



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 79 OF 2017

ROSEMARY WANJIRU KUNGU.....PLAINTIFF/APPLICANT

-VERSUS-

PETER WILLIAM KINYANJUI.....DEFENDANT

RULING

1. In the Notice of Motion dated 11th November, 2019 *Rosemary Wanjiru Kungu*, the plaintiff/applicant herein, sought orders that the defendant's statement of defence dated 5th January, 2018 be struck out and that judgment be entered in her favour as prayed in the plaint.
2. The Motion is supported by the grounds laid out on its body and the facts deponed in the applicant's affidavit.
3. The defendant did not file any documents to oppose the Motion and similarly did not participate at the hearing of the Motion despite evidence showing that he was served with a copy thereof.
4. The applicant put in written submissions in respect to the application.
5. I have considered the grounds laid out on the body of the Motion, the facts deponed in the affidavit supporting the Motion and the submissions filed on behalf of the applicant.
6. A brief background of the matter as narrated to this court is that the applicant instituted a civil suit at the Chief Magistrate's Courts-Milimani titled **Civil Suit No. 145 of 2010 (Rosemary Wanjiru Kungu v Elijah Macharia Githinji & Autoplus Used Parts Trading Company)** in which the applicant sought for an award of damages in respect to personal injuries sustained as a result of an accident. An interlocutory judgment was entered against the defendants in that instance and the matter proceeded for formal proof, with the trial court finally entering judgment in favour of the applicant on 2nd July, 2014 in the sum of Kshs.15,042,157.32 together with costs of the suit and interest.
7. Thereafter, the applicant instituted a second suit namely **Chief Magistrate's Civil Suit No. 195 of 2016 (Rosemary Wanjiru Kungu v Directline Assurance Company Limited ("the insurance company"))** seeking a declaratory judgment against the defendant in that suit on the basis of the aforementioned judgment.
8. The applicant stated that the second suit was compromised by way of a consent in which the insurance company agreed to pay the applicant the statutory sum of Kshs.3,000,000/ on behalf of its insured.
9. The applicant is now seeking payment of the decretal balance from the defendant herein in the current suit, with the applicant claiming that the defendant was at all material times the registered owner of motor vehicle registration number KAW 625U ("the subject motor vehicle") insured by the insurance company vide Policy Number 0007393.
10. It is noted that the Motion concerns itself with the twin issues on the striking out of the defendant's statement of defence and entry of judgment in favour of the applicant.
11. It was the applicant's contention that the defendant's statement of defence meets the threshold set out under **Order 2, Rule 15(1)** of the **Civil Procedure Rules, 2010** which provides inter alia 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.”

12. It is the applicant’s contention that the statement of defence is a sham and does not contain any triable issues but raises mere denials and is intended to frustrate the applicant and delay if not deny her the fruits of her judgment: The applicant cited the case of **Vivo Energy Ltd v George Murunji [2014] eKLR** in which the court in striking out a statement of defence held *inter alia* that if the suit was allowed to proceed for hearing, the same would only serve the purpose of prolonging the plaintiff’s realization of the fruits of his judgment.

13. The applicant is of the view that since judgment was entered against the defendant by virtue of being the actual/beneficial owner of the subject motor vehicle and by virtue of the insurance relationship between himself and the insurance company, it goes without saying that he is obligated to pay the balance of the decretal amount in line with the provisions of **Section 5 of the Insurance (Motor Vehicles Third Party Risks) Act Cap. 405 Laws of Kenya** which stipulates the following:

“In order to comply with the requirements of section 4, the policy of insurance must be a policy which—

(b) insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of, or bodily injury to, any person caused by or arising out of the use of the vehicle on a road:

Provided that a policy in terms of this section shall not be required to cover—

(iv) liability of any sum in excess of three million shillings, arising out of a claim by one person.”

14. Upon perusal of the record, it is noted that it is not in dispute that the present suit arose out of Civil Suit No. 145 of 2010 lodged by the applicant before the lower court and in which judgment was eventually entered in favour of the applicant in the manner set out hereinabove.

15. It is also not disputed that the applicant and the insurance company being at all material times the insurer of the subject motor vehicle entered into a consent where the insurer agreed to pay the statutory sum of Kshs.3,000,000/.

16. A glimpse of the defendant’s statement of defence will reveal that though the Defendant denied having knowledge of the accident in question and the resulting liability on his part, the defendant admitted the existence of the insurance policy number 0007393 in respect of the subject motor vehicle.

17. There is equally nothing from the statement of defence to indicate a denial of ownership of the subject motor vehicle by the defendant. In that respect, I also looked at a copy of the sale agreement dated 28th November, 2006 attached to the applicant’s documents indicating that the said agreement was entered into between the defendant as the purchaser and Autoplus Used Parts Trading Company who was the 2nd defendant in Civil Suit No. 145 of 2010.

18. In view of the foregoing facts, it is apparent to me that the suit now before this court is purely declaratory. In the premises, I am convinced that the statement of defence filed by the defendant does not raise any triable issues which would necessitate a trial.

19. Going by the circumstances before me, I take the view that the defendant has no credible defence to offer in the presence of a lawful judgment which has not been set aside, thereby making the statement of defence on record frivolous and vexatious. I concur with the applicant’s sentiments that to allow the suit to go to full trial would only further prejudice, frustrate and delay the applicant’s efforts at realizing the fruits of her judgment.

20. I am persuaded that the only reasonable step for this court is to grant the prayers being sought by the applicant.

21. For the foregoing reasons, the Motion is granted as prayed, consequently,

a) The defendant’s statement of defence dated 5th January, 2018 is hereby struck out and judgment is hereby entered in favour of the plaintiff/applicant in accordance with b) and c) hereinbelow.

b) A declaration be and is hereby issued that the defendant shall pay the sum of Kshs.12,042,157.32 being the unpaid balance of the decretal amount arising from the judgment entered in Civil Suit No. 145 of 2010 (Rosemary Wanjiru Kungu v Elijah Macharia Githinji & Autoplus Used Parts Trading Company) to the plaintiff.

c) The plaintiff/applicant shall have costs of the suit and interest thereon at court rates from the date of judgment until payment in full.

d) The applicant shall also have costs of the Motion to be borne by the defendant.

Dated, signed and delivered at Nairobi this 28th day of February, 2020.

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J.K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff/Applicant

.....for the Defendant/Respondent