



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NO. 134 OF 2014

CORPORATE INSURANCE COMPANY LIMITEDPLAINTIFF

VERSUS

BENJAMIN MWANGI HARUNDEFENDANT

RULING

1. Before this court is a preliminary objection by the defendant dated 20th January, 2017. The grounds therein are:

i. That the plaint is fatally defective as it does not disclose any cause of action against the defendant.

ii. That the issues raised in the present suit are also the subject matter in another on going 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 accident herein, hence the current suit is subjudice.

iii. The plaintiff has no locus standi to institute this suit against the defendant.

iv. That the suit is bad in law and an abuse of the court process and the same should be struck out.

2. This preliminary objection was canvassed by way of written submissions. For the defendant it was submitted that the suit does not disclose a reasonable cause of action against the defendant. That the suit is fatally defective since it seeks judgment against among others, one Stephen Maina Kagua who is not a party to this suit.

3. It was stated that the defendant has no knowledge of the said Stephen Maina Kagua and that if at all the plaintiff intended to mean Samson Macharia Kagua, to whom the defendant sold his vehicle, the said Samson has not been enjoined in this suit to warrant the plaintiff to seek judgment against him. It was argued that seeking such a relief is fatal to a suit. It was stated that the plaint dated 19th May, 2014 is a mere admission that there was no contractual relationship between itself and the defendant admitting that the defendant had no insurable interest in the subject motor vehicle having transferred it to another party who in turn transferred it to yet another party. It was stated that a suit namely Milimani High Court Civil Suit No. 5458 of 2013 *Samuel Githaka Gichuhi & Esther Nyambura Githaka (Suing as personal representatives of the estate of Michael Githaka Gichuni) v John Gakuru Githaiga & Kithuma Nzainga* was filed as a result of the accident involving KAJ 884J and the defendant therein were the driver and registered owner of the subject vehicle respectively.

4. That the said case is still pending at the High Court and no judgment has been entered. The defendant cited **section 10 (1) of the Insurance (Motor Vehicles Third Party Risks) Act, Cap 405 of the Laws of Kenya** and stated that this claim is misconceived since no judgment has been entered against the defendant and no suit has been preferred against him. It was further argued that the plaintiff has no *locus* to institute this suit for the reason that the plaintiff had no contractual relationship with the defendant as at 1st November, 2012. It was stated that the insurance policy No. C01/070/1/910559/2011 between the two was valid from 12th April, 2011 to 11th April, 2012.

5. The plaintiff on the other hand contended that the preliminary objection did not meet the threshold of a preliminary objection. It was argued that it contained issues which required to be ascertained by way of evidence. The plaintiff cited **MUKISA BISCUITS MANUFACTURERS LTD V WESTEND DISTRIBUTORS LTD, [1969] E. A. 696** and **ORARO V MBAJA, [2005] 1KLR 141**. On the issue of subjudice, it was argued that the two suits involve different parties and cannot therefore be said to be subjudice. In this regard the plaintiff cited **HENRY WANYAMA KHAEMBA V STANDARD CHARTERED BANK (K) LTD & ANOTHER, [2014] e KLR**.

6. On *locus standi*, it was submitted that although the defendant argues that the contract between them ended on 1st November, 2012, he did not inform the plaintiff of the same until the year 2014. That in fact the defendant renewed the contract for the period 17th April, 2012 to 16th April, 2013.

7. I have carefully considered the preliminary objection and the submissions. The issue for determination is *whether in the circumstances of this matter the preliminary objection should be allowed*. The essence of a preliminary objection was discussed in the case of **MUKISA BISCUITS MANUFACTURING CO. LTD V. WEST END DISTRIBUTORS, (1969) EA 696**. At page 700 as follows:

“...a ‘preliminary objection’ consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

Sir Charles Newbold P. added as follows at page 701:

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.” (Emphasis mine)

In the case of **ORARO V MBAJA, [2005] 1KLR 141**, Ojwang, J [as he then was], expressed himself as follows on preliminary objections:

“The principle is abundantly clear. A ‘preliminary objection’ correctly understood, is now well defined as and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling proof or seeks to adduce evidence for its authentication, is not, as matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts a matter cannot be raised as a preliminary point. ... Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.”

8. As submitted by the plaintiff and correctly so, the preliminary objection herein does not raise points of law. It raises matters of evidence which require the court to ascertain certain facts. Further, the correct procedure for having a suit struck out for failure to disclose a reasonable cause of action is laid out in **Order 2 rule 15 of the Civil Procedure Rules**. In the premises, the preliminary objection does not meet the threshold set out in the **Mukisa Biscuit case** and the same is hereby dismissed with costs to the

plaintiff. It is so ordered.

Dated, signed and delivered at Nairobi this 27th day of April, 2017.

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L NJUGUNA

JUDGE