REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL CASE NO. 7 OF 2015

ANITA MWENDE ADALO.......................................PLAINTIFF

VERSUS

INVESCO ASSUARANCE COMPANY LTD…...... DEFENDANT

R U L I N G

1. This is the application dated 28/10/15 seeking that the honourable court strikes out the defendants defence and that judgment be entered against the defendant as prayed in the plaint. The applicant also seeks for orders that judgment be entered against the respondent on admission for the sum contained in the decree issued in Embu CMCC No. 248 of 2013. The application is supported by the affidavit of Caroline Wanyaga Njagi.

2. In the affidavit, it is stated that the the applicant who is a next friend of the plaintiff minor commenced the suit against the respondent seeking a declaration that the respondent is liable to pay the judgment amount in Embu CMCC 247 of 2013 after the respondent failed to pay the decretal sum even after the lapse of the stay of execution period. The respondent filed a defence where in addition to denying knowledge of the existence of Embu CMCC 247 of 2013 and Embu CMCC 247 of 2015 also denied that it had insured the defendant Augustine Ndwiga Nyaga.

3. The applicant states that the respondent in paragraph 6 of the defence admitted that it owed the applicant the amounts in the decree and agreed with the applicant's advocates to pay the same in installments. It is argued that it is clear that the respondent participated in the defence of its insured Augustine Ndwiga who was the defendant in Embu CMCC 247 of 2015. it is further argued that the respondent by virtue of Section 10Y (2) of the Motor Vehicle Third Party Risks Act CAP 405 is liable to pay the decretal amount.

4. The respondent in the replying affidavit stated that the defendant had a strong defence which raised weighty issues including the existence of the policy,the existence and validity of the certificate of insurance and whether the motor vehicle was insured by the defendant at the time of the accident. The plaintiff did not address this questions despite the fact that they were raised in the defence. The defence raised triable issues and it is only fair that the issues arising be determined after a full trial. This is not a proper case for summary dismissal.

5. Both parties filed written submissions for disposal of the application and cited authorities in support of their respective cases.

6. The applicant submitted that the defence should be struck out as it consists of mere denials and is scandalous, frivolous and vexatious. The case of ***TRUST BANK LIMITED VS AMIN & COMPANY LIMITED & ANOTHER [2000] eKLR*** where the guiding principles were discussed. It was held that a

pleading should not be struck out if it is arguable and raises a single triable issue, it must be shown that the pleading is scandalous, frivolous, vexatious and an abuse of the court process.

7. The court further stated that if the applicant can prove that the pleading is indecent and consists of mere denials he can be said to have proved that the pleading is scandalous. A pleading is frivolous if it is groundless and tends to cause the other party unnecessary anxiety. The court stated that a pleading which is an abuse of court process is one that is a misuse of the court machinery. The applicant also cited the case of ***FRANCIS KIMANI KARIUKI VS INTRA AFRICA ASSURANCE CO LTD [2008] eKLR*** which laid down the same principles as those in the Trust Bank case.

8. It was further submitted that the respondent's allegations in the defence that the defendant was not insured at the time of the accident; that it was never served with a statutory notice and that it had no knowledge of the accident that gave rise to Embu CMCC 247 of 2013 are denials of facts. The truth is that the respondent was served with the statutory notice which was received and stamped.

9. The respondent made an offer to settle the decretal amount in installments as stated in paragraph 6 of their defence and paid the applicants expenses for undergoing second medical examination. The applicant further argues that the respondent's allegation that they did not receive demand letter is scandalous as there is proof of service.

10. The respondent admitted in paragraph 6 of the statement of defence that it owed the applicant the sums decreed in Embu CMCC 247 of 2013 and offered to settle the same in instalments. The applicant relied on the principles upon which a court can enter judgment on admission were stated in the case of ***MOMBASA MOTOR VEHICLE SALES LTD & 5 OTHERS VS JANE KAVITI NZIOKA [2013] eKLR.*** It was held that an admission can be expressed or implied on the pleading or otherwise, Admissions have to be plain and obvious and not requiring a magnifying glass to ascertain their meaning.

11. The respondent submitted that the application has not met the threshold of striking out a defence as the defence raises triable issues,the applicant has not responded to the weighty issues raised in the defence and that it is only fair that the issues be ventilated in a full trial. The law requires that the court must exercise a lot of restraint before striking out pleadings. The respondent relied on the following case law which has been considered herein.

12. In the case of ***NAHASHON KARIUKI MBATIA VS HOUSING FINANCE COMPANY OF KENYA [2013] eKLR*** the court relied on the case of ***ATTORNEY GENERAL VS EQUIP AGENCIES LTD [2006] 1 KLR*** where it was held:-

> *"that unless the matter is 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........The purpose of summary judgment is to enable a plaintiff to obtain a quick judgment where there is plainly no defence to his claim...."*

13. In that of ***DR. GERALD NJOROGE NJUGUNA VS UNITED INSURANCE CO. LTD [2004] eKLR*** the court cited the case of ***D.T DOBIE & CO. (KENYA) LIMITED AND JOSEPH MBARIA MUCHINA*** where it was held that:-

> *" suit ought to be summarily dismissed unless it appears so hopeless and it plainly and obviously discloses no cause of action and is so weak as to be beyond redemption and incurable by amendment........."*

14. KISII FARMERS COOPERATION UNION LIMITED VS SANJAU NATWARLA CHAUHAN T/A ORIENTAL MOTORS [2006] eKLR where it was held that:-

> *"A court of justice should aim at sustaining a suit rather than terminating it by summary.…. No suit should be dismissed unless it appears hopeless that it plainly and obviously discloses no reasonable cause of action and is weak as to be beyond redemption".*

15. The law applicable in this application is Order 2 Rule 15 which provides;

(1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that;

(a) it discloses no reasonable cause of action or defence in law; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

16. Order 13 Rule 2 of the Civil Procedure Rules provides that;

Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the court may upon such application make such order, or give such judgment, as the court may think just.

17. In the case of ***FORTY AVIATION LIMITED VS TRADEWINDS AVIATION SERVICES LIMITED [2015] eKLR*** discussed what amounts to triable issues. It held that:-

*This Court in **MOI UNIVERSITY VS VISHVA BUILDERS LIMITED [2010] eKLR** considered various authorities on the matters which we are called upon to determine in this appeal. The court considered **H.D. HASMANI VS BANQUE DU CONGO DEIGE [1938] 5 EACA** where it had been earlier held that only one trial issue was sufficient for a defendant to be granted leave to defend. The court added:*

*"We must however hasten to add that a triable issue does not mean one that will succeed. Indeed, in **PATEL VS E.A. CARGO HANDLING SERVICES LTD [1974] EA 75** at page 76 Duffus P. said:*

"In this respect defence on the merits does not mean, in my view a defence that must succeed, it means as SHERIDAN, J put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication".

18. In ***RAMJI MEGJI GUDKA LTD VS ALFRED MORFAT OMUNDI MICHIRA & 2 OTHERS [2005] eKLR*** the court in dealing with striking out pleadings held that

"the power to strike out pleadings must be sparingly exercised. It can only be exercised in clearest of cases.....In dealing with the issue of triable issues, we must point out that even one triable issues would be sufficient. A court would be entitled to strike out a defence when satisfied that the defence filed has no merit and is indeed a sham. A defence on merit does not mean a defence which must succeed but it means a defence which raises triable issues to warrant adjudication by the court".

19. The court relied on the cases of ***DT DOBIE & COMPANY (KENYA) LTD VS MUCHINA [1982] KLR 1*** and ***PATEL VS EA CARGO HANDLING SERVICES [1974] EA 75 P 76.*** Judgment on admission was discussed in the case of ***CHOITRAM -V- NAZARI (1984) KLR 327*** where it was held.

"For the purpose of Order XII Rule 6, admission can be expressed or implied either on the pleadings or otherwise, e.g. in correspondence. 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."

20. Further in the case of *CASSAM -VS- SACHANIA [1982] KLR 191* it was held:-

> *"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."*

21. The respondent alleges that it has a valid defence which raises the following weighty issues:-

- *the existence and validity of the policy*
- *the existence and validity of certificate of insurance*
- *whether the motor vehicle was insured by the defendant at the time of the accident*
- *subsistence of the insurance cover at the time of the accident*

22. These issues may be summarized as; whether the motor vehicle of the judgment debtor in CMCC No. 247 of 2013 was validly insured by the defendant at the time of the accident.

23. A copy of statutory notice annexed to the application shows that it was received in the respondent's office and a copy stamped. This is sufficient proof of service and renders the respondent's denial in the defence just a mere denial.

24. It is not in dispute that the respondent paid throw away costs of Shs.12,000/= through cheque No. 000345 in favour of the defendant in CMCC No.247 of 2013. It also paid for the cost of the 2nd medical report in favour of the plaintiff. The respondent could not have spent its resources to meet these expenses if the 1st defendant in CMCC No. 247 of 2013 was not insured by the company.

25. Further, the statutory notice dated 6/08/2013 was received by the respondent on 27/11/2013. This was the first chance the respondent had to deny that the 1st defendant was its client but no response was made to the notice. The second chance arose when the suit was filed in court against the defendants. This chance was not utilized. The reasons for the omission by the respondent was not explained.

26. In the defence, the respondent admits that it had made an offer to settle the matter in favour of the plaintiff by installments. It is highly probable that such an offer could only be only be made by a party who had quietly admitted liability. The respondent was not in a philanthropic mission to dish out its resources to parties who were not its clients and in cases which did not concern it.

27. The respondent was served with the copy of the judgment as shown by a letter dated 17/8/2015 which was duly acknowledged by affixing its official stamp. The denial in the defence that the respondent was not aware of the suit in the lower court is nothing but a mere denial.

28. I come to the conclusion that the defence is a mere denial. It is scandalous, frivolous, vexatious and it would be a waste of the court's time to allow this case to go for full trial. All the issues referred to by the respondent as triable have been thrashed by the evidence in support of the application.

29. The applicant has shown that the 1st defendant in CMCC No. 247 of 2013 was holder of policy number 085/084/1/000023/2010/06 with the respondent and which unless otherwise proved was valid at the time of the accident. The respondent is therefore liable under Section 10Y of the Motor Vehicle Third Party Risks Act Cap 405 to compensate the applicant to the extent of the judgment.

30. I find this application merited and allow it as prayed. The defence is hereby struck out with costs to the applicant and judgment entered as prayed in the plaint.

DELIVERED, DATED AND SIGNED AT EMBU THIS 25TH DAY OF JULY, 2016.

F. MUCHEMI

JUDGE

In the presence of:-

Ms. Muriuki for Nalyanya for plaintiffs

Mr. Kisinga for Gathogo for defendant