



REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CIVIL CASE NO. 1 OF 2013

GIANFRANCO MANENTI

ANTONIETTA FARINATO PLAINTIFFS

VERSUS

AMACO ASSURANCE COMPANY LTDDEFENDANT

RULING

1. Before me is the plaintiff's application filed on 8th October, 2013 and expressed to be brought under several provisions, including Order 2 rule 15 (1) (b), and (d) of the Civil Procedure Rules which states;

“at any stage of the proceedings the court may order struck out or amended any pleading on the ground that-

b) it is scandalous, frivolous or vexatious

c)

d) it is otherwise an abuse of the process of the court.”

2. The application is supported by the affidavit of Antoniella Farinato the 2nd plaintiff. The affidavit expends upon the three grounds on the face of the application, namely:
 - a. **THAT the defendant/respondent is truly indebted to the plaintiffs herein arising from a contract of insurance duly executed by both parties and expressly acknowledged in several correspondence exchanged between the parties;**
 - b. **THAT the defendant/respondent has filed a defence that is fundamentally evasive and consists of mere denials aimed at delaying payment to the plaintiffs;**
 - c. **THAT owing to the list of documents and witness statements filed and relied on by the plaintiffs/applicants and the lack of documentary and/or testamentary evidence from the defendant/respondent, the pleadings filed by the defendant/respondent are vexatious and if allowed to stand would prejudice, embarrass and/or delay the fair disposal of this suit.”**
3. Through their legal officer Lilian Munyiri, the defendants filed a replying affidavit asserting that the defence on record is good and raises triable issues which can only be canvassed at a full trial.

In this regard paragraph 20 of the said defence is cited. The defendant further takes objection to the manner in which the plaintiff has drafted the plaint, which allegedly embodies a special damage claim.

4. The parties disposed of the application by way of written submissions which took are from the respective affidavits. I have now considered all the material placed before me in regard to the plaintiff's application. I take the following view of the matter. The applicant's main contention is that the defence filed contains mere denials or is at best evasive. Striking out a pleading is a drastic measure. Courts have always been exhorted to act cautiously when asked to take such a measure. In **D. T. Dobie & Co. (K) Ltd v Joseph Mbara Muchina & Another [1982] KLR1** the court stated:

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and it is so weak as to be beyond redemption and incurable by amendment.”

5. The above words also apply in equal force to a written defence statement. The applicant based the application on grounds that the defence filed is scandalous, frivolous and vexatious or otherwise an abuse of the court process. These terms were considered by Bosire J., as he then was in **Ngokonyo & 2 others v Kenya Posts & Telecommunication Corporation [1992] KLR 567.**

6. The court observed at pages 571 -572:

“scandalous implies a pleading, which is merely made for the purpose of abusing, or prejudicing the opposite party's case....indecent or offensive matters are scandalous and so are words or allegations, which are unnecessary but merely intended....to slight the opposite party ...frivolous implies petty or lacking in bona fides. Allegations touching on good faith require evidence to establish....The applicants have also alleged that the defences filed by the respondents are vexatious, that is to say intended to annoy them...in general terms abuse of the process of the court by a party arises where the party is guilty of misrepresentation, fraud or by the gaining of an unfair advantage by the use of a rule of procedure. There could be other acts...”

7. The plaintiff's complaints may not be without merit as much of the averments in the defence are crafted as mere denials, save for paragraph 20 upon which, the defendants have latched in opposition to this application. However, when the entire defence is read in light of paragraph 20, it is evident that the said defence may not qualify as scandalous, frivolous, vexatious, or an abuse of the court process. More so because the applicant admits in her statement filed together with the plaint that there were reports that the fire could have been caused by an electrical fault in a transformer belonging to the Kenya Power and Lighting Company.
8. The mere fact that the defendant has not filed its documents as required under Order 7 rule 5 of the Civil Procedure Rules cannot by any stretch render a defence which raises, even one triable issue vexatious. Some of the correspondence attached to the plaint may be read to represent the defendant's offer to settle the claim at Shs. 500,000/- but the plaintiff is asking for much more. Although the prayers in the plaint are drawn as declarations it is evident from the plaint that the plaintiff's claim is essentially for the sum of Shs. 11million odd and should have been pleaded as such. I agree with the submissions by the defendant that the plaintiff while faulting the manner in which the defence is pleaded are themselves also guilty of offending Order 2 of the Civil Procedure Rules.
9. It is my considered view that both parties ought to amend their pleadings so that they comply with the rules and all the real issues in dispute can be isolated and determined once and for all. In the case of the plaintiff, full filing fees must be tendered along with the amended plaint. Such amendments are to be effected, starting with the plaintiff, within fourteen (14) days of today's date, followed by the defendant, within fourteen (14) days upon service of the amended plaint.

Needless to say, the defendants must also file all their documents at the time of filing the amended defence.

10. In view of the foregoing, the plaintiff's application must fail and is dismissed. Each party bears its own costs.

Delivered and signed at Malindi this **24th** day of **March, 2014** in the absence of the parties

Court clerk – Samwel

C. W. Meoli

JUDGE