REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NUMBER 408 OF 2014

GRACE NJOKI GAKURU AND PRISCILLAH WANGUI RITHO

(*suing as Personal Representatives of the Estate of* FRANCIS RITHO

MUGO(DECEASED) …….....…….… PLAINTIFF

VERSUS

CORPORATE INSURANCE COMPANY LTD...……..……... DEFENDANT

TITLE BY WAY OF COUNTERCLAIM

CORPORATE INSURANCE COMPANY LIMITED. ……....……. PLAINTIFF

VERSUS

PETER GACHIE MATIRU. …….....…. DEFENDANT

R U L I N G

The Application for determination by the court is the Notice of Motion dated 26th October, 2015 brought under Order 2 Rule 15(1) (b) (c) and (d), Order 13 Rule 2, Section 10(1) of the Insurance (Motor Vehicles Third Party Risks) Act Cap 405 Laws of Kenya, Order 51 Rule 1 of the Civil Procedure Rules and Sections 1A, 1B, 3 and 3A of the Civil Procedure Act.

The Application seeks for orders: -

1.THAT, this honourable court be pleased to enter judgment on admission against the defendant in the main suit for the sum of Ksh.9,606,943/- plus costs of this suit and interest thereof.

2. That in the alternative to prayer 1 above, this Honourable Court be pleased to strike out the Amended Defence and Counter Claim dated 11th August, 2015 and consequently enter judgment against the defendant in the main suit as per prayers 1 and 3 on the Plaint.

3. Costs of this Application as well as those of the suit be borne by the Defendant in the main suit.

It is premised on the grounds set out on the body of the Application and it's supported by the Affidavit of Grace Njoki Gakuru annexed thereto.

The Applicant (who is the Plaintiff in the primary suit) avers that the Defendant has admitted that indeed

they had insured motor vehicle registration No. KAP 406S vide Policy Number CO1/070/1/908010/2010 with the Insurance Policy period being from 14th January, 2010 to 13th January, 2011.

The Applicant depones that the Defendant in the main suit was properly served with a statutory notice as to the intention to file suit against their insured vehicle on 28th April, 2011, a Notice of Entry of judgment in the primary suit and a notice to institute this declaratory suit.

That upon receipt of the notice, the Defendant in the main suit did not do anything to repudiate the claim as required under the law. The amended defence and counter-claim filed herein does not disclose a reasonable defence and it's an abuse of the court process.

The Applicant further avers that the (Insurance Motor Vehicles Third Party Risks) Act Cap 405 is very clear under Section 10(1) that the defendant in the main suit should pay the judgment in HCCC No. 434/2011 and be indemnified by its insured and further that the defendant's circumstances do not fall within the exception clause of Section 10(2) of the Act.

The Application is opposed vide a Replying Affidavit sworn by Nancy Shikuku on the 30th November, 2015. In the said Affidavit she admits that an Insurance Policy Number CO1/070/1/908010/2010 was issued to Peter Gachie Matiru by the Defendant in the main suit for Motor vehicle Registration Number KAP 406S but by the 16th December, 2010 when the alleged accident the subject of the main suit occurred, the said motor vehicle had already been sold by the insured – Peter Gachie Matiru to one David Mburu Matiru.

That their insured did not inform them of the sale of his interest in the said motor vehicle to David Mburu Matiru but he purported to transfer his insurance cover to the new owner and it was not until after the accident occurred that the Defendant in the main suit learnt about the sale which prompted them to engage the services of Targbull Insurance Loss Assessors to investigate the same. The said investigators confirmed the sale and that the same was done before the accident occurred.

She further depones that there was no privity of contract between the Defendant in the main suit and the said David Mburu Matiru or Joseph H. Wanjiku as claimed by the Plaintiffs/Applicants. According to her, the Policy of Insurance Number CO1/070/1/908010/2010 terminated once their insured sold the motor vehicle and ownership of the same passed to David Mburu Matiru. The contract of insurance with their insured Peter Gachie Matiru was based on the fact that he was the owner of the subject motor vehicle and as such once he transferred his ownership thereto to David Mburu Matiru, the contract terminated.

She deponed that due to the foregoing, on the 16th December, 2010 when the alleged accident occurred, the Defendant in the main suit was not the insurer of the motor vehicle registration Number KAP 406S as the contract of insurance had been terminated as aforesaid. According to her the Defendant is not seeking to repudiate the policy as the contract of insurance was already terminated at the time of the accident and therefore the remedies being sought by the Defendant in its amended defence and counter-claim are in the doctrine of privity of contract under the common law.

It is further deponed that the judgment obtained by the Plaintiff in the main suit cannot as a matter of law be enforced against the Defendant as per the provisions of (Motor Vehicles Third Party Risks Act) Cap 405 as the Defendant was not the insurer of motor vehicle registration Number KAP 406S at the time of the accident. She depones that the amended defence and Counter-claim raises triable issues which can only be canvassed through a full trial.

I have carefully considered the Application together with the supporting affidavit, the replying affidavit and the submissions made by the counsels for both parties.

The Application herein seeks for entry of judgment on admission or in the alternative striking out of the amended defence and counter claim.

The principles which guide our courts in determining Applications for summary judgment are very clear. In the case of **Industrial and Commercial Development Corporation Vs Daber Enterprises Limited (2000) IEA 75** the court stated that the purpose of the proceedings in an application for summary judgment is to enable a Plaintiff to obtain a quick judgment where there is plainly no defence to the claim. To justify summary judgment, the matter must be plain and obvious and where it is not plain and obvious, a party to a civil litigation is not to be deprived of his right to have his case tried by a proper trial.

In the case of **Dhanjal Investments Limited Vs Shabaha Investments Limited**, Civil Appeal No. 232 of 1997 the court had earlier stated as follows regarding summary judgment: -

> ***"The law on summary judgment procedure has been settled for many years now. It was held as early as in 1952 in the case of Kandnlal Restaurant v Devshi & Co (1952) EACA 77 and followed by the Court of Appeal for Eastern Africa in the case of Sonza Figuerido & Co Ltd v Mooring Hotel Limited [1952] EA 425 that, if the defendant shows a bona fide triable issue, he must be allowed to defend without conditions…."***

Regarding what constitutes triable issues, in **Kenya Trade Combine Ltd Vs Shah** Civil Appeal No. 193/1999, the Court of Appeal stated as follows: -

> ***"In a matter of this nature, all a defendant is supposed to show is that a defence on record raises triable issues which ought to go for trial. We should hasten to add that in this respect a defence which raises triable issues does not mean a defence that must succeed."***

The Defendant is at liberty to show, by whatever means he chooses, whether by defence, oral evidence, affidavits or otherwise, that his defence raises bonafide triable issues. Where Bonafide issues have been disclosed, the court has no discretion to exercise in regard to the Defendant's right to defend the suit, see **Momanyi Vs Hatimy and Another (2003) 2EA 600).** That is precisely the reason why the Defendant is entitled to unconditional leave to defend.

The Defendant in its list of authorities cited the case of **Simal Velji Shah Vs Chemafrica Limited [2014] eKLR** which quoted the case of **Saudi Arabian Airlines Corporation Vs Sean Express Services Ltd [2014] eKLR** which laid out the test in a case for summary judgment in the following long but useful rendition: -

> ***"I need not re-invent the wheel on the subject of striking out a defence. A great number of judicial decisions have now settled the legal principles which should guide the Court in determining whether to strike out a pleading. Except, I can state comfortably that these principles now draw, not only from judicial precedent, but from the principles of justice enshrined in the Constitution especially in Article 47, 50 and 159. The first guiding principle is that, every Court of law should pay homage to its core duty of serving substantive justice in the judicial proceeding before it, which explains the reasoning by Madan JA in the famous DT DOBIE case that the Court should aim at sustaining rather than terminating suit. That position applies mutatis mutandis to a statement of defence and counter-claim. Secondly, and directly related to the foregoing constitutional principle and policy, is that courts should recognize the act of striking out a pleading (plaint or defence) completely divests a party of a hearing, thus, driving such party away from the judgment seat; which is a draconian act comparable only to the proverbial drawing of the ''Sword of the Damocles''. Therefore, the power to strike out a suit or defence should be used sparingly and only on the clearest of cases where the impugned pleading is 'demurer or something worse than a demurer' beyond redemption and not curable by even an amendment. Thirdly, in case of a defence, the court must be convinced upon looking at the defence, that it is a sham; it raises no bona fide triable issue worth a trial by the court. And a triable issue need not be one which will succeed but one that passes the SHERIDAN J Test in PATEL v E.A. CARGO HANDLING SERVICES LTD. [1974] E.A. 75 at P. 76 (Duffus P.) that"…a triable issue …is an issue which raises a prima facie defence and which should go to trial for adjudication." Therefore, on applying the test, a defence which is a sham should be***

struck out straight away."

From the amended Defendant's statement of defence and counterclaim and the replying Affidavit, can it be said that it is plain and obvious that the defence discloses no triable issue?

In paragraph 4 of the amended defence and counter-claim, "***the Defendant pleads that it had insured motor vehicle KAP 406S but its insured was Peter Gachie Matiru and not Joseph N. Wanjiku as alleged. The insured later sold the motor vehicle to one David Mburu Matiru and the said Policy contract terminated once Peter Gachie Matiru sold the motor vehicle."***

In paragraph 12 the Defendant avers as follows: -

> ***"The Defendant states that even if the said motor vehicle was involved in an accident as alleged "which is denied" the Defendant states that the policy of Insurance Number CO1/070/1/908010/2010 terminated once its insured sold motor vehicle registration number KAP 406S to David Mburu Matiru and the said insurance policy was not available to the new owner and indeed any other party"***

In the counter-claim paragraph 21 the Plaintiff who is the Defendant in the main suit states: -

> ***"the Plaintiff in the counter-claim issued the policy of insurance to the Defendant on the premise that he Defendant in the counter-claim was the owner of the motor vehicle registration number KAP 406S and therefore had an insurable interest in the same"***

And paragraph 22 of the counter claim states: -

"The said policy of insurance was non-transferable"

From the aforegoing paragraphs of the amended defence and counter-claim, and in my view, this is not, by any means a plain and obvious case justifying an order for summary judgment.

I now turn to prayer 1 of the Application on judgment on admission. For the Applicant to be entitled to judgment on admission, the admission had to be plain and clear.

In the case of **Choitran Vs Nazari (1984) KLR 327** Madan JA (as he then was) stated as follows regarding admissions: -

> ***"Admissions have to be plain and obvious, as plain as a pikestaff and clearly readable because they may result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning. Much depends upon the language used. The admissions must leave no room for doubt….."***

Still on admission, I would wish to refer to the case of **Guardian Bank Limited Vs Jambo Biscuits Limited [2014] eKLR**

> ***"The principle applicable in judgment on admission is that the admission must be very clear and unequivocal on a plain perusal of the admission. The admission in the sense of Order 13 Rule 2 of the Civil Procedure Rules is not one which requires copious interpretations or material to discern. It must be plainly and readily discernible. In such clear admission, like J.B. Havelock J stated in the case of 747 Freighter Conversion LLC v One Jet One Airways Kenya Ltd & 3 Others HCCC No. 445 of 2012, there is no point in letting a matter go for a trial for there is nothing to be gained in a trial. See the case of Botanics Kenya Ltd Ensign Food (K) Ltd HCCC No. 99 of 2012, where Ogola J gave a catalogue of other cases which amplified this principle."***

The Judge's discretion to grant judgment on admission of fact under the order is to be exercised only in plain cases where the admissions of fact are so clear and unequivocal that they amount to an admission of

liability entitling the Plaintiff to judgment.

The basis of the Application before the court is paragraph 4 of the amended defence and counter-claim. The Applicant avers that the Defendant has admitted that indeed they had insured motor vehicle registration number KAP 406S vide policy number CO1/070/1/908010/2010 with the insurance policy period being from 14th January, 2010 to 13th January, 2011. In the said paragraph, the Defendant has not made a clear and plain admission. Thought it admits that it had insured the motor vehicle it goes further to state that the insured was Peter Gachie Matiru and not Joseph N. Wanjiku since the insured had sold the motor vehicle. This to me is not an admission that is very clear and unequivocal on its plain perusal.

As regards the contention by the Applicant that the Defendant did not repudiate the claim, this may have been so, but that does not disentitle them the right to defend the claim at this stage. In any event, the policy of insurance was between the defendant and Peter Gachie Matiru and the same was not transferable, the said policy terminated from the moment ownership of the said motor vehicle changed from its insured to David Mburu Matiru. This in effect meant there was no policy between the Defendant and David Mburu Matiru to repudiate.

In the premises aforesaid, I am satisfied that this is not a suitable case for summary judgment and judgment on admission.

Accordingly, I dismiss the Application dated 26th October, 2015 with costs to the Defendant.

Dated, signed and delivered at Nairobi this 18th day of February, 2016.

……

L NJUGUNA

JUDGE

In the presence of

…… ***for the Plaintiffs***

…….....*for the Defendants*