



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT NO. 112 OF 2017**

**VEGPRO (K) LTD.....PLAINTIFF**

**VERSUS**

**TAUSI ASSURANCE COMPANY LIMITED .....1<sup>ST</sup> DEFENDANT**

**INSURANCE REGULATORY**

**AUTHORITY IRA.....2<sup>ND</sup> DEFENDANT**

**RULING**

This is an application by way of Notice of Motion dated 13<sup>th</sup> September, 2017 under Order 4 Rule (1), (f) and Order 2 Rule 15 (1) of the Civil Procedure Rules, and Section 3A of the Civil Procedure Act seeking an Order that this suit be struck out with costs to the 1<sup>st</sup> defendant.

The reason for seeking that order is that, the plaint is a gross abuse of the court process in that prior to filing this suit the plaintiff lodged another suit before the Chief Magistrate's Court, being No. 6422 of 2016 against the 1<sup>st</sup> defendant arising from the same cause of action. There is a supporting affidavit sworn by the advocate for the 1<sup>st</sup> defendant.

The plaint relating to CMCC No. 6422 of, 2016 and the defence of the 1<sup>st</sup> defendant are annexures to that affidavit. The application is opposed and there is a replying affidavit sworn by the Group Human Resource Manager of the plaintiff. The suit in the lower court is admitted, and the reason for filing the present suit is because the 1<sup>st</sup> defendant has an obligation to meet the judgment in the lower court entered against the plaintiff herein, it being the insurer of the plaintiff, and the 2<sup>nd</sup> defendant being the Insurance Regulatory Authority with the duty to compel the 1<sup>st</sup> defendant to meet its obligation. This duty, the 2<sup>nd</sup> defendant has failed to meet.

Both parties have filed submissions which I have considered. I have related the pleadings in the lower court to the pleadings in this court alongside the submissions filed. The thrust of the application is that the plaintiff is guilty of duplicity. It is true that some of the pleadings in the lower court have been repeated in the instant case word for word. I notice however that in addition to the prayers set out in the lower court, the present plaint has addressed the duty and liability of the 2<sup>nd</sup> defendant in a declaratory manner.

It cannot be said therefore that the two cases are identical. An allegation of duplicity necessarily means that the aggrieved party may be subjected to double jeopardy. Looking at the prayers, there is no way the 1<sup>st</sup> defendant can be subjected to such a situation. There may be some concern about costs when the two matters are eventually determined, but that should not call for the striking out of the plaint. If the plaint were to be struck out the plaintiff would have no recourse in compelling the 2<sup>nd</sup> defendant to perform its statutory duty.

Striking out of a pleading is a drastic measure which should be applied cautiously. This is because it drives out a litigant from the seat of justice. I consider it undesirable in the circumstances of this case.

This application must fail and is dismissed with costs to the plaintiff.

*Dated, signed and delivered at Nairobi this 21<sup>st</sup> Day of June, 2018.*

**A. MBOGHOLI MSAGHA**

**JUDGE**