Sanlam General Insurance Limited v Royal Hisham Kenya Limited; Diamond Trust Bank Kenya Limited (Third party) (Commercial Case EOO6 of 2021) [2022] KEHC 14334 (KLR) (25 October 2022) (Ruling)

Neutral citation: [2022] KEHC 14334 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

COMMERCIAL CASE EOO6 OF 2021

OA SEWE, J

OCTOBER 25, 2022

BETWEEN

SANLAM GENERAL INSURANCE LIMITED ..... PLAINTIFF

AND

ROYAL HISHAM KENYA LIMITED ..... DEFENDANT

AND

DIAMOND TRUST BANK KENYA LIMITED ..... THIRD PARTY

RULING

1. The notice of motion dated May 5, 2021 was filed by the defendant, Royal Hisham Kenya Limited. It is expressed to have been filed under order 2 rule 15 and order 7 rule 1 of the *Civil Procedure Rules*. It seeks the following orders:

   (a) That the plaint be struck out for contravening section 10(4) of the *Insurance (Motor Vehicles Third Party Risks) Act*, chapter 405 of the Laws of Kenya;

   (b) That the plaint be struck out for being *res judicata* Mombasa Chief Magistrate's civil caseNo. 1227 of 2018: Sanlam General Insurance Limited v Royal Hisham Kenya Limited.

   (c) That the costs of the application and the entire suit be borne by the plaintiff,

2. The application was premised on the grounds that the plaintiff has no reasonable cause of action in this suit; that the plaint may prejudice, embarrass or delay the fair trial of the action; the plaint is otherwise an abuse of the process of the court; and that the cause of action is time-barred. It was further the contention of the defendant that the matter is *res judicata* Mombasa CMCC No 1227 of 2018, and therefore ought to be struck out without further ado.

3. The aforementioned grounds were explicated in the supporting affidavit sworn by Husna Rashid Al-Naamani, the defendant's Chief Operations Officer. It was the contention of the defendant, at paragraph 3 of the supporting affidavit that, since the suit is premised on section 10(1) of the *Insurance (Motor Vehicles Third Party Risks) Act*, a suit for repudiation and/or avoidance ought to have been instituted within 3 months of the commencement of the lower court proceedings in which judgment was given. Thus, it was the contention of the defendant that this action is time-barred. And, at paragraphs 12 to 14, the defendant raised the assertion that the suit is *res judicata* Mombasa CMCC No 1227 of 2018; which was ultimately struck out on appeal for having been wrongly filed by way of originating summons.

4. The application was resisted by the plaintiff and a replying affidavit to that effect filed herein, sworn by the plaintiff's Claims Manager, Janette Awidhi. She denied that the current suit has been brought under section 10 of the *Insurance (Motor Vehicles Third Party Risks) Act* for repudiation of the subject policy, No 010/2533902/2017/11. She explained that, to the contrary, what the plaintiff seeks in this suit is interpretation of the insurance contract entered into between the parties, as there are no third parties involved.

5. In response to the averment that the suit is *res judicata*, Ms Awidhi averred that Mombasa CMCC No 1227 of 2018 was a distinct suit from the current one, in that it was brought under the provisions of the *Insurance (Motor Vehicles Third Party Risks) Act* and not the *Law of Contract Act*, chapter 23 of the Laws of Kenya. She added that, in any event the plaintiff was granted leave in Mombasa HCCA No 32 of 2019: Diamond Trust Bank Kenya Limited v Sanlam General Insurance Limited and Royal Hisham Kenya Limited to file a fresh suit. A copy of the judgment was annexed to the replying affidavit and marked annexure JA-1. Ms Awidhi added that, since cases based on contract have a limitation period of 6 years which has not lapsed, the plaintiff's suit is properly before the court.

6. On behalf of the third party, Diamond Trust Bank Kenya Limited, a replying affidavit was filed herein on March 23, 2022 sworn by Mr Joram Kilwanda. He essentially supported the defendant's application and denied that the suit is about interpretation of the insurance contract. Accordingly to him, the suit is nothing but a crafty attempt by the plaintiff to circumvent the provisions of section 10 of the *Insurance (Motor Vehicles Third Party Risks) Act*. And, to demonstrate that the instant suit is *res judicata,* Mr Kilwanda annexed a copy of the originating summons filed in Mombasa CMCC No 1227 of 2018 as Annexure "JK1" to his affidavit for the court's perusal.

7. Pursuant to the directions given herein on March 23, 2022, the instant application was canvassed by way of written submissions. In his written submissions filed herein on March 31, 2022, Mr Ambwere for the defendant proposed the following two issues for determination:

   (a) Whether the plaintiff's suit should be dismissed;

   (b) Whether this is a matter of contract and not repudiation

8. Counsel relied on section 10(1) and (4) of the *Insurance (Motor Vehicles Third Party Risks) Act*, *Britam General Insurance Co Ltd v Josephat Ondiek* [2018] eKLR as well as Mombasa High Court civil suit No 73 of 2018: *Madison Insurance Co Ltd v Caroline Wanjiru Njoroge* to buttress his arguments.

9. On whether this is a matter of contract and not repudiation, Mr Ambwere took the stance that the suit has been cleverly pleaded by the plaintiff with a view of avoiding its obligation towards the defendant for purposes of section 10 of the *Insurance (Motor Vehicles Third Party Risks) Act*. He accordingly posited that, if subjected to the strictures of that provision it would be clear that suit is untenable. Counsel consequently prayed that the defendant's application be allowed; and that the suit be dismissed with costs.

10. On his part, Mr Jengo for the plaintiff took issue with the fact that the defendant brought an omnibus sort of application that did not distinguish between order 2 rule 15(1)(a) of the *Civil Procedure Rules* and the rest of the provisions of that rule. He relied on *D.T Dobie & Company (K) Ltd v Joseph Mbaria Muchina & another* and urged the court to find that the application is, for that reason, incompetent. Mr Jengo also relied on the said authority for the proposition 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.

11. Mr Jengo pointed out that there is a valid dispute over the type of contract that exists between the plaintiff and the defendant and what the various clauses mean. On the authority of *Euromec International Limited v Shandong Taikai Power Engineering Co Ltd* [2021] KEHC 93 (KLR), he urged the court to find that the plaintiff has approached the court seeking interpretation of the subject contract; and that the suit has nothing to do with section 10(4) of the *Insurance (Motor Vehicles Third Party Risks) Act* or repudiation of the policy.

12. With regard to the doctrine of *res judicata*, counsel submitted that, for the doctrine to apply, the following four elements must be demonstrated, which in his view are lacking:

    (a) The former judgment or order must be final;

    (b) the judgment or order must be on merits;

    (c) it must have been rendered by a court having jurisdiction over the subject matter and the parties; and

    (d) there must be between the first and the second action identify of parties, of subject matter and cause of action.

13. In support of the foregoing, Mr Jengo relied on *Independent Electoral & Boundaries Commission v Maina Kiai & 5 others* [2017] eKLR and section 7 of the *Civil Procedure Act* and pointed out that Mombasa CMCC No 1227 of 2018 was a case for repudiation of the policy as opposed to interpretation of the contract; and that, in any case, it was not decided on its merit but on a technicality. He further pointed out that, even assuming that the issues are the same, the plaintiff was granted leave to file a new case *vide* HCCA No 32 of 2019: *Diamond Trust Bank (K) Ltd v Sanlam General Insurance Limited & another*; and that to rule otherwise would be tantamount to sitting on appeal in respect of the decision of a judge of concurrent jurisdiction. Thus, Mr Jengo urged the court to dismiss the application dated May 5, 2021 with costs.

14. I have given careful consideration to the application, the averments set out in the affidavits filed herein in respect of that application, as well as the written submissions filed by learned counsel. The defendant's application impugns the plaint dated January 14, 2021 on three prongs: that the entire suit discloses no reasonable cause of action; may prejudice, embarrass or delay the determination of this dispute; and therefore amounts to an abuse of the process of the court for purposes of order 2 rule 15, *Civil Procedure Rules* as the plaintiff is merely out to repudiate a policy that it is under obligation to honour under section 10 of the *Insurance (Motor Vehicles Third Party Risks) Act*. The second line of attack was that in any event the suit is time-barred for purposes of repudiation. The third angle taken by the defendant is that the suit is res judicata.

15. Accordingly, the issues for determination in the instant application are as hereunder:

    (a) Whether the suit should be struck out for being *res judicata* to Mombasa Chief Magistrate Case civil suit No 1227 of 2018 Sanlam General Insurance Limited v Royal Hisham Kenya Limited; and if not,

(b) Whether the plaint should be struck out for contravening section 10(4) of the *Insurance (Motor Vehicle Third Party Risk) Act*.

(c) Whether the suit herein ought to be struck out under order 2 rule 15 of the *Civil Procedure Rules* on the grounds that it raises no reasonable cause of action, is an abuse of the court process and is only intended to prejudice, embarrass or delay the fair trial of the action.

[a] On Res Judicata:

16. In respect of the doctrine of *res judicata* the Court of Appeal had the following to say in *Independent Electoral & Boundaries Commission v Maina Kiai & 5 others* [2017] eKLR (hereinafter "the Maina Kiai Cas"):

> ...res judicata is a matter properly to be addressed*in limine as it does possess jurisdictional consequence because it constitutes a statutory peremptory preclusion of a certain category of suits. That much is clear from section 7 of the *Civil Procedure Act*, 2010..."

17. Now, section 7 of the *Civil Procedure Act*, provides that:

> No court shall try any suit or issue in which the matter in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title...and has been heard and finally decided by such court."

18. Needless to mention therefore that res judicata is as applicable to main suits as it is to interlocutory applications. Hence, in *Uhuru Highway Development Ltd v Central Bank of Kenya & 2 others*) civil appeal No 36 of 1996), the Court of Appeal held that:

> There is not one case cited to show that an application in a suit once decided by courts of competent jurisdiction can be filed once again for rehearing. This shows only one intention on the part of the legislature in India and our Civil Procedure Act. That is to say, there must be an end to applications of a similar nature; that is to say further, wider principles of *res judicata* apply to applications within the suit. If that was not the intention, we can imagine that the courts could and would be inundated by new applications filed after the original one was dismissed. There must be an end to interlocutory applications as much as there ought to be an end to litigation..."

19. The question to pose, therefore, is whether in the circumstances hereof it can be said that the instant application is *res judicata*. In the *Maina Kiai Case*, it was held that:

Thus, for the bar of *res judicata* to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;

a. The suit or issue was directly and substantially in issue in the former suit.

b. That former suit was between the same parties or parties under whom they or any of them claim.

c. Those parties were litigating under the same title.

d. The issue was heard and finally determined in the former suit.

e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised."

20. With the foregoing in mind, I have perused the originating summons dated June 6, 2018 (annexed to the third party's replying affidavit as annexure JK1). It confirms that the lower court suit, namely, Mombasa CMCC No 1227 of 2018 was between the same parties as the current suit; and that it was brought under section 10(4) of the *Insurance (Motor Vehicles Third Party Risks) Act*. The plaintiff thereby sought a declaration that it was entitled to avoid policy No 010/080/1/253902/17/11 in respect of motor vehicle registration No KBK 692E on the ground that it was obtained by non-disclosure of a material fact that the motor vehicle was being used for hire and reward by entities and persons other than the defendant.

21. The instant suit is in respect of motor vehicles No KCF 645S, KCF 647S and KCF 648S and policy No 010/080/1/253902/17/11 as well as policy No 010/080/1/2533902/2017/11. And, by way of prayers, the plaintiff seeks:

    (a) A declaration that the policy of insurance issued to the defendant under the insurance agreement by the plaintiff was a class "B" motor commercial cover, covering own goods, commercial general cartage, and institutional buses;

    (b) A declaration that policy No. 010/080/1/2533902/2017/11 issued by the plaintiff to the defendant was not a class "A" public service hence did not provide cover for hire and reward, hence the plaintiff is not bound to compensate hirers of the motor vehicle in case of an accident.

    (c) Costs.

22. Thus, although the parties are the same, the subject matter cannot be said to be the same; for which reason the defendant and the interested party endeavoured to persuade the court that the plaintiff craftily couched his pleadings with repudiation in mind so as to escape paying compensation. I note however that the plaintiff vehemently denied those allegations; such that, going by what is pleaded, as opposed to the defendant's and third party's perception of the plaintiff's case, I am unable to say that the cause of action is the same.

23. In any event, the parties are all in agreement that the lower court matter was never heard and determined on its merit but was struck out on appeal on a technicality. In this regard, I note that although what was annexed to the plaintiff's replying affidavit and marked annexure JA-1 is not a judgment but ruling of the appellate court. Accordingly, I have taken the liberty to peruse the judgment dated May 8, 2020 as reported in the Kenya Law Reports; namely *Diamond Trust Bank Kenya Limited v Sanlam General Insurance Limited & another* [2020] eKLR and confirmed that the lower court suit was indeed struck out on technicalities. In particular, the appellate court (Hon P.J Otieno, J) held that:

> 18. This court is also satisfied the claims under section 10 (4) of the Insurance (Motor Vehicle Third Party Risks Act) cap 405 Laws of Kenya are not contemplated under order 37 rule 1 to be initiated and prosecuted by way of an originating summons. Therefore, the originating summons as filed falls outside the scope and tenure of the provisions of order 37 and bringing of the aforementioned matter by way of originating summons was improper, irregular and fatally defective. I find the suit was only suited to have been commenced in accordance to order 3 rule 1 of the Civil Procedure Rules, by way of a plaint.
>
> 19. I therefore find that the court was not properly moved nor clothed with the requisite jurisdiction to hear the dispute placed before it. Furthermore, the said originating summons having been incompetently presented before the

court, the trial court had no power to consider converting it into a plaint as contemplated under order 37 rule 19."

24. Consequently, this suit cannot be said to be *res judicata*. In any event, counsel for both the defendant and the third party are fully aware that the appellate court made it clear that the plaintiff had the liberty to file another competent suit to agitate its claim; which order has not been reviewed or set aside or upset on appeal. The last paragraph of the aforementioned judgment reads:

The upshot of the foregoing is that I allow the appellant's appeal and set aside the ruling delivered on the February 4, 2019 and the appellant's application dated October 19, 2018 is allowed. The 1st respondent remains at liberty to agitate its claim through an ordinary civil suit. I award the costs to the appellant.

[b] As to whether the suit is for repudiation of the insurance policy:

25. Section 10(4) of the *Insurance (Motor Vehicles Third Party Risks) Act* provides that:

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.

26. As has been pointed out hereinabove, the parties are not in agreement as to the exact nature of the dispute in this suit. While the defendants urged the court to find that the plaintiff has craftily pleaded a contractual dispute while the true intention is to seek repudiation, the plaintiff has denied that it has come to court for repudiation under section 10 of the *Insurance (Motor Vehicles Third Party Risks) Act*. The suit is the plaintiff's and therefore there is no basis for pinning it down to the strictures of section 10 of the *Insurance (Motor Vehicles Third Party Risks) Act* when it has not explicitly disclosed such a cause of action in its plaint. Accordingly, the arguments pitched by the defendant and third party that the suit ought to have been filed within 3 months; or that the defendant ought to have been served with a fourteen (14) days' notice for the commencement of the suit herein, as required under section 10(4) of the *Insurance (Motor Vehicles Third Party Risks) Act* are untenable and are for dismissal.

[c] On whether the suit herein ought to be struck out under Order 2 Rule 15 of the Civil Procedure Rules

27. It is notable that the defendant brought its application under order 2 rule 15 of the *Civil Procedure Rules, 2010*; and although it did not specify which subrules it intended to rely on, it is clear that the provisions referred to in the application fall under rule 15 (1), (a), (c) and (d) which provide: -

(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) .....

(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,

28. A holistic reading of order 2 rule 15 of the *Civil Procedure Rules* shows that an application for striking out of pleadings brought under order 2 rule 15 (1) (a), ought not to be based on empirical evidence, for order 2, rule 15 (2) states that:

(2) No evidence shall be admissible on an application under subrule (1)(a) but the application shall state concisely the grounds on which it is made.

29. In the same vein, the Court of Appeal, in the case of *Olympic Escort International Co Ltd & 2 others v Parminder Singh Sandhu & another* [2009] eKLR, held that: -

> ..._We think for our part that it was inappropriate to combine the two prayers, one of which requires evidence before a decision is made and one that does not. There was affidavit evidence on record and it was in fact considered by the learned judge. It matters not therefore that the applicant had stated that the affidavits should not be considered.As the prayer sought under order 6 r 13 (1) (a) was in contravention of sub-rule (2) of that order, it was not for consideration and we would have similarly struck out the application on that score..."

30. It is my considered view therefore that it was inappropriate for the defendant to include other prayers together with a prayer under order 2 rule 15(1)(a) of the *Civil Procedure Rules*, in respect of which no evidence is envisaged by dint of rule 15(2) of the *Civil Procedure Rules*. This provision is couched in peremptory terms and therefore is not the sort that can be cured by article 159 (2) (d) of the *Constitution*.

31. Further to the foregoing, it is now settled that striking out a pleading, being such a draconian measure that has the effect of sending a party away from the seat of justice, ought to be used sparingly. Accordingly, in The *Co-Operative Merchant Bank Ltd v George Fredrick Wekesa* civil appeal No 54 of 1999 the Court of Appeal held as follows: -

> ...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..."

32. Similarly, in *Yaya Towers Limited v Trade Bank Limited (In Liquidation)* [2000] eKLR, it was held: -

> ...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. In *Lawrence v Lord Norreys* (1890) 15 App Cas 210 at 219, Lord Herschell said: -
>
> > "It cannot be doubted that the court has an inherent jurisdiction to dismiss an action which is an abuse of the process of the court. It is a jurisdiction which ought to be sparingly exercised, and only in very exceptional cases. I do not think its exercise would be justified merely because the story told in the pleadings was highly improbable, and one which it was difficult to believe could be proved..."

33. The same thoughts were expressed in *D.T Dobie* thus:

> > 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 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 not usually fully informed so as to deal with the merits without discovery, without oral discovery tested by cross-examination in the ordinary way."

34. It is in the light of the foregoing that I find no merit in the defendant's application dated May 5, 2021. The same is hereby dismissed with an order that the costs thereof be in the cause.

It is so ordered.

DATED SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 25TH DAY OF OCTOBER 2022

OLGA SEWE

JUDGE