REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 61 of 2018

GEOFREY OTIENO ONGONDO.....PLAINTIFF

VERSUS

APA INSURANCE CO. LIMITED.....DEFENDANT

RULING

This suit was filed on 9th March, 2017. After service if summons the defendant filed a defence on 24th April, 2011. A reply to the defence followed on 2nd May, 2017. The cause of action is based on a judgment HCCC No. 767 of 2004 in which the plaintiff herein sued the defendant's insured and obtained judgment in his favour. This is therefore a declaratory suit that the defendant should satisfy the decree of that previous suit, because it is the successor of Pan African Insurance Company Limited which had insured the motor vehicle involved in the accident with the plaintiff.

There is evidence that this matter was referred to mediation which however failed and the matter reverted to the court.

The application before me seeks the order that the defendant's statement of defence be struck out and the defendant be compelled to satisfy the decree in HCCC No. 767 of 2004 aforesaid. The application is supported by an affidavit to which there is a reply opposing the same.

The principles governing such applications are now settled. The applicant is supposed to demonstrate that there are no triable issues capable of being subjected to a trial. It has been observed severally that striking out of a pleading completely denies a party the right to a hearing, and thereby driving such a party from the judgment seat. It is a draconian step which should be used sparingly and only in the clearest of cases.

In the case of a defence being sought to be struck out, the applicant must show and convince the court that it is a sham, and raises no *bonafide* triable issue worth the consideration of a court by way of a trial. A triable issue has been defined as an issue which raises a *prima facie* defence which should go to trial for adjudication. See HCCC No. 79 Of 2013 Saudi Arabia Airlines **Corporation vs. Premimiun Petroleum Co. Limited, DT Dobie & Co. Limited vs. Muchina & Another (1982) Klr 1 and Bakex Millers Limited vs. Eagles Industries Limited (2014) e KLR.**

Some submissions made by counsel delve into evidence which reinforce the position that a hearing is necessary alongside interpretation of applicable status. Since submissions may not take the place of evidence, I am persuaded there are clear triable issues which belong to the province of a trial. In the case of **Cassam vs. Sachania (1982) KLR 191 at 197 the court (Potter JA)** said as follows,

> **"But summary determinations are for plain cases, both as regards the facts and the law. An issue between the parties to an interlocutory application should not be decided at that stage unless the material facts are capable of being adequately established and the law is capable of being fully argued without the benefit of a trial."**

This is not a case suitable for summary procedure. I have no hesitation in dismissing the application and at the same time observe that, such applications contribute to delay in finalising disputes before the court yet the courts end up being blamed for the same.

Having dismissed the application, the plaintiff shall pay their defendant costs occasioned by this application.

Dated, signed and delivered at Nairobi this 20th Day of December, 2018.

A. MBOGHOLI MSAGHA

JUDGE