



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CIVIL CASE NO. 8 OF 2015

CAROLINE WANYAGA NJAGI.....PLAINTIFF

VERSUS

INVESCO ASSURANCE COMPANY LTD....DEFENDANT

R U L I N G

1. The application dated 28/10/2015 seeks for prayers that this court strikes out the defence and enter judgment in favour of the plaintiff as prayed in the plaint. Further that the court enters judgment on admission of the sum contained in the decree in Embu CMCC No. 248 of 2013.
2. The grounds in support of the application are that the defence is an abuse of the due process of the court since it admits the decretal sum in Embu CMCC No. 247 of 2013. It is also contended that the defence contains mere denials and does not answer to the plaintiff's claim.
3. The facts leading to this application are that the applicant's vehicle registration No. KAU 416 F was validly insured by the respondent under the Motor Vehicle Insurance (Third Party Risks) Act Cap. 405 under Policy No. 085/084/1/000023/2010/6. The respondent was under a legal obligation to pay the decretal amount in Embu CMCC No. 248 of 2013 decreed upon judgment entered for the plaintiff against the applicant.
4. The respondent was notified of the claim as required by the law and participated in the entire proceedings. After judgment, a stay of 30 days was granted, the respondent failed to meet his legal obligation in favour of the applicant. This omission gave rise to these proceedings. The applicant in the suit seeks to be paid the decretal amount in the Chief Magistrate's civil case.
5. The applicant's claim in the plaint is for a declaration under Section 10(2) of the Motor Vehicle Third Party Risk Act, Cap. 405 that the respondent is liable to pay the plaintiff judgment decreed in CMCC No. 248 of 2013. There is also a prayer that the respondent be ordered to produce the insurance policy document in respect of the policy No. 085/084/1/000023/2010/06.
6. It is contended that the plaintiff was lawfully traveling in the defendant's vehicle registration No. KAU 416 F when it was involved in an accident resulting in the plaintiff sustaining injuries. The plaintiff sued the actual owner of the vehicle as well as the beneficial owner and was awarded damages, costs and interests of the suit.
7. In its defence the respondent has denied the claim and put the applicant to strict proof thereof. It is denied that there was any valid insurance policy in favour of the defendants in the suit in the court below relating to motor vehicle registration No. KAU 416 F. It is also denied that the accident was reported to the respondent and that the statutory notice, demand letter or pleadings of Embu CMCC No. 248 of 2013

were ever forwarded to the defendant.

8. In paragraph 6 however, the respondent states that

“without prejudice to the above, the plaintiff and the defendant mutually agreed to settle the decree in Embu No. 248 of 2013 in the mode of installments.”

9. In its submissions, the respondent argued that its case raised triable issues as to the existence and validity of the insurance policy, certificate and cover. It was argued that the applicant did not respond to these issues and this means that the respondent agrees with the said denials.

10. The respondent cited the following cases in support of its arguments:-

(i) **COURT OF APPEAL KISUMU ECLR [2006] KISII FARMERS CO-OPERATIVE UNION VS SANJAY CHAUHAN & ANOTHER** where the court held that the court ought to act very cautiously and carefully and consider all the facts before dismissing a case for failure to disclose a reasonable cause of action.

(ii) **NAHASON KARIUKI MBATIA VS HOUSING FINANCE CO. OF KENYA NAIROBI CIVIL CASE NO. 105 OF 2005** where the court held that the court should not dismiss a case unless it is so plain and obvious and that the court to accord the parties a chance to be heard in the trial.

11. The respondent relied on the two other cases explaining the principle of statutory notice. It was held in the **ESTHER OBAIRE ONGECHI** case that where service of a statutory notice under Section 10(2) is disputed, this amounts to a triable issue which ought to be disposed of at the trial.

12. In the case of **MARY ADHIAMBO ONYANGO**, the court held that the issue of existence of an insurance certificate and statutory notice should go for trial although the documents were annexed to the application.

13. The applicant submitted that the denials in paragraph 4 and 5 of the defence on the existence of the policy and existence of a valid insurance cover and the certificate including the denial that the statutory notice was ever served are mere denials. The same case applies to the denial that the respondent had no knowledge of the accident. It was argued that these are tactics designed to delay the disposal of the case. The respondent's participation in the proceedings and offer to settle the decretal amount in installments.

14. The applicant also seeks for judgment in pursuance of Order 13(2) of the Civil Procedure Act which provides:-

Any party may at any stage of a suit, where admission of facts has been made, either on the pleading 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.

15. Section 18 of the Evidence Act defines admission as:-

“.....statements made by a party to the proceedings or by an agent to any such party, whom the court regards in the circumstances of the case as expressly or impliedly authorized by him to make them are admissions.”

16. The applicant relied on the case of **MOMBASA MOTOR VEHICLES SALES LTD & 5 OTHERS VS JANE KAVITI NZIOKA eCLR [2013]** where the court defined an admission thus:-

“.....an admission can be express 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.”

17. The applicant avers that the respondent unequivocally admitted liability in paragraph 6 of the defence and urges the court to enter judgment in his favour on admission.

18. Paragraph 6 of the defence states:-

In the alternative and without prejudice to the above the plaintiff and defendant mutually agreed to settle decree in Embu No. 248 of 2013 in mode of installments.

19. This means that the parties had a discussion on payment of the decretal amount after judgment and agreed that the respondent could settle the decretal amount in installments.

20. For the respondent to be involved in such negotiations, he must have admitted that he was under an obligation to pay the decretal amount. The respondent's action must have been based on an existing and valid contract of insurance at the time of the accident.

21. This is express admission of the debt and the failure to honour the undertaking led to the respondent being sued herein.

22. It was held in the case of **TRUST BANK LTD VS AMIN & CO. LTD & ANOTHER HCCC NO. 984 OF 1994** that:-

If the applicant can prove that the pleading is either indecent, or offensive or improper, or amounts to a denial of what the defendant had earlier clearly admitted earlier on then he can be said to have brought the case within the standards required under order VI rule 13 (1) (b) as being scandalous.

A pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble or expense.

A pleading which is an abuse of the process of the court means a pleading which is a misuse of the court machinery or process.

23. The defence in this case which contains denial in paragraph 4, 5 and 7 is frivolous, vexatious and an abuse of the due process of the court. It denies knowledge of the suit CMCC No. 248 of 2013 as well as service the statutory notice and the demand letter.

24. The applicant has annexed copies of the two documents bearing the official stamp of the respondent and the respective dates of service. For the respondent to deny knowledge of suit and service of the documents duly received and stamped in its registered office borders on abuse of the due process of the court.

25. Consequently, I find that the applicant has satisfied this court as to the merit of its application. The defence paragraph 4, 5 and 7 are hereby struck out for being frivolous, vexatious and an abuse of the court process.

26. Judgment is hereby entered on admission in favour of the applicant in terms of prayers (a), (c) and (d) of the plaint with costs and interests at court rates from the date of judgment in CMCC No. 248 of 2013.

27. The application is allowed and it is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 28TH DAY OF NOVEMBER, 2016.

F. MUCHEMI

JUDGE

In the presence of:-

Ms. Kariuki for Nalyanya for Applicant