



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL CASE NO. 144 OF 2008

ALBERT MMUMATA MUGONE.....PLAINTIFF

VERSUS

**1. POLLMANS TOURS AND SAFARIS LTD
2. APOLLO INSURANCE COMPANY LTD.....DEFENDANTS**

R U L I N G

1. The 2nd Defendant seeks by **notice of motion dated 9th February 2011** the main order that the Plaintiff's suit against it be struck out for being scandalous, frivolous and vexatious, and an abuse of the process of the Court. The application is brought under **Order 2, Rule 15(1) (b) and (d)** of the **Civil Procedure Rules, 2010 (the Rules)**. **Sections 3A, 1A and 1B** of the **Civil Procedure Act, Cap 21 (the Act)** are also cited.
2. The grounds for the application appearing on the face therefore include -
 - i. That the Plaintiff has no claim against the 2nd Defendant as there is no privity of contract between them.
 - ii. That the indemnity in favour of the 1st Defendant only arises after a claim against the 1st Defendant has been proved and judgment entered for the Plaintiff.
 - iii. That there is no judgment obtained by the Plaintiff against the 1st Defendant.
3. There is a supporting affidavit sworn by one **Antony Mungai**, a legal officer of **APA Insurance Ltd** of which the 2nd Defendant is now part. It is deponed as follows, *inter alia* -
 - (i) That the 1st Defendant was insured by the 2nd Defendant by way of a **Group Personal Accident** cover for one year from 1st July 1989 to 30th June 1990.
 - (ii) That it was a term of the policy that in the event of liability being determined against the 1st Defendant the 2nd Defendant would make reasonable payments to the 1st Defendant.
 - (iii) That it was a further term of the policy that in the event of any claim and payments becoming payable under the policy, all the benefits would be

paid to the 1st Defendant who would give a valid discharge to the 2nd Defendant.

(iv) That the said policy of insurance is a contract between the Defendants and not between the 2nd Defendant and the Plaintiff.

(v) That in any event there is not yet any judgment for the Plaintiff against the 1st Defendant in this suit against the 1st Defendant, which suit is based on the tort of negligence, upon which any claim can be made upon the insurance policy (by the 1st Defendant).

4. The Plaintiff has opposed the application by **replying affidavit sworn by him and filed on 30th March 2011**. The grounds of objection taken include –

(i) That the 1st Defendant had admitted liability to the Plaintiff and communicated that fact to the 2nd Defendant.

(ii) That both Defendants are liable to the Plaintiff for compensation in common law and under the **Workmen's Compensation Act**.

5. The application was canvassed by way of written submissions. The 2nd Defendant's submissions were filed on 19th October 2011 while those of the Plaintiff were filed on 1st February 2012. I have considered those submissions, including the cases cited.

6. The contract of insurance was between the 1st Defendant and the 2nd Defendant. It was not between the 2nd Defendant and the Plaintiff. That contract of insurance was for the benefit of the 1st Defendant; it was not for the direct benefit of the Plaintiff and other workers of the 1st Defendant. It was the 1st Defendant who was insured by the 2nd Defendant on account of any payments the 1st Defendant may have to make to any worker as compensation for any injuries received in the course of employment. The Plaintiff can thus not sue the 2nd Defendant under that contract of insurance. The Plaintiff was not a party to the contract. There no privity of contract between the Plaintiff and the 2nd Defendant.

7. Even if there was judgment obtained by the Plaintiff against the 1st Defendant (and there is no such judgment as yet – and an admission, even if there was one is not a judgment), any right of the Plaintiff to enforce such judgment directly against the 2nd Defendant would have to be granted by statute, such as is granted, for instance under **section 10(2) the Insurance (Motor Vehicles Third Party Risks) Act, Cap 405**.

8. In the present case, the right of the Plaintiff to deal directly with the 2nd Defendant upon the policy of insurance is as granted by **section 27(1) of the Workmen's Compensation Act, Cap 236** (since repealed) which provides –

“27. (1) Where an employer has entered into a contract with any insurers in respect of any liability, under this Act, to any workman, then, in the event of the employer becoming bankrupt, or making a composition or arrangement with his creditors, or, if the employer is a company, in the event of the company having commenced to be wound up or receiver or manager of the company's business or undertaking having been duly appointed, the rights of the employer against the insurers as respects the liability shall, notwithstanding anything contained in any laws relating to bankruptcy and the winding-up of companies for the time being in force, be transferred to and vest in the workman, and upon any such transfer the insurers shall have the same rights and remedies and be subject to the same liabilities as if they were

the employer:

Provided that the insurers shall not be under any greater liability to the workman than they would have been to the employer.”

9. That right would accrue only in the event of the 1st Defendant becoming bankrupt, or making a composition or arrangement with its creditors, or if it has commenced its own winding-up, or if a receiver or manager of its business or its undertakings has been duly appointed. No such event has been pleaded by the Plaintiff.

10. In the circumstances, the Plaintiff's suit as against the 2nd Defendant is clearly misconceived. It is hereby struck out with costs to the 2nd Defendant. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 3RD DAY OF SEPTEMBER 2013

H. P. G. WAWERU

JUDGE

DELIVERED AT NAIROBI THIS 5TH DAY OF SEPTEMBER 2013