



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 426 of 2010

RICHARD KIMEU NTHENGE

(suing as the Administrator of the estate of

MAINGI NTHENGE, Deceased).....PLAINTIFF

V E R S U S

JUBILEE INSURANCE COMPANY LIMITEDDEFENDANT

R U L I N G

1. This is an application by the Plaintiff by **notice of motion dated 27th January 2011** for orders that the Defendant's statement of defence dated 11th October 2010 be struck out and judgment be entered for the Plaintiff in the sum of KShs 1,308,450/00 with costs and interest.
2. The application is brought under **Order 2, Rule 15 (b), (c) and (d)** of the **Civil Procedure Rules** (the **Rules**) upon the following grounds as stated on the face of the application -
 - (i) That the Defendant having been the insurer of the accident motor vehicle, the defence is an abuse of the process of the court.
 - (ii) That the Defendant "*participated*" in the judgment suit and is therefore *estopped* from denying knowledge of the accident; the defence is thus intended to prejudice, embarrass or delay the trial of the suit.
 - (iii) That the defence is scandalous, frivolous and vexatious.
 - (iv) That the defence does not raise any triable issue.
3. There is a supporting affidavit sworn by the Plaintiff's learned counsel. To it are annexed a number of documents, including the judgment in the judgment suit, **Nairobi HCCC No. 594 of 2000**.
4. The Defendant has opposed the application as set out in the **grounds of opposition dated 15th February 2011** and a **replying affidavit** sworn by one DINNAH OGULLA, the Legal Manager of the Defendant. The grounds of opposition are -
 - (i) That the nature of the relief sought calls for an inquiry at a hearing of the action.
 - (ii) That there is a reasonable defence to the claim which ought to be ventilated at trial.

(iii) That the application is fatally defective for being supported by a defective affidavit and by correspondence specifically excluded under the “*without prejudice*” rule.

(v) That an entry in a police abstract of an accident report is not proof of insurance cover under the Insurance Act, particularly where such cover has been specifically denied.

The replying affidavit elaborates those grounds.

5. The learned counsels filed written submissions and also orally argued the application. I have considered those submissions, including the cases cited.

6. The following main issues call for determination in this application –

(i) Is the supporting affidavit fatally defective, and thus rendering the application equally fatally defective?

(ii) Does the Defendant’s statement of defence raise any triable issues? In other words, does it raise any reasonable defence to the claim?

(iii) Is the defence scandalous, frivolous and vexatious?

7. Is the supporting affidavit fatally defective, thus rendering the application also fatally defective? The reason advanced for the alleged fatal defect is exhibition of some letters written by the Defendant on a “without prejudice” basis. Those letters were addressed to the Plaintiff’s advocates before the judgment suit was decided. They were dated 27th August 1998, 13th November 1998, 29th January 1999 and 29th March 2000.

8. The letters concerned the issue of liability as between the Plaintiff and the tortfeasor. The letters did not concern directly the issue of the Defendant’s liability under the law to satisfy the judgment. It was the issue of negligence that was meant not to be prejudiced, not the issue of Defendant’s liability to satisfy any judgment that may eventually be passed against the tortfeasor.

9. I therefore find that the Plaintiff is not precluded by any rule of evidence from using these letters on the issue of the Defendant’s liability. In the letters the Defendant admits having insured the accident motor vehicle. The supporting affidavit is thus not defective at all, let alone fatally defective.

10. I will now look at the defences raised in the Defendant’s defence. The following defences are disclosed –

(i) That the Defendant was not the insurer of the accident motor vehicle (paragraph 3).

(ii) That the accident as alleged did not occur (paragraph 3).

(iii) In the alternative that if the Defendant was the insurer of the accident motor vehicle, the contract of insurance would not in law obligate it to settle the judgment herein.

(iv) That no statutory notice was served upon the Defendant.

11. Was the Defendant the insurer of the accident motor vehicle? I have already pointed out that the Defendant implicitly admitted being the insurer of the accident motor vehicle in its letters to the Plaintiff’s advocates dated 27th August 1998, 13th November 1998, 29th January 1999 and 20th March 2000. The Defendant cannot get away from that admission at this late stage. The admission lent credence to the police abstract of the accident that showed the Defendant as the insurer of the accident motor vehicle. The Plaintiff could not possibly be expected to have with him the contract of insurance between the Defendant and its insured, or the certificate of insurance. Those would be documents belonging to those two. They are not public documents.

12. Whether or not the accident giving rise to the claim in the judgment suit occurred is not an issue that can be litigated in the present suit. It was litigated and decided in the judgment suit. It is not, and cannot be, a germane issue in the present declaratory suit.
13. Was the contract of insurance between the Defendant and the tortfeasor such as would obligate the Defendant in law to satisfy the judgment in the judgment suit?
14. **Section 4(1) of the Insurance (Motor Vehicles Third Party Risks) Act, Cap 405 (the Act)** requires that motor vehicles used on a road be insured against third-party risks. Such policy of insurance must satisfy the requirements set out in **section 5** of the Act.
15. The Defendant's obligation to satisfy the judgment in the judgment suit is set out in **section 10** of the Act.
16. The Defendant has not argued that the contract of insurance between it and the tortfeasor in respect of the accident motor vehicle did not satisfy the requirements set out in section 5 aforesaid, particularly in paragraph (3) thereof.
17. The Defendant has not demonstrated that it comes within the exceptions set out in **section 10(2)** of the Act. Although it denied in its defence and in the replying affidavit that it was served with the statutory notice required by section 10(2) (a) of the Act, the Plaintiff has exhibited the statutory notice dated 20th July 1998 in the supporting affidavit. The Defendant expressly acknowledges receipt of that notice in its letter dated 27th August 1998 (one of the letters referred to elsewhere above).
18. I am satisfied from the material before the court that the Defendant was duly served with statutory notice under section 10(2) (a) of the Act.
19. The Defendant has not demonstrated that the judgment sought to be executed against it was stayed pending appeal. Nor has it demonstrated any of the other exceptions set out in paragraph (c) of subsection (2) of section 10 aforesaid, or in subsection (4) of the same section.
20. I therefore find that the Defendant's defence raises no triable issues at all. There is no reasonable defence demonstrated. The statement of defence is frivolous and vexatious.
21. In the event I will allow the Plaintiff's application and strike out the Defendant's defence. I will also enter judgment for the Plaintiff for a declaration that the Defendant is obligated under **section 10(1)** of Cap 405 aforesaid to satisfy the judgment (and decree) in **Nairobi HCCC No. 594 of 2000**, and that the Plaintiff is entitled to execute the same against the Defendant. That is the only proper order to make. Judgment cannot be entered in the terms proposed by the Plaintiff in the application as he already has judgment in those terms in the judgment suit!
22. The Plaintiff shall have costs of this suit (including costs of the application). Those shall be the orders of the court.
23. Delay in preparation of this ruling (and the distress caused to the parties) is deeply regretted. It was caused by my poor state of health the last few years. But thank God I have now fully recovered my health.

DATED AT NAIROBI THIS 16th DAY OF OCTOBER 2012

H.P.G. WAWERU
JUDGE

DELIVERED AT NAIROBI THIS 17TH DAY OF OCTOBER 2012