Joyinc Solutions Limited the said motor cycle was at the material time being ridden by one **Philip Gitonga Wanjunji** to whom it was leased though the policy was in favour of the said Joyinc Solutions Limited as per the exhibited risk note. It therefore insisted that the Respondent had failed to show the nexus between it and the Defendants in the original suit.

6. After hearing the said application, the learned trial magistrate in her ruling dated 12th March, 2019 found that there was no dispute that the said accident occurred and that the motor cycle in question belonged to Joyinc Solutions Limited and was insured by the Appellant. She found that the Respondent took all the requisite steps and procedures before filing the suit against the Appellant the primary suit having proceeded to its ultimate conclusion and judgement having been entered for the Respondent. According to the learned trial magistrate the Appellant had notice of the suit against its insured. Since the motor cycle was leased to one **Philip Gitonga**, the rider, she found that the 1st Defendant was a proper party to the said suit and the Appellant having not instituted proceedings seeking repudiation of liability within the prescribed time, its defence could not hold. She proceeded to strike it out and entered judgement as prayed.

Determination

7. I have considered the issues raised in this appeal.

8. The principles guiding the striking out of pleadings and cases are now well settled. These principles, as set out in **D T Dobie & Company (K) Ltd vs. Muchina [1982] KLR 1**, are 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. The rationale for this is due to a realisation that the exercise of the powers for summary procedure are draconian, coercive and drastic. And because a party may thereby be deprived of his right to a plenary trial, the court exercises those powers with the greatest care and circumspection and only in the clearest of cases as regards the facts and the law. The summary procedure should therefore only be adopted when it can be clearly seen that a claim or case is clear and beyond doubt unarguable and the judicial system would never permit a party to be driven from the judgement seat without any court having considered his right to be heard, except in cases where the cause of action was obviously and almost incontestably bad.

9. As already indicated the application before the trial court was principally brought under Order 2 rule 15 of the ***Civil Procedure Rules***. Subrule (1) of the said provision provides as follows:

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.

10. In the exercise of its powers under the said provision there are certain well established principles that a court of law is to adhere to. Whereas the essence of the said provisions is the striking out of an action or defence, that is a jurisdiction that must be exercised sparingly and in clear and obvious cases and unless the matter is plain and obvious, a party to civil litigation is not to be deprived of his right to have his suit tried by a proper trial. 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 or striking out a defence for not disclosing a reasonable cause of action defence for being otherwise an abuse of the process of the court.

11. The power to strike out pleadings must be sparingly exercised and it can only be exercised in clearest of cases. If a pleading raises a triable issue even if at the end of the day, it may not succeed then the suit ought to go to trial. However, where the suit is without substance or groundless of fanciful and or is brought is instituted with some ulterior motive or for some collateral one or to gain some collateral advantage, which the law does not recognise as a legitimate use of the process, the court will not allow its process to be a forum for such ventures. To do this would amount to opening a front for parties to ventilate vexatious litigation which lack bona fides with the sole intention of causing the opposite party unnecessary anxiety, trouble and expense at the expense of deserving cases contrary to the spirit of the overriding objective which requires the court to allot appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

12. The grounds upon which the application was based were that the defence filed was scandalous, frivolous, vexatious and was otherwise an abuse of the process of the Court.

13. A pleading is scandalous if it states (i) matters which are indecent; or (ii) matters that are offensive; or (iii) matters made for the mere purpose of abusing or prejudicing the opposite party; or (iv) matters that are immaterial or unnecessary which contain imputation on the opposite party; or (v) matters that charge the opposite party with bad faith or misconduct against him or anyone else; or (vi) matters that contain degrading charges; or (vii) matters that are necessary but otherwise accompanied by unnecessary details. See **Blake vs. Albion Life Ass. Society (1876) LJQB 663; Marham vs. Werner, Beit & Company (1902) 18 TLR 763; Christie vs. Christie (1973) LR 8 Ch 499.**

14. However, the word "scandalous" for the purposes of striking out a pleading under Order 2 rule 15 of the Civil Procedure Rules is not limited to the indecent, the offensive and the improper and that denial of a well-known fact can also be rightly described as scandalous. See **J P Machira vs. Wangechi Mwangi and Nation Newspapers Civil Appeal No. 179 of 1997.**

15. But they may not be scandalous if the matter however scandalising is relevant and admissible in evidence in proof of the truth of the allegation in the plaint or defence so that when considering whether the matter is scandalous regard must be had to the nature of the action.

16. A matter is frivolous if (i) it has no substance; or (ii) it is fanciful; or (iii) where a party is trifling with the Court; or (iv) when to put up a defence would be wasting Court's time; or (v) when it is not capable of reasoned argument. See **Dawkins vs. Prince Edward of Save Weimber (1976) 1 QBD 499; Chaffers vs. Golds Mid (1894) 1 QBD 186.**

17. Again a pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble and expense. See **Bullen & Leake and Jacobs Precedents of Pleading (12th Edn.) at 145.**

18. A matter is said to be vexatious when (i) it has no foundation; or (ii) it has no chance of succeeding; or (iii) the defence (pleading) is brought merely for purposes of annoyance; or (iv) it is brought so that the party's pleading should have some fanciful advantage; or (v). where it can really lead to no possible good. See **Willis Vs. Earl Beauchamp (1886) 11 PD 59**.

19. Pleading tend to prejudice, embarrass or delay fair trial when (i) it is evasive; or (ii) obscuring or concealing the real question in issue between the parties in the case. It is embarrassing if (i) It is ambiguous and unintelligible; or (ii) it raises immaterial matter thereby enlarging issues, creating more trouble, delay and expense; or (iii) it is a pleading the party is not entitled to make use of; or (iv) where the defendant does not say how much of the claim he admits and how much he denies. See **Strokes vs. Grant (1878) AC**

345; Hardnbord vs. Monk (1876) 1 Ex. D. 367; Preston vs. Lamont (1876).

20. A pleading which tends to embarrass or delay fair trial is described as a pleading which is ambiguous or unintelligible or which states immaterial matters and raises irrelevant issues which may involve expenses, trouble and delay and that which contains unnecessary or irrelevant allegations which will prejudice the fair trial of the action and lastly a pleading which is abuse of the process of the court really means in brief a pleading which is a misuse of the Court machinery or process. See **Trust Bank Limited vs. Hemanshu Siryakat Amin & Company Limited & Another Nairobi HCCC No. 984 of 1999.**

21. A pleading is an abuse of the process where it is frivolous or vexatious or both.

22. Where the pleading as it stands is not really and seriously embarrassing it is wiser to leave it un-amended or to apply for further particulars. See **Kemsley vs. Foot (1952) AC 325.**

23. In the **Raghbir Singh Chatte vs. National Bank of Kenya Limited Civil Appeal No. 50 of 1996**, the Court of Appeal held:

"If a general traverse…were held to be sufficient and effectual, that would render meaningless provisions such as Order VI Rule 9(3) of the Civil Procedure Rules and even the decisions of this Court such as *Magunga General Stores vs. Pepco Distributors Limited [1988-92] 2 KAR 89.* The position of the law…is that a mere denial or general traverse in defence is not sufficient and a defendant who does not specifically plead to all the issues raised in a plaint risks the probability of his defence being struck out or being held to Constitute an admission of the issues raised in the Plaint."

24. In **Magunga General Stores vs. Pepco Distributors Ltd. [1987] KLR 150; [1988-92] 2 KAR 89 [1986-1989] EA 334** the same Court held:

"Mere denial is not a sufficient defence in a claim for breach of contract for goods sold and delivered and cheques issued in settlement thereof. There must be a reason why the defendant does not owe the money. Either there was no contract or it was not carried out or failed. It could also be that payment had been made and could be proved. It is not sufficient therefore to simply deny liability without some reason given."

25. However, in **The Co-Operative Merchant Bank Ltd. vs. George Fredrick Wekesa Civil Appeal No. 54 of 1999** the Court of Appeal stated as follows:

"The power of the Court to strike out a pleading under Order 6 rule 13(1)(b)(c) and (d) is discretionary and an appellate Court will not interfere with the exercise of the power unless it is clear that there was either an error on principle or that the trial Judge was plainly wrong....Striking out a pleading is a draconian act, which may only be resorted to, in plain cases....Whether or not a case is plain is a matter of fact....Since oral evidence would be necessary to disprove what either of the parties says, the appellant's defence cannot be said to present a plain case of a frivolous, scandalous, vexatious defence, or one likely to prejudice, embarrass or delay the expeditious disposal of the respondent's action or which is otherwise an abuse of the process of the court. The defence raises a fundamental issue, namely, whether there was any misrepresentation as alleged by the respondent, a question which, cannot possibly be answered at the stage of an application for striking out; nor will it be competent for the court of appeal to try to answer it as its jurisdiction only extends to identifying whether, if any, there are issues which are fit to go for trial. The court has no doubt whatsoever, that the above is a fundamental triable issue....A Court may only strike out pleadings where they disclose no semblance of a cause of action or defence and are incurable by amendment. The appellant's defence cannot be said to fall into that category and had the trial Judge considered fully all the matters alluded to, he would not have come to the same conclusion as he did."

26. In **Yaya Towers Limited vs. Trade Bank Limited (In Liquidation) Civil Appeal No. 35 of 2000** the same court expressed itself thus:

"A plaintiff is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant can demonstrate shortly and conclusively that the plaintiff's claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court, it must be allowed to proceed to trial....It cannot be doubted that the Court has inherent jurisdiction to dismiss that, which is an abuse of the process of the Court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told

in the pleadings was highly improbable, and one, which was difficult to believe, could be proved....If the defendant assumes the heavy burden of demonstrating the claim is bound to fail, he will not be allowed to conduct a mini trial upon affidavits....It is not the length of arguments in the case but the inherent difficulty of the issues, which they have to address that, is decisive.... The issue has nothing to do with the complexity or difficulty of the case or that it requires a minute or protracted examination of the documents and facts of the case but whether the action is one which cannot succeed or is in some ways an abuse of the process of the Court or is unarguable....Where the plaintiff brings an action where the cause of action is based on a request made by the defendant he must allege and prove inter alia, both the act done and the request made for doing such an act. In the absence of any request shown to have been made by the defendant in the particulars delivered of such allegation, it would not be possible for the plaintiff to prove any request made by the defendant and without this the essential ingredient of the cause of action cannot be proved and the plaintiff is bound to fail....No suit should be summarily dismissed unless it appears so hopeless that it is plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment."

27. Section 10(1) of the ***Insurance (Motor Vehicle Third Party Risks) Act***, Cap 405, Laws of Kenya (the Act) provides as hereunder:

(1) If, after a policy of insurance has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of section 5 (being a liability covered by the terms of the policy) is obtained against any

person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.

28. The side note to that section is ***"Duty of insurer to satisfy judgments against persons insured".*** In **Bushell vs. Hammond [1904] 2 KB 563,** it was held that though it is true that the marginal notes do not form part of a statute, yet some help can be derived from the side note to show what the section is dealing with. From the side note it is clear that the section deals with the obligation by the insurer to satisfy judgements obtained against persons insured. What clearly comes out from the said provision it is clear that for an insurance company to be under a statutory obligation to satisfy a decree certain condition precedent must be satisfied. Firstly, before a judgement is obtained, there must have been a policy of insurance in effect. Secondly, the judgement must have been in respect of a liability required to be covered by a policy under paragraph (b) of section 5 (being a liability covered by the terms of the policy). **Thirdly, the judgement must have been obtained against a person insured by the policy**.

29. In this case, the appellant contended that the insured was **Joyinc Solutions Limited** and not the Defendants in the original suit who were **Philip Maina** and **Auto Industries Limited**. The Learned Trial Magistrate seemed not to have addressed this pertinent issue. She seems to have been persuaded by the fact that the Appellant was aware of the proceedings in the original suit and took no action to repudiate liability within the prescribed time. In my view, when the Appellant denied that it insured the said person against whom judgement was obtained, it became incumbent upon the Respondent to adduce evidence proving that the said vehicle was not only insured by the Appellant but that judgement was in fact obtained against a person insured by the policy. In this case there was no evidence that the Defendants were the Appellant's insureds. The fact that a statutory notice was given to the Appellant and the Appellant did not take action to repudiate liability within the prescribed time does not necessarily make the Appellant liable if in fact, it was not liable under the Act.

30. Section 10(4) of the Act provides as hereunder:

No sum shall be payable by an insurer under the foregoing provisions of this section if in an action commenced before, or within three months after, the commencement of the proceedings in which the judgment was given, he has obtained a declaration that, apart from any provision contained in the policy he is entitled to avoid it on the ground that it was obtained by the non-disclosure of a material fact, or by a representation of fact which was false in some material

particular, or, if he has avoided the policy on that ground, that he was entitled so to do apart from any provision contained in it:

Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not thereby become entitled to the benefit of this subsection as respects any judgment obtained in proceedings commenced before the commencement of that action, unless before or within fourteen days after the commencement of that action he has given notice thereof to the person who is the

plaintiff in the said proceedings specifying the non-disclosure or false representation on which he proposes to rely, and any person to whom notice of such action is so given shall be entitled, if he thinks fit, to be made a party thereto.

31. In my view, a declaratory suit by the insurer is to be filed against the insured with a notice to the claimant who may opt to be joined to those proceedings. Where it is alleged that the insured has not been sued, there is no obligation on the part of the insurer to file a declaratory suit.

32. It must now be clear that the defence filed by the Appellant disclosed at least one triable issue regarding the issue whether the person against who judgement in the primary suit was obtained was a person insured by the policy. Therefore, the decision striking out the Appellant's defence and entering judgement was improper.

33. Accordingly, this appeal succeeds, the ruling of the learned trial magistrate delivered on 11th September, 2018 in PMCC No. 67 of 2018 is hereby set aside and it is hereby directed that the case be heard on its merits.

34. In the circumstances of this case, there will be no order as to costs.

35. It is so ordered.

36. This Judgement has been delivered online with concurrence of counsel for the parties due to the prevailing restrictions occasioned by COVID 19 pandemic.

Read, signed and delivered online at Machakos this 22nd day of May, 2020

G V ODUNGA

JUDGE

Delivered in the presence of:

CA Geoffrey

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