



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 408 OF 2014

GRACE NJOKI GAKURU and PRISCILLA WANGUI RITHO

(Suing as personal representative of the estate of

FRANCIS RITHO MUGO (Deceased).....PLAINTIFF/APPLICANTS

VERSUS

CORPORATE INSURANCE COMPANY LTD...DEFENDANT/RESPONDENT

TITLE BY WAY OF COUNTERCLAIM

CORPORATE INSURANCE COMPANY LIMITED.....PLAINTIFF

VERSUS

PETR GACHIE MATIRU.....DEFENDANT

RULING

1. What is before, the court for determination is the plaintiff's application dated the 12th day of June, 2017 seeking the following orders;

- a. That the Defendants Counter Claim in the Amended Defence and Counterclaim cannot properly be disposed of in this suit.
- b. That this Honourable Court therefore be pleased to strike out the Defendants Amended Defence dated 11th August, 2015.
- c. That consequently judgment be entered against the Defendant as prayed in paragraph 10 (a), (c) and (d) of the Plaintiff.
- d. That the cost of this application be provided for;

2. The application is supported by the annexed affidavit in which she deposes that since the defendant amended the defence way back on 11th August, 2015, her claim has stalled because no step has been

taken by the defendant to ensure that the counter-claim is set down for hearing.

3. She further avers that a counter-claim by the defendant against another person cannot properly be disposed of in this suit since their claims are not related in any way, in that her claim against the defendant is based on tort while that of the defendant in the counter-claim is based on a breach of contract between the defendant and their insured.

4. She contends that she is not a party to the contract between the defendant and their insured and as such her claim should not be combined with that of the defendant against a stranger. According to her, the defendant ought to have filed a separate suit instead of a counter-claim.

5. She has deponed that what the defendant has done, is to repudiate the claim through a back door by introducing a counter-claim against their insured for purposes of avoiding to pay her claim. That under section 10 Chapter 405 laws of Kenya, the defendant ought to pay the claim and pursue its insured later in a separate suit.

6. The Respondent filed grounds of opposition dated the 12th day of July, 2017 on the following grounds;

i. That the application is res judicata as the plaintiffs sought similar orders in their application dated the 20th day of October, 2015 which application was dismissed.

ii. That the plaintiff's application is defective, malicious, vexatious and an abuse of the process of court. In addition, the plaintiff filed a replying affidavit by Nancy Shikuku sworn on the 12th July 2017 in which she avers that the application herein is res judicata.

7. It is contended that the defendant in the main suit is seeking declaratory orders that it is not liable to make any payments arising out of the said policy as there is no privity of contract between itself and the party sued by the plaintiffs in Milimani 434 of 2011 or David Mburu. That the main suit and the counter-claim are linked as they are both seeking orders in relation to the policy of insurance number Co1/070/1/908010/2010 and the court would be able to effectively and completely adjudicate and settle all issues relating to the said policy.

8. Parties filed submissions in support of their respective positions which I have duly considered. The defendant/applicant has raised a substantive point of law that the application herein is res judicata. On the other hand, the applicant maintains that it is not. I will start by considering that point. The plea of res judicata is provided for in section 7 of the Civil Procedure Act and it would be important for this court to quote it in verbatim as follows;

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directed 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, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

9. The respondent has raised the plea of res judicata on the basis that the court entertained an application dated 26th October 2015, by the defendant in which similar orders as the ones in present application were sought.

10. The court has carefully perused the two application and the orders sought therein. There is no doubt that prayers 2, 3 and 4 of the application herein are similar to prayers 2 and 3 of the application dated 26th October 2015 which raises the same issues for determination by the court. Having heard the parties in similar issues in the earlier application dated 26th October 2015 I am persuaded by the Respondent's submission that the present application is res judicata and an abuse of the court process.

11. In my view, the only recourse that the applicant has, is to review the orders of the court made in the

application dated 26th October 2015 and not to file a different application.

12. I find that the application has no merits. The same is dismissed with costs to the Respondent.

Dated, Signed and Delivered at Nairobi this **19th** Day of **April, 2018.**

.....

L. NJUGUNA

JUDGE

In the Presence of

..... *For the Applicant*

..... *For the Respondent*