



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VOI

CIVIL SUIT NO. 2 OF 2019

BRITAM GENERAL INSURANCE COMPANY LTD.....PLAINTIFF

VERSUS

1. RENTCO EAST AFRICA LIMITED

2. CO-OP BANK FLEET AFRICA LEASING LTD.....DEFENDANTS

AND

FESTUS MBITHI THOMAS & 36 OTHERS.....INTERESTED PARTIES

RULING

1. There are two applications pending for determination in this matter. The first one is the Plaintiff's **amended Notice of Motion** application dated **3rd March, 2021** (herein-after referred to as "the Plaintiff's application") and the second one is the Defendant's Notice of Motion application dated **9th December, 2020** (herein-after referred to as "the Defendant's application").

2. The Plaintiff's application is expressed to be brought under the provisions of **Section 1A** and **2A** both of the **Civil Procedure Act** and all other enabling provisions of the law and seeks for the following orders;

a) Spent;

b) Spent;

c) Spent;

d) That this Honourable Court be pleased to order stay of proceedings in respect of any filed claim arising from the passengers of the accident involving the Defendant's Motor Vehicle Registration No.GKB 904T Isuzu FT which occurred on the 21st day February, 2019, particularly claims filed in Voi Magistrate's Court being; CMCC Nos.81, 82,83,84,85,86,87,88,89,90,91,92,93,94,95,96,97,98,99,100,101,102,103,104,105,106,107,108,109,110,111,112,113,114,115,116,117,118,119,120,121,122 & 123 all of 2019 pending hearing and determination of this suit filed against the Defendants herein;

e) That the costs of this application be provided for.

3. The application is supported by grounds on its face and the **affidavit** of its Legal Manager, **Caroline Kimeto** sworn on **3rd March, 2020**. The Applicant's case is that, it is the insurer of the Defendants' jointly owned **Motor Vehicle Registration No.GKB 904T Isuzu FT** which was involved in a road traffic accident on **21st February, 2019** leading to over thirty six (36) claims against the Defendants/Respondents. However, the Applicant avers that the Defendants and/or their authorized driver breached the fundamental conditions of the Insurance Policy by carrying passengers using the load section of the Motor Vehicle at the time of the accident when the said Motor Vehicle was not insured for the purpose of carrying passengers. The Applicant avers that it has been exposed to risk of liability potentially arising from the claims made against the Defendants and it wishes to avoid the same since the policy did not cover passengers in excess of the designated sitting areas. That, it is therefore it is paramount that the primary suits filed against the Defendants be stayed pending the hearing and determination of this suit for the purpose of establishing the Applicants' liability in those claims.

4. The Defendants opposed the application by **Replying Affidavits**. The interested parties opposed the application through the **Replying Affidavit** sworn by their advocate, **Shem Kabongo** on **31st May, 2021**. The learned counsel termed the application as frivolous and

vexatious for among other reasons that after the Interested Parties had filed the suits against the Defendants, statutory Notice was also served to Insurance Company, the Plaintiff herein. However, the Defendants and/or their insurer failed to enter appearance and default Judgments were entered against the Defendants. Further, that some of the matter in the lower court have been heard and Judgment entered. The learned counsel added that the Plaintiff/Applicant is not yet a party to the suits before the lower court and will not be affected by the decisions to be achieved therein instantly. Therefore, the Applicant can ventilate its interests by fast tracking the hearing of this suit without fettering the Interested Parties' rights for fair hearing as guaranteed under **Article 50** of the **Constitution**. In that connection, the counsel was of the view that stay of proceedings would prejudice the Plaintiffs in the lower court cases which is against the interest of justice and contrary to the overriding objective of the court. He therefore sought the court to dismiss the application.

5. On the other hand, the 2nd Defendant/Respondent opposed the application by filing a **Replying Affidavit** sworn by its Business Manager **Jacinta Wambua** on **9th December, 2020**. In that affidavit it is averred that the Co-operative Bank of Kenya Ltd is a shareholder in the 2nd Respondent and the two are two different entities. That although the Plaintiff has previously offered insurance services to both entities, the policy in question in this particular case involves a Motor Vehicle in respect of which the insured parties are the 1st Respondent and the Bank but not the 2nd Respondent. That notwithstanding, the policy does not state the insured Motor Vehicle is **Registration No.GKB 904T** and it would be so uncertain to believe the correct Motor Vehicle by the policy is **GKB 904T**. It is further averred that neither the 2nd Respondent nor the Bank are parties to the 36 primary suits. On that basis the Applicant has failed to establish a *prima facie* case with respect to the subject Insurance Policy. The second Respondent has thus sought the court not to grant the orders of stay of proceeding based on uncertain policy.

6. Simultaneous with the **Replying Affidavit**, the 2nd Respondent filed a **Notice of Motion** application dated **9th December, 2020** brought under the provisions of **Sections 1A, 1B & 3A** all of the **Civil Procedure Act** and **Order 1 Rules, 10(2), 14 & 25, Order 2 Rule 15(1)** and **Order 51 Rule 1** all of the **Civil Procedure Rules**. The application seeks for two prayers namely;

*a) This Honourable Court be pleased to strike out the suit as against **Rentco East Africa Leasing Limited**, the 1st Defendant herein from this suit;*

b) The Respondent do bear the costs of the application and of the suit.

7. The application is premised on among other grounds that the 1st Defendant has neither beneficial nor possessory interests in the subject **Motor Vehicle Registration No.GKB904T** and therefore the Plaintiff discloses no reasonable cause of action as against the 1st Defendant since the joinder of the 1st Defendant is an abuse of the court process and will prejudice the fair hearing of the matter.

8. The application is further supported by the **affidavit** of **Jacinta Wambua**, the 2nd Defendant's Business Manager. She avers therein that the subject **Motor Vehicle Registration No.GKB904T** is registered in the names of 2nd Respondent and Co-operative Bank Limited and thus the 1st Defendant is wrongly enjoined. According to her, the Respondent will not be prejudiced if the suit against the 1st Defendant is struck out.

9. Nonetheless, the Plaintiff opposed the application through its **Grounds of Opposition** dated **18th January, 2021** and filed on **19th January, 2021** which can be summarized as follows; that the 1st and 2nd Defendants have been jointly sued as beneficial policy holders of **Motor Vehicle Registration No.GKB904T**, and they are both necessary parties to the present suit. Therefore, the application is premature and is only meant to delay the litigation.

10. Both applications were canvassed by way of written submissions and the record shows that the submissions were filed as follows:

The Plaintiff's Submissions

11. For the Plaintiff, it is submitted that the striking out of pleadings or a party from a suit as provided for under **Order 2 Rule 15** of the **Civil Procedure Rules** should only be invoked where the pleadings do not disclose any reasonable cause of action. Since it is not disputed that the policy was issued jointly to the Respondents, it is upon the 1st Respondent to enter appearance and state its case by filing the appropriate defence. On the same note, the question as to whether the 1st Defendant has beneficial or possessory interests in the subject Motor Vehicle is a question for the court to deliberate on after considering the evidence of the parties and should be dismissed at this point. To support these submissions, the Plaintiff relied on a number of decided cases including the case of **Susan Rokih –vs- Joyce Kandie & 6 Others [2018]eKLR** and **Crescent Construction Co. Ltd –vs- Delphis Bank Ltd [2007]eKLR**.

The 2nd Defendant's submissions

12. In its submissions, the 2nd Defendant reiterated the averments in its pleadings especially that the Plaintiff bore the burden to establish a proper case against the Defendants especially the 1st Defendant who is neither a beneficiary nor the owner of the subject Motor Vehicle. It is also reiterated that the Plaintiff has not established a reasonable cause of action as against the 1st Defendant and thus the case against the 1st Defendant should be struck out. In support of these submissions, reliance was placed on the case of **D.T Dobie & Company (Kenya) Limited –vs- Joseph Mbaria Muchina & Another (1980)eKLR**.

Interested Parties' Submissions

13. On their part, the Interested Parties submitted on whether the Plaintiff has satisfied the conditions set for issuance of orders of stay of proceedings. And on this, the court was invited to consider the decision in the case of **Global Tours & Travels Ltd, Nairobi Winding-up Cause No.43 of 2000**, where the court observed that a court has to first consider the pros and cons of whether to grant or not grant the orders

of stay of proceedings and the guiding principles would be whether the Applicant has established a *prima-facie* case, if the application was filed expeditiously and if sufficient cause has been shown.

14. As regards a *prima-facie* case, it is submitted that under **Section 10(1) and (2) of the Insurance (Third Party Risks) Act**, an insurer cannot escape liability until it settles all the claims by third parties notwithstanding the fact that the insurer may be entitled to avoid the policy. In addition to that, the case of **Directline Assurance Co. Ltd-vs-Anderson Muindi & Peter Mbae Sebastian [2016]eKLR** and **Madison Insurance Co. Ltd –vs- Adrew Kariuki & Another [2018]eKLR**, where the court was of the view that staying the proceedings in the lower court would be fettering the rights of the Plaintiffs therein.

Analysis and Determination

15. I have carefully considered both the Plaintiff's application dated **3rd March, 2020** and the 2nd Defendant's application dated 9th December, **2020** together with the affidavits sworn in support and in rebuttal of the applications. I have also read through the submissions filed by the parties and the authorities relied thereon. In my view, there are only two main issues arising for determination which are:-

a) Whether the primary suits filed in the lower court with respect to road traffic accident involving Motor Vehicle Registration No.GKB 904T should be stayed pending the hearing and determination of the suit herein, and;

b) Whether the suit as against the 1st Defendant should be struck out.

16. On the first issue of whether the proceedings in the primary suits filed before the trial court should be stayed, this court observes that the seriousness of an order of stay of proceedings which is of grave and draconian nature that it fundamentally impinges on the right of a litigant to conduct his litigation and as well interfering with the right to access justice, right to be heard without delay and overall, right to fair trial.

17. Therefore, in my view, the test for stay of proceedings is high and stringent since every litigant has the right to conduct his litigation towards the trial on the basis of the substantive merits of his case. Generally, the order of stay of proceedings should not be imposed unless the proceedings, beyond all reasonable doubt ought not to be allowed to continue.

18. It therefore goes without saying that the court should zealously guard against the impediment of the right to fair hearing and the need for expeditious disposal of cases. Thus, the power to stay proceedings which is discretionary, should be exercised sparingly and only in exceptional cases where the proceedings are shown to be frivolous, vexatious, where they are manifestly groundless or lastly where it is clearly shown that there is no cause of action.

19. Applying the above test to the present case, it is a common ground that the Plaintiff has filed this suit seeking to avoid liability that may attach against the Defendant in the matters filed in the lower court for breach of the insurance policy conditions and warranties. Clearly then, the suit is of the nature of a declaratory suit in which the Plaintiffs in the primary suits have been enjoined as interested parties. The Plaintiff has averred that unless stay of proceedings in the primary suits is granted, it will be exposed to multiple claims in which it seeks to avoid liability. It proceeds to submit that those suits should be stayed until the issue of liability is first determined.

20. However, I am not persuaded that the Plaintiff will be exposed to any danger of loss if the stay is not granted. The only possible way the interested parties can enforce a decree against the Plaintiff herein is through declaratory suits and none is yet to be filed against the Plaintiff. It has also not been shown that the primary suits are improper or are incompetently before the court. In the premises, I find that no reasonable cause has been demonstrated to warrant stay of the proceedings by the Interested Parties.

21. In the circumstances, the Plaintiff should fast track the hearing of this case and seek the court to determine it expeditiously but not seeking to subject the determination of the suit by the Interested Parties to this suit. If the proceedings were stayed without any reasonable cause being shown, the same would be tantamount to impediment of the Interested Parties' right to fair hearing and against this court's overriding objectives of expeditious determination of the case and fair administration of justice.

22. The foregoing therefore leads to the ultimate conclusion that it would not be in the interest of justice to order for the stay of proceedings in the primary suits, and that prayer is equally denied.

23. On the second issue on whether the suit against the 1st Defendant should be struck out, this court has equally considered the provisions of **Order 2 Rule 15** of the **Civil Procedure Rules** which deals with striking out of pleadings and provides as follows:-

“15. (1) 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.”

24. Similarly, the Court of Appeal in the celebrated case of **D.T. Dobie and Company (Kenya) Ltd –vs- Joseph Mbaria Muchina &**

Another (1982) KLR 1, restated these principles to be considered in an application seeking to strike out a Pleint on grounds that it did not disclose a reasonable cause of action thus-

“We too would not express our opinion on certain aspects of the matter before us. In that judgment, the learned Judge quoted Dankwerts L.J in the case of Cail Zeiss Stiftung vs Ranjuer & Keeler Ltd and others (No.3) (1970) ChpD 506, where the Lord Justice said:-

“The power to strike out any pleading or any part of a pleading under this rule is not mandatory; but permissive and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending pleading.”

We may add that like Madan J.A, said, the power to strike out a pleading which ends in driving a party from the judgment seat should be used very sparingly and only in cases where the pleading is shown to be clearly untenable.”

25. The same court went on to interpret the provisions of **Order VI Rule 13 (1)** of the **repealed Civil Procedure Rules** which is the equivalent of the current **Order 2 Rule 15** of the **civil Procedure Rules** defined the term **“reasonable cause of action”** to mean **“an action with some chance of success when allegations in the plaint only are considered. A cause of action will not be considered reasonable if it does not state such facts as to support the claim prayer. ...”** .

26. The court went further to define what constitutes a cause of action and held that a cause of action referred to an act on the part of the Defendant which gave the Plaintiff a cause of complaint. In the same case, **Madan JA** (as he then was) expressed himself as follows:

“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 for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is usually fully informed so as to deal with the merits without discovery, without oral evidence tested by cross-examination in the ordinary way ... 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” (Emphasis added).

27. It can therefore be discerned from the above-cited authority that the court ought to exercise its discretion with utmost care when faced with an application such as the present one because needless to state, striking out a claim is a draconian action which may have the consequences of slamming the door of justice on the face of one party without according it an opportunity to be heard.

28. In expounding the rationale for the need to exercise great caution in determining applications seeking striking out of pleadings, the Court of Appeal in the case of **Crescent Construction Co Ltd –vs- Delphis Bank Limited, [2007]eKLR**, stated as follows:

“However, one thing remains clear, and that is that the power to strike out a pleading is a discretionary one. It is to be exercised with the greatest care and caution. This comes from the realization that the rules of natural justice require that the court must not drive away any litigant however weak his case may be from the seat of justice. This is a time-honoured legal principle. At the same time, it is unfair to drag a person to the seat of justice when the case purportedly brought against him is a non-starter.”

29. Guided by the above principles, I now turn to consider to the merits of the 2nd Defendant’s application seeking the case against the 1st Defendant to be struck out for failing to disclose reasonable cause of action. It is argued that the subject **Motor Vehicle Registration No.GKB 904T** is registered in the names of the 2nd Defendant and Co-operative Bank of Kenya Ltd while the 1st Defendant has neither ownership nor beneficiary interests in the said Motor Vehicle and is therefore wrongly enjoined in this case.

30. On the other hand, the Plaintiff averred that it has sued both Defendants as co-insured with respect to policy covering **Motor Vehicle Registration No.GKB 904T**. The said policy contract forms part of the Plaintiff’s documents. Having read through the said policy, it is evident that the respective insured are **Rentco East Africa Limited** (the 1st Defendant and Co-operative Bank of Kenya Ltd) while the Plaintiff on the other hand is the Insurer. The present case being a declaratory suit seeks to repudiate the said policy. I am persuaded to agree with the Plaintiff’s submissions that the 1st Defendant being a party to the same policy has the obligation to step on its boots to answer the averments in the Pleint.

31. Given the definition of the term **“reasonable cause of action”** in the **DT Dobie case (supra)** and considering that an insurer may be entitled to avoid liability pursuant to **Section 10(1) and (2)** of the **Insurance (Third Party Risks) Act**, the insured is entitled to a chance to answer to those allegation. Therefore, the 1st Defendant is directly connected to the instant suit by virtue of being an insured in the subject policy and it is at liberty to enter appearance and answer to the claim. In view of the foregoing I find no merit to the prayer seeking to strike out the suit against the 1st Defendant.

32. For the above reasons and finding, I believe enough has been said to demonstrate that I have come to the conclusion that the two application, to wit, the **Plaintiff’s application dated 3rd March, 2020** and the **2nd Defendant’s application dated 9th December, 2020** are void of merit. I proceed to dismiss the same with no orders as to costs.

It is hereby so ordered.

SIGNED, DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 28TH DAY OF JANUARY 2022.

D. CHEPKWONY

JUDGE

IN THE PRESENCE OF:

NO APPEARANCE FOR PLAINTIFF AND DEFENDANTS

M/S OWITI COUNSEL FOR INTERESTED PARTIES

COURT ASSISTANT - GITONGA