



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL SUIT NO 134 OF 2014

CORPORATE INSURANCE COMPANY LIMITED.....PLAINTIFF

VERSUS

BENJAMIN MWANGI HARUN.....DEFENDANT

RULING

INTRODUCTION

1. On 19th May 2014, the Plaintiff filed a Complaint of even date seeking the following reliefs from the Defendant:-

a. A declaration do issue that the Plaintiff had no privity of contract with the said Stephen Maina Kagua's (sic) as at the date of the accident.

b. A declaration do issue that the Plaintiff was and had at all material times been entitled to avoid the aforesaid Policy of Insurance No C01/070/1/910559/2011 on the ground that the Defendant had no insurable interest in the subject matter of the said policy as at the date of the accident.

c. A declaration that the Plaintiff was not liable to make any payment under the aforesaid policy of insurance No C01/070/1/910559/2011 in respect of any claim against the Defendant herein arising out of damage to any motor vehicle, property, fatal or bodily injuries, loss or damage sustained by any party in the accident on 1st January 2012 involving motor vehicles registration numbers KAJ 884J and KBH 469N.

d. Costs of the suit.

2. The Defendant filed his Defence dated 16th January 2015 on the same date. His contention was that as at the material time of the accident on 1st December 2012, he had no control of Motor Vehicle Registration No KAJ 884J (hereinafter referred to as "the subject Motor Vehicle") and having had no insurable interest in the said Motor Vehicle, he was a stranger to the suit herein. He sought that the said suit against him be dismissed with costs to him.

3. On 10th November 2015, the Plaintiff filed a Notice of Motion application dated 3rd November 2015 pursuant to Order 13 Rule 2 and Order 51 Rule 1 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act and all enabling provisions of law seeking the following orders:-

1. THAT this court be pleased to enter judgment on admission against the Defendant.

2. THAT in the alternative the court be pleased to grant the Declaratory Orders to the Plaintiff against the Defendant.

3. THAT the costs of this application be borne by the Defendant/Respondent.

4. The Plaintiff had filed a Further Affidavit on 23rd February 2015. The same was sworn by its Legal Officer, Tiberius Nyangau on 19th February 2015.

5. In response to the said application, on 29th January 2016, the Defendant filed a Replying Affidavit sworn on even date. He also filed a Notice of Preliminary Objection dated 20th January 2017 on the same date. The Grounds of the Preliminary Objection were as follows:-

1. THAT the Plaintiff was fatally defective as it did not disclose any cause of action against the Defendant.

2. THAT the issues raised in the present suit were also the subject matter in another ongoing suit namely Milimani Chief Magistrates Civil Suit No 5458 of 2013 which was instituted in August 2013 by the Representatives of the estate of Michael Gichuni Githaka, who sustained fatal injuries from the subject accident herein, and hence the current suit was *subjudice*.

3. The Plaintiff had no *locus standi* to institute this suit against the Defendant.

4. THAT the suit was bad in law and was an abuse of the court process and the same should be struck out.

6. On 23rd January 2017, Njuguna J directed that the Preliminary Objection be heard first. In her Ruling of 27th April 2017, she dismissed the said Preliminary Objection with costs to the Plaintiff.

7. When the matter came up before this court on 18th April 2018, parties indicated that they were exploring possibilities of settling the matter out of court. They recorded a consent which was endorsed and adopted as an order of this court on the following terms:-

a) THAT a declaration be and is hereby issued that the Plaintiff is and has at all material times being entitled to avoid Policy of Insurance No C01/070/1/91055/2011 on the ground that the Defendant has no insurable interest in the subject matter of the said policy as at 1st November 2012 which was the date of the accident.

b) THAT a declaration be and is hereby issued that the Plaintiff is not liable to make any payments under the Policy of Insurance No C01/070/1/91059/2011 in respect of any claim against the Defendant arising out of damage to any motor vehicle, property, fatal or bodily injuries, loss of damage sustained by any party in the accident on 1st November 2012 involving Motor Vehicle Registration Numbers KAJ 884J and KBH 469N.

c) THAT the court do determine the issue of costs of the suit.

8. As the parties were completely unable to agree on the issue of costs, this court directed them to file their Written Submissions on the said issue for its determination. The Plaintiff's Written Submissions were dated 23rd May 2018 and filed on 25th May 2018 while those of the Defendant were dated 8th June 2018 and filed on 11th June 2018.

9. When the parties came before the court on 11th June 2018, they requested it to deliver its Ruling based on their respective Written Submissions which they relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

THE PLAINTIFF'S CASE

10. The Plaintiff submitted that the Defendant only agreed to have the prayers it had sought in the Plaintiff allowed after his Preliminary Objection was dismissed. It contended that had the Defendant so agreed to the granting of the reliefs earlier, litigation would not have been protracted.

11. It was its submissions that because costs follow the event, it was entitled to costs. It urged this court not to deny it costs merely because the matter did not proceed to trial. It relied on the case of Morgan Air Cargo Limited vs Evrest Enterprises Limited [2014] eKLR where Gikonyo J held as follows:-

“It is the failure to agree on costs that parties asked the Court to make a determination on the issue. There is also no attrition of any conduct which would prevent the Plaintiff from being awarded costs. In sum, I do not find any material on which an estoppel would raise in this matter. Further illumination on this position is in a work of this Court in Orix Oil (Kenya) Limited vs Paul Kabeu & 2 Others [2014] eKLR where the Court stated: “...the Court should have been guided by the law that costs follow the event, and the Plaintiff being the successful party should ordinarily be awarded costs unless its conduct is such that it would be denied the costs or the successful issue was not attracting costs. None of those deviant factors are present in this case and the Court would still have awarded costs to the Plaintiff, which I do.”

12. It pointed out that since it had commenced trial against the Defendant due to his conduct, it had incurred costs and consequently, it ought to be awarded the costs of the suit.

THE DEFENDANT'S CASE

13. On its part, the Defendant pointed out that the said subject Motor Vehicle was insured with the Plaintiff from 12th April 2011 to 11th April 2012 vide Insurance Policy No C01/070/1/91055/2011 and that he sold it to Samson Macharia Kagua on 18th December 2012. The said Samson Macharia Kagua then sold it to another person who then subsequently sold it to a Kithuma Nzainga.

14. The Plaintiff wrote to him on 1st November 2012 informing him that the said subject Motor Vehicle had been involved in an accident whilst being driven by a John Gakuru Githaiga and that it had repudiated liability. He was thus shocked when the Plaintiff sued him repudiating liability which he said he had no objection to as he no longer had any insurable interest in the said subject Motor Vehicle.

15. He submitted that whereas Section 27 of the Civil Procedure Act provides that **“costs follow the event”** and that courts have unfettered

discretion to award costs as was stated in Judicial Hints on Civil Procedure 2nd Edition (Nairobi Law Africa) 2011 by Justice (Retired) Kuloba that was also referred to by the Plaintiff herein, “in the common law style, courts have to proceed on a case by case basis to identify “good reasons” for such a departure as was held in the case of Jazbir Singh Rai & Others vs Tarlochan Rai & Others [2014] eKLR.

16. He was emphatic that he was in agreement with the Plaintiff that it could repudiate any claim that arose from the said accident because he had sold the said Motor Vehicle. He contended that he was dragged in court unnecessarily and following this court’s analysis of the issues herein and the consent they entered into, there was no clear winner but that because he was dragged to court, the Plaintiff ought to pay the costs of the suit.

17. A perusal of Paragraph 14 of the Plaintiff shows that the accident herein occurred on 1st November 2012 and at the time of the accident, the Defendant was neither the owner of the said Motor Vehicle nor in possession of the same, a position that the Defendant wholly concurred with. The Plaintiff added that the Defendant ceased to have an insurable interest in the said Motor Vehicle on 18th September 2012 when he sold the same to Samson Macharia Kagua.

18. A further perusal of the Witness Statement of Tiberius Nyang’au clearly showed that the Third Party Policy No C01/070/1/910599/2011 it had issued to the Defendant was for a period of twelve (12) months i.e from 12th April 2011 to 11th April 2012.

19. The Investigation Report of Targbull Insurance Loss Assessors showed that the policy was renewed on 28th May 2012 through Walokana Supreme Insurance Agencies. The Third Party cover was to run from 28th May 2012 to 16th April 2013. It was therefore clear that by the time the accident occurred on 1st December 2012, the Third Party Policy the Plaintiff had issued to the Defendant was still in force.

20. Having sold the Motor Vehicle to Samson Macharia Kagua on 18th September 2012, the Plaintiff’s liability ceased forthwith as the Defendant no longer had insurable interest in the Motor Vehicle. As the Third Party Policy was still in place at the time the Defendant sold the Motor Vehicle to Samson Macharia Magua, the Defendant was under a legal obligation to notify the Plaintiff that he no longer had any insurable interest in the Motor Vehicle having sold it to a Third Party.

21. The Plaintiff was therefore entitled to file the present suit seeking the declarations it had sought in its Plaintiff. This court therefore agreed with the Plaintiff’s submissions that it acted correctly when it filed the present suit to safeguard its interests as an insurer following the aforesaid accident. It was a necessary cause of action. This court was thus not persuaded by the Defendant’s arguments that he was dragged to court unnecessarily.

22. Accordingly, having considered the parties Written Submissions and the case law they each relied upon, this court came to the firm conclusion that the Plaintiff was entitled to costs for the reason that it had a reasonable cause of action against the Defendant.

23. Notably consent that the Plaintiff and the Defendant entered into was to the Plaintiff’s advantage and it was thus the winner in the proceedings herein. As the Defendant did not demonstrate why this court should depart from the general rule that “**costs follow the event**”, and this court did not find anything that seemed to suggest that the Plaintiff behaved in a manner that would have disentitled it from being awarded costs, this court came to the firm conclusion that the Plaintiff was entitled to costs as costs follow the event as stipulated in Section 27 of the Civil Procedure Act.

DISPOSITION

24. For the foregoing reasons, this court directs that the costs of the suit that were compromised by a consent that was recorded by the parties on 9th May 2018 shall be paid to the Plaintiff by the Defendant. Interest on the said costs shall be on court rates from the date of this Ruling.

25. It is so ordered.

DATED and DELIVERED at NAIROBI this 27th day of September 2018

J. KAMAU

JUDGE