

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 65 OF 2015

ZIPPORAH KARIMI MBIJIWE PLAINTIFF

- V E R S U S -

GENERAL ACCIDENT ASSURANCE DEFENDANT

RULING

1. The subject matter of this ruling is the motion dated 29th March 2017 taken out by General Accident Assurance, the defendant herein. In the aforesaid motion the defendant seeks to have the suit filed by zipporah Karimi Mbiyiwe, the plaintiff herein dismissed. The motion is supported by the affidavit and a further affidavit sworn by Hellen Omiti Machora. When served with the application, the plaintiff filed a replying affidavit she swore to oppose the motion. When the motion came up for interpartes hearing, learned counsels appearing in the matter recorded a consent order to have the motion disposed of by written submissions.

2. I have considered the grounds set out on the face of the motion and the facts deponed in the supporting affidavits. I have also considered the rival written submissions. It is the submission of the defendant that Nairobi H.C.C.C no. 17 of 2007 involving the Estate of Lewis Mbiyiwe and Martin Mbiyiwe were non-compliant with Section 10(2) (a) of the Insurance (motor vehicle third party risks) Act. It is argued that a notices of the institution and existence of the primary suits were not served upon the defendant as required by law. It is the defendant's submission that failure to issue the notice was fatal thus disentitling the plaintiff any reliefs flowing from this suit.

3. In response to the defendant's application, the plaintiff averred that the defendant was properly enjoined in the original suit as a third party and the question of service was properly determined in the primary suit. The plaintiff further argued that the defendant has pleaded knowledge of the events that gave rise to the claim. It is pointed out that the defendant was aware that the Third Party Notice was served by way of advertisement on the newspapers but failed to act to safeguard its interest.

4. After a careful consideration of the material presented to this court, I am convinced that this is not one of those cases this court can confidently make an order dismissing the suit. The plaintiff has raised serious issues which can only be settled in a trial where the evidence tendered will be tested by way of cross-examination. The question as to whether or not statutory notices of institution of the primary suits were served upon the defendant cannot summarily determined. There must be serious interrogation of the issue via a trial.

5. In the end, I find no merit in the defendant's motion dated 29th March, 2017. The same is dismissed with costs abiding the outcome of this suit.

Dated, Signed and Delivered in open court this 29th day of September, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Respondent

..... for the Applicant