



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KISII**  
**CIVIL CASE NO.24 OF 2013**  
**ICEA LION GENERAL INSURANCE CO. LTD.....PLAINTIFF**  
**VERSUS**  
**THE BOARD OF GOVERNORS**  
**RIOMA MIXED SECONDARY SCHOOL.....DEFENDANT**

**RULING**

1. By an amended notice of motion dated 4<sup>th</sup> February 2014 and filed in court on 5<sup>th</sup> February 2014, the defendant/applicant seeks the following orders:-

- 1. That this honourable court be pleased to certify this matter urgent and fit to be heard ex parte in the first instance and on priority basis.*
- 2. That plaintiff's claim, reply to defence and defence to the defendant's counter claim be and is hereby struck out and judgment be and is hereby entered in favour of the defendant/applicant as prayed in the defendant's statement of defence and counter claim.*
- 3. That a declaration do issue that the disclaimer clauses in the plaintiff's insurance policy contract are unilateral, superimposed, subservient and/or contrary to Sections 8 and 16 of the Insurance (Motor Vehicle Third Party Risks) Act Cap 405 Laws of Kenya and therefore of no effect or legal consequence.*
- 4. That in the alternative to prayer 2, 3 and 4 above, (sic) the plaintiff be ordered to receive and/or defend all 3<sup>rd</sup> party claims filed or to be filed against the defendant arising from the road accident that occurred on the 10<sup>th</sup> July, 2013 in a bid to giving the court and the parties to the suit the opportunity to verify the claims, the claimants and propriety thereof.*
- 5. That costs of this application and suit be awarded to the defendant/applicant.*

2. The motion is brought pursuant to **Sections 4,5,7,8, 10 and 16 of the Insurance (Motor Vehicle Third Party Rules) Act Cap 405, Order 2 rule 15 (1) a, b, c and d of the Civil Procedure Rules 2010, Order 51 Rules 1, 2, 3 and 13 (2), Sections 1A, 1B, 3, 3A and 63 (e) of the Civil Procedure Act, Article 159 (2) (a), (b) and (d)** and all other enabling provisions of the Law. It is premised on the grounds on the face of the application and supported by an annexed affidavit of Rawlings Onyango Juma sworn on the 4<sup>th</sup> of February 2014.

3. Briefly in his supporting affidavit the secretary of the defendant/applicant avers that the plaintiff 's suit is a non-starter in law and with patent misinterpretations of the law as the same has been filed in a rush and in anticipation, it is scandalous, frivolous, vexatious and an abuse of the process of this honourable court warranting to be struck out.

4. Further that the plaintiff's allegations concerning breach of contract are anticipatory devoid of factuality and a presumed situation that the 3<sup>rd</sup> party aspect of the instant insurance contract is compulsory to protect the interest of the 3<sup>rd</sup> party which is public interest, the plaintiff/respondent is under obligation to accept and test the veracity and number of individual claims once filed so as to ascertain claims filed which aspect has not been crystallized. He further avers that the disclaimer clauses in the plaintiff's insurance policy contract are unilateral, superimposed, subservient and/or contrary to **Sections 8 and 16 of the Insurance (Motor Vehicle Third Party Risks) Act Cap 405 Laws of Kenya** and therefore of no effect or legal consequence. He concludes that no prejudice whatsoever shall be occasioned upon the respondent if the orders sought herein are granted.

5. The application is opposed. Lucy Muriithi the Deputy Manager claims, Legal section of the plaintiff/respondent duly authorized to so swear, has sworn the replying affidavit dated 4<sup>th</sup> February 2014.

6. She avers that the application before court is premature and baseless and should be dismissed with costs; the application is supported by an affidavit of a person who has no authority. She further avers that the orders sought in the application are untenable and the suit before court is merited and based on the law and is validly before this honourable court. She adds that the suit raises weighty legal issues which require a full hearing for the parties to articulate their case and the court to determine the same.

7. She also states that the suit as filed is based on contract which by law the court is mandated to interpret the terms thereof and a determination made on the same and therefore the orders sought cannot issue in the circumstances.

8. Further that **Section 10 (4) of the Insurance (Motor Vehicle Third Party Risks) Act Cap 405 Laws of Kenya**, affords the respondent herein the right to move the court for reliefs sought and therefore the suit before court is proper meritorious and should be allowed to proceed to full trial. She adds that an order seeking to strike out a suit cannot issue as such order is a draconian order which touches on the parties rights directly and should not be granted at interlocutory stage. That such an order is a decision which the court can only make after it is convinced that the suit does not disclose any reasonable cause of action, and has no triable issues for determination between the parties. Lastly that the respondent's right to institute the claim herein is cherished and protected under the Constitution of Kenya.

9. The background to this case is that on or about 10<sup>th</sup> July 2013, an accident occurred along the Itumbe-Igare road involving the defendant's motor vehicle registration number KBT 580N, an Isuzu Bus. The said motor vehicle was at all material times insured by the plaintiff. As a result of the said accident, a number of the occupants of the bus were killed and/or injured. As a further result of the deaths/injuries, a number of suits were filed by various third parties against the defendant/respondent herein. Most of the suits were filed and are still pending before the Principal Magistrate's court at Ogembo.

10. The defendant herein entered appearance and filed defence, denying the plaintiff's allegations and praying that plaintiff's suit be dismissed in its entirety with costs. It is out of those pleadings that this application emanates.

11. On the 11<sup>th</sup> March 2014 parties herein made their oral submissions.

The defendant/applicant was represented by Mr. Mose of Mose Nyambega & Co. Advocates while Miss Mokua duly instructed by M/s Onyinkwa & Co. Advocates was present for the plaintiff/respondent.

**12. Order 2 Rule 15 of the Civil Procedure Rules 2010** provides as follows:-

**“(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;**

**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 court process and may order the suit to be stayed or dismissed or judgment to be entered accordingly as the case may be.”**

13. In HCCC No.511 of 2008 – Mohammad Hasim Pondor & another –vs- Summit Travel services Ltd & 4 others [2011] e KLR the court struck out the defence and entered judgment against the defendant and stated as follows:-

**“The court has power to strike out a pleading under Order VI Rule 13**

**(b) and (d) of the old Civil Procedure Rules the precursor to the present Order 2 Rule 15. The applicant would then need to demonstrate the suit is scandalous, frivolous and vexatious or an abuse of the court process. A frivolous suit must be plainly so on its face. It is one so baseless as to have no legs to stand on .....**”

14. In the case of John Patrick Machira t/a Machira & Co. Advocates –vs- Grace Wahu Njoroge [2006] e KLR the Court of Appeal held:-

**“The court has an inherent power to prevent the abuse of legal machinery .... undoubtedly therefore the court has power to strike out a statement of claim, but the power of the court is not confined to that; it applies also to a statement of defence which is frivolous and vexatious and an abuse of procedure ... It appears to be that evidence may be received in a proper case of motion of this kind to show that a pleading is an abuse of the process of the court.”**

15. With the above cited authorities in mind, the one issue for determination in this application is whether the plaint filed on the 8<sup>th</sup> October 2013 raises triable issues or is a sham and therefore befitting to be struck out. From the plaint the plaintiff seeks a declaration that it is not liable under the policy to compensate any claims arising from the accident in respect of the defendant’s motor vehicle registration No. KBT 580 N. I find that this is a triable issue which needs to be ventilated at a full hearing.

16. Secondly the plaintiff seeks for a declaration that the proviso to **Section 10 (4) of the Insurance (Motor Vehicle Third Party Risk) Act Cap 403 Laws of Kenya** absolves the plaintiff from any liability in respect of and in relation of the aforesaid accident. I do find that this too is a triable issue. The matters raised in the plaint are of a contractual nature which this court is mandated to look into, interpret and come up with a finding. There are numerous weighty issues raised both in the plaint and in the defence and counter-claim which will actually require a full hearing for the parties to articulate and the court to determine the case.

17. In the premises, I find that the suit herein is properly before this court and the same raises triable issues which need to be ventilated during a full trial.

18. The upshot of what I have stated above is that the application dated 4<sup>th</sup> February 2014 has no merit and the same is hereby dismissed with costs to the respondent.

**Delivered, dated and signed at Kisii this 22<sup>nd</sup> day of October, 2014**

**R.N. SITATI**

**JUDGE**

In the presence of:-

Miss Mokuu (absent) for the Plaintiff/Respondent

Mr. Nyanyuki (present) for the Defendant/Applicant

Mr. Bibu - Court Assistant