



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL CASE NO. 478 OF 2003**

**CONSOLIDATED BANK OF KENYA LIMITED :::::::::::::::::::::::::::::: PLAINTIFF**

**VERSUS**

**PAN AFRICA INSURANCE COMPANY LIMITED :::::::::::::::::::::::::::::: DEFENDANT**

**R U L I N G**

1. The Notice of Motion before the court is dated 27<sup>th</sup> May 2014. It is filed under Section 3A and 7 of the Civil Procedure Act and Order 2 Rule 15 of the Civil Procedure Rules. The application seeks the following orders:-
  1. ***That the Plaintiff's Complaint herein and consequently the suit be struck out.***
  2. ***That the costs of this application as well as the entire suit be awarded to the Defendant.***
2. The application is premised on the ground that the Plaintiff has already obtained Judgement in Nairobi High Court Civil Case No. 594 of 2003 against Securicor Security Services Kenya Limited in respect of the cause of action herein, which judgment has extinguished the Plaintiff's cause of action. This suit is therefore not only *res judicata* but it is also barred by the doctrine of estoppel and/or amounts to a gross abuse of the court process.
3. The application is supported by affidavit of **Stephen Kihara Muchai** dated **27<sup>th</sup> March 2014**.
4. The application is not defended. On 25<sup>th</sup> September 2014, a Mr. Kiptiness came on record for the Plaintiff after the firm of Oraro & Company Advocates were allowed to withdraw from acting for the Plaintiff. Mr. Kiptiness successfully sought the leave of the court to file a replying affidavit to the application within 21 days. The court also listed the matter for hearing on 27<sup>th</sup> October 2014. Mr. Kiptiness did not only fail to file the said replying affidavit, but he also did not attend to the hearing of the application on 27<sup>th</sup> October 2014 and so the Applicant proceeded ex-parte.
5. The brief history of the application is as follows. On or about the 23<sup>rd</sup> December 2002, the sum of Ksh.18,550,00/= belonging to the Plaintiff was being transported in an armored vehicle from the Plaintiff's branch at Maua to Nairobi by Securicor Security Services Kenya Limited when the said Security Company's guards transporting the said money were allegedly attacked by armed gangsters who allegedly stole all that money. The Plaintiff had a money insurance cover with the Defendant herein and as a result of this loss the Plaintiff sought to recover from the Defendant herein under the said policy the entire sum allegedly stolen from the Security Guards of Securicor Security Services Kenya Limited being Kshs.18,550,000/=. The Defendant resisted the Plaintiff's claim herein due to the reasons that the Plaintiff herein had breached the terms of the Transit Warranty in the said Money Insurance Policy. The Plaintiff therefore brought the suit herein against the Defendant for the recovery of the stolen money from the Defendant under the said Money Insurance Policy. Subsequent to filing this suit herein and totally unknown to the

Defendant the Plaintiff brought another suit before this Court against the transporter of the lost money that is to say Securicor Security Services Kenya Limited for the recovery of the same said Kshs.18,550,000/= for breach of the Transport Contract and for negligence on the part of Securicor Security Kenya Limited being **HCCC NO. 594 of 2003 – Consolidated Bank of Kenya - Vs -Securicor Security Services Kenya Limited**. The Plaintiff was and still in being represented by the same firm of Advocates in both suits. For a long time and unknown to the Defendant herein the two suits proceeded simultaneously. The Applicant now states that while the 1<sup>st</sup> suit was pending in court the 2<sup>nd</sup> suit proceeded to full hearing and judgement was on the same delivered on the 4<sup>th</sup> July 2013 in which the Plaintiff was successful. It was awarded the claimed sum of Kshs.18,550,000/= against the Securicor Security Services Kenya Limited together with costs and interest from the date of judgment. A copy of the judgment was annexed to the application and marked “SKM 1”. Upon becoming aware of the plaintiff’s 2<sup>nd</sup> suit and the Judgement thereof the Defendant through its advocates sought to know from the Plaintiff’s advocates if their client was going to withdraw the suit herein in view of the fact that it now had judgment for the stolen amount in full. The Plaintiff through its advocates confirmed that despite having obtained the judgment in question it had no intention of withdrawing the suit herein.

6. In their submissions, the Defendants/Applicants submitted that upon suffering the loss of Kshs.18,500,000/= the Plaintiff had the option of either claiming the said loss from the Defendant pursuant to its Money Insurance Policy with the Defendant or to claim the loss directly from the Security Company responsible for the loss but could not claim from both its insurers and from the Security Company which is what the Plaintiff is now trying to do. It was submitted that had the Defendant compensated the Plaintiff for the loss herein the Plaintiff would have subrogated its claim against the Security Company to the Defendant leaving the Defendant free to claim a refund of the compensation paid to the Plaintiff from the Security Company if there was proof that the said loss was occasioned by either breach of contract or negligence or both on the part of the Security Company.
7. I have carefully considered the Applicant’s submissions. The reasons for the application are compelling, and the only challenge to the same would be the allegation contained in a letter dated 14<sup>th</sup> November 2013 by M/s Oraro & Company Advocates, then on record for the Plaintiffs, that the said two suits were separate and distinct and that **HCCC No. 594 of 2003 Consolidated Bank of Kenya – Vs – Securicor Security Services Limited** was an action based on breach of contract and negligence. However, the Respondents never opposed the application and did not urge the above point. That leaves the court with no option but to believe the submissions of the Applicant. The Plaintiff now having obtained a Judgement in *rem* for the entire stolen amount against the Security Company cannot now again claim against the insurance company based on the Policy of Insurance. Simply put the Plaintiff cannot benefit twice under a single insurance policy. This position would be different if the Plaintiff could prove to this court that the suit HCCC No. 594 of 2003 was based on a purely different cause of action. The Plaintiff was also at fault for failure to disclose to the Defendant the existence of the two suits. It paints the Plaintiff as not being very faithful, especially considering the fact that contracts of insurance are *uberiime fidei* and based on utmost good faith.
8. The Plaintiff has stated in its letter aforesaid that the said Judgement is being challenged in appeal. It is not clear whether the Plaintiff hopes to come back to the suit herein should the said appeal succeed. Whether the Plaintiff intends to do, only the Plaintiff knows. For having failed to give the court its part of the story, this court cannot purport to know.
9. The upshot of the above is that the Defendant’s application dated 27<sup>th</sup> March 2014 and filed in court on 2<sup>nd</sup> April 2014 is herewith allowed. The costs of the application and the suit shall be for the Defendant.

Orders accordingly.

**READ, DELIVERED AND DATED AT NAIROBI**

**THIS 18TH DAY OF NOVEMBER 2014**

**E. K. O. OGOLA**

**JUDGE**

**PRESENT:**

M/s Gitahi for the Plaintiff

No appearance for Defendant

Teresia – Court Clerk