



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS COMMERCIAL & TAX
DIVISION)

CIVIL CASE 96 OF 2004

HALIMA ABDINOOR HASSA

JELLE SHEIKH AHMED and

ABDIKHEIR SHEIKH AHMED (suing as the Administrators of the estate of

ABDULLAHI SHEIKH AHMED
(DECEASED).....APPELLANT

VERSUS

CORPORATE INSURANCE COMPANY
LTD.....PLAINTIFF

R U L I N G

1. By their Complaint dated 12th February, 2004, the Plaintiffs brought this suit against the Defendant as the administrators of the estate of the late Abdullahi Sheikh Ahmed. The Plaintiffs contended that the deceased was the registered owner of aircraft registration number 5Y-BIW Serial No. BB-782 (hereinafter “the aircraft”), that by a policy of insurance dated 8th November, 1996 the aircraft was insured by the Defendant under Policy number AVN/901/00073 until 7th November, 1997 (hereinafter (“the policy”), that the policy provided for, inter alia, payment of US\$1,200,000 by the Defendant in the event of total loss of the aircraft, that the aircraft was destroyed on the night of 20th September, 1999 whilst the policy was in force, that despite notification of the loss the Defendant had failed to compensate the Plaintiff whereby the Plaintiffs claimed Kshs.90 million, general damages costs and interest.

2. By its Amended Defence filed in court on 18th June, 2004, the Defendant denied that the deceased was the registered owner of the aircraft, that the policy holder was one Buraq Sheikh Ahmed and not the deceased and that therefore there was no privity of contract between the deceased and the Defendant, that the contract of insurance was a nullity *ab initio* for want of capacity and that the policy lapsed on 8th August, 1999 for non-payment of premiums. The Defendant denied that the policy was in force on the 20th September, 1999 and contended that the fire that caused the explosion was an excepted peril under the policy, that the Plaintiff was guilty of material non-disclosure and the Defendant was therefore entitled to repudiate the contract. In their reply, the Plaintiffs insisted that they had *locus standi* to bring the suit, that the policy was valid on the date of the fire outbreak.

3. After pre-trials had been undertaken and the suit cleared for trial, the Defendant brought an

application dated 18th May, 2012 under Order 2 Rule 15 (1) (a), (c) and (d) of the Civil Procedure Rules praying that the Plaintiffs' suit be struck out. The grounds upon which the application was brought was that the Plaintiffs had no reasonable cause of action against the Defendant, that there was no valid claim by the Plaintiffs on behalf of the estate and that the deceased had no contract with the Defendant.

4. That application was supported by the Affidavit of Mark Joseph Obuya sworn on 18th May, 2012. The Defendant indicated that the said Affidavit was in support of the other grounds in the motion other than the ground that the Plaintiffs have no reasonable cause of action against the Defendant. The Defendant contended that it issued a policy of insurance to one B.S.A on 8th November, 1997, that the insured aircraft was destroyed on 20th September, 1999 and a claim was made under the policy, that investigations revealed that the insured was a 5 year old minor who had no insurable interest in the aircraft as the same was owned by a 3rd party. That in the premises the suit was an abuse of the court process.

5. Mr. Muragara learned counsel for the Defendant submitted that the issue before court is whether there was a contract between the deceased and the Defendant. That the Defendant's application was being made at this stage because of the witness statement by the Plaintiffs which disclosed that the contract of insurance was on behalf of the minor. Counsel urged that the application be allowed.

6. The Plaintiffs filed a Replying Affidavit by Jelle Sheikh Ahmed sworn on 31st May, 2012. The Plaintiffs contended that the Defendant knew that the policy was in the name of the minor, that the signature on the proposal form was of the deceased, that the ploy to take out the Insurance Policy in the name of the minor was orchestrated by the Defendant with its connivance and acquiescence and that the Defendant should not be allowed to benefit from the same, that since the proposal form had the name of the deceased, it is the Defendant to explain how the name of the minor appeared in the policy as the Registration Certificate of the aircraft was in the name of the deceased, that the estate of the deceased was paying the premiums which were accepted by the Defendant and the estate therefore had an insurable interest in the property insured and was capable of claiming under the policy.

7. Mrs. Keya, learned Counsel for the Plaintiff submitted that it is not denied that the deceased was the owner of and had insured the aircraft, that he was party and privy to the contract of insurance with the Defendant and that since the deceased's interest in the aircraft survived him, the Plaintiffs had an insurable interest in the risk insured. Counsel therefore urged that the motion be dismissed with costs.

8. I have considered the Affidavits on record, the written submissions, oral hi-lights of Counsel and authorities relied on by counsel. The law on striking out pleadings has been settled in the Court of Appeal case of **D.T Dobie & Company Ltd -vs- Muchina & another (1982) KLR 1** wherein the court stated at page 9:-

"No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a Court of justice ought not to act in darkness without the full facts of the case before it."(Emphasis mine.)

9. Some of the principles that were settled in that case were that the power to strike out a pleading in a summary manner is a draconian remedy that should only be exercised in the clearest of cases, in plain and obvious cases where the pleading in question on the face of it is unsustainable, it is a power to be exercised with extreme caution and it is a strong power to be sparingly exercised. However, in appropriate cases, that power should be exercised to achieve the objective of saving the precious judicial time.

10. The Defendant's application has been brought under Order 2 Rule 15(1) (a) (c) and (d) of the Civil Procedure Rules. The grounds for which the application has been brought are set out in the motion as:-

- “a) The Plaintiffs have no reasonable cause of action against the Defendant.***
- b) The Plaintiffs cannot purport to bring any valid claim on behalf of the deceased’s estate.***
- c) The deceased had no contract with the Defendant.***
- d) The insured was a minor aged 5 years who did not enter into any contract with the Defendant.***
- e) The insured had no insurable interest in the insured aircraft.”***

The Defendant has expressly stated in the motion that the Affidavit in support only applies to grounds (b), (c), (d) and (e) above. In effect ground (a) was not expected to be supported by any evidence as is required by the law.

The question that arises is, what is the propriety of bringing an application under Order 2 Rule 15 (1) and combine the ground under sub-rule 1(a) and the other grounds under (c) and (d)? I do not think that it is proper. This is so considering that under sub-rule 2 of Rule 15, no evidence is admissible on an application brought under sub-rule 1(a) i.e. where there is an allegation that the pleading sought to be struck out discloses no reasonable cause of action or defence. As I have already stated, one of the grounds upon which the Defendant has made the application is that the Plaintiffs have no reasonable cause of action against the Defendant. I have had an opportunity of considering this issue in the case of **Kyanzavi Farmers Ltd –vs- Middle East Bank Kenya Ltd Milimani HCCC No. 388 of 2011 (UR)** wherein I delivered myself thus:-

“In the case of Olympic Escort International Co. Ltd & 2 others –vs- Perminder Singh Sandhu & another (2009) e KLR the Court of Appeal when considering an application made under our former Order VI Rule 13 (1) (a) held that:-

“We think for our part that it was inappropriate to combine the two prayers, one of which requires evidence before a decision is made and one that does not. There was affidavit evidence on record and it was in fact considered by the learned judge. It matters not therefore that the applicant had stated that the affidavits should not be considered. As the prayer sought under Order 6 Rule 13 (1) (a) was in contravention of Sub rule (2) of that order, it was not for consideration and we would have similarly struck out the application on that score.”

After citing that decision of the Court of Appeal, I continued:

“I will here add that, since our legislature in its wisdom decided that the grounds in rule 15(1) of Order 2 are in the alternative and that three (3) out of four (4) of them, that is Rule 15 (1) (b) (c) and (d) may be based on evidence whilst the one under Rule 15 (1) (a) should not, I do hold that whilst a party can bring an application combining the grounds in Rule 15 (1) (b) (c) and (d) – such an application cannot and should not be brought with a ground under Rule 15 (1) (a). This is so because, if those grounds are combined, there would definitely be prejudice in that the court would have to look at the evidence produced in support of the grounds under sub rule (1) (b) (c) and (d) yet sub rule (2) has specifically barred the Court from considering any evidence once an application under Rule 15 (1) (a) is up for consideration. Applying the rule of interpretation that a latter provision amends or varies an earlier provision, I hold that the intention of the legislature in enacting Rule 15(2) was that if an application is brought to strike out a pleading for disclosing no reasonable cause of action or defence, no evidence at all shall be adduced in support of such an application. That is so even if any of the grounds thereon are under Order 15 Rule (1) (b) (c) and (d). In my view, prejudice must be guarded against and it will be very difficult for the court to consider the other grounds based on the evidence produced then disabuse itself of that evidence when considering the ground of disclosing no reasonable cause of action under Rule 15 (1) (a).”

I still hold the same view that one cannot combine an application under order 2 Rule 15(1) (a) with any of the other grounds in sub-rule 1 (b) (c) and (d). On this ground alone, the Defendant’s application fails.

If I am wrong on that, is the Defendant's application meritorious? The basis of the Defendant seeking to strike out the suit is that the Plaintiffs cannot bring a valid claim for the estate, that the deceased had no contract with the Defendant and that the insurance was in favour of a 5 year old minor who had no insurable interest in the aircraft. The Plaintiffs responded to these allegations and contended that the contract was between the deceased and the Defendant, that the contract of insurance was signed by the deceased. Indeed at paragraphs 6, 7 and 8 of the Replying Affidavit, the deponent stated:-

“6. THAT in as much as the policy was in the name of the minor, the signatory to that contract was not a minor since at that time B.S.A was only five years old and incapable of appending any signature of any document whatsoever. (Annexed hereto is a copy of the proposal form marked as exhibit ‘JDAI’)

7. THAT the ploy to take the Insurance Policy in the names of the minor was orchestrated by the Defendant with their connivance and acquiescence and if not they were an active party to it and hence should not be allowed to benefit from such.

8. THAT I am advised by my advocates on record, which advise I verily believe to be true that through the said application, the Defendant is not approaching/coming to this court with clean hands by failing to explain how the minor's name appeared on the Insurance Policy as the insured and yet the name that appeared on a crucial document for purposes of insurance as the Registration Certificate of the plane was that of the deceased, the real owner of the plane, ABDULLAHI SHEIKH AHMED.”

These averments were never denied. From this deposition, it would seem that the Defendant had a hand in either wrongly or otherwise having the name of the minor used as the insured. If that be the case, can the Defendant rely on its wrong to escape liability ? This is a serious issue that can only be resolved at the trial. It should be remembered that throughout, the Plaintiffs had not admitted in both the Plaint and Reply to Amended Defence that the insurance was in favour of the minor B.S.A. It is only in the statement of Jelle Sheikh Ahmed dated 18th April, 2012, that for the first time it is admitted that the policy was in the name of B.S.A. However, the statement does not explain the circumstances under which the policy came to be in the name of the minor. It is in the Replying Affidavit as I have set out above that the Plaintiffs state that the issuance of the policy in the names of the minor was through the connivance and acquiescence of the Defendant.

If of course the policy was issued in the names of the child without any input by the Defendant in the circumstances sworn to in paragraphs 6, 7 and 8 of the Replying Affidavit, then the suit cannot stand since that minor is not a party to these proceedings. But for the reasons set out in paragraphs 6, 7 and 8 of the Replying Affidavit aforesaid, I am inclined to lean towards saving the suit rather than terminating it prematurely as sought of the Defendant.

Accordingly, the application by the Defendant is without merit and is hereby dismissed with costs.

DATED and Delivered at Nairobi this 30th July, 2012.

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A. MABEYA

JUDGE