



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Case 209 of 2009

CORPORATE INSURANCE COMPANY LIMITED.....PLAINTIFF

VERSUS

JOYCE WANGARI NGONDI.....DEFENDANT

RULING

1. The Chamber Summons dated 14th May 2010 is brought by the Defendant under the provisions of **Order 6 rule 13(1) (b) (c) (d) and 16** of the **Civil Procedure** Rules. The Applicant is seeking for an order that the Plaintiff's suit be struck out and judgment be entered against the Defendant in terms of the amended counterclaim dated 20th January 2010. This application is grounded on the fact that the Plaintiff as amended is scandalous, vexatious and it is meant to prejudice and delay the fair trial of the Defendant's counterclaim. The application is further supported by the affidavit of Joyce Wangari Ngondi sworn on 14th May 2010.

2. According to the Applicant, the Defendant was insured by the Plaintiff under the terms and conditions contained in the policy. The terms of the policy included a limitation for use of the motor vehicle which was supposed to be used only for domestic, leisure and in the insured's professional capacity. The only exclusion was to use the vehicle for hire or reward or commercial travelling. The indemnity also extends to an unauthorized driver using the motor vehicle with the permission of the insured. The Plaintiff's claim is that the motor vehicle was involved in an accident while being driven by a third party.

3. However the applicant contends that the use of the motor vehicle by the third party who was driving it, was duly authorized by the Applicant. The motor vehicle was being used within the context of social use. Counsel for the Applicant submitted that the Plaintiff's claim as per the amended Plaintiff is not supported by the policy which extends to authorized drivers, thus the claim in the suit is meant to derail and deny the Defendant her rightful claim for compensation for the risk that was insured.

4. This application was opposed; reliance was placed on the replying affidavit sworn by M/s Nancy Shikuku on 26th May 2010. It is contended that there are triable issues as per the statements of issues which was drawn by the Defendant, those issues should proceed to trial for determination. The Defendant having drawn the issues cannot now turn around and claim that the suit does not raise triable issues. The issue of whether the motor vehicle was being used against the terms of the policy and whether the vehicle was insured to carry passengers can only be determined through the hearing of witnesses.

5. This application invokes the jurisdiction under the provisions of; Order 6 Rule 13 which provides as follows:

“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 or

b) It is scandalous, frivolous or Vexatious; or

c) It is otherwise an abuse of the Process of the court, and may order the suit to be stayed or dismissed or Judgment to be entered accordingly, as the case may.

6. It is trite law that striking out pleadings is a drastic measure which is sparingly done and it is done when the pleadings complained about are an abuse of the court process and discloses no triable issue. (See the case of **DT Dobie & Co. Limited vs Muchina [1982] KLR**) as per Madan JA:

“The court should aim at sustaining rather than terminating a suit. A suit should only be struck out if it is so weak that it is beyond redemption and incurable by amendment. As long as a suit can be injected with life by amendment, it should not be struck out.”

7. The Plaintiff's claim as per the amended Plaintiff is that the Plaintiff insured the Defendant's motor vehicle registration Number KAX 456K and the insurance policy was confined to use of the motor vehicle by the Defendant in person. It is alleged by the Plaintiff that the motor vehicle was used for carriage of goods and it was used by third parties to transport passengers when it was involved in an accident and personal representatives of the deceased passengers filed the suit against the Defendant in which the Plaintiff is supposed to indemnify the injured passengers. In the amended defence and counterclaim the Defendant denied that the vehicle was being used outside the terms of the policy. The Third Party who was driving the motor vehicle was authorized.

8. The Defendant is supposed to be indemnified for loss of the motor vehicle valued at Kshs. 550,000/-, damages for breach of contract, as well as legal fees for the defence by the third party claimant. The Defendant also annexed a copy of the policy especially clause 2 which provides as follows:

“Indemnity to other Persons

The company will subject to the Limits of Liability Restrictive and Extensive Clauses indemnify any Authorized Driver or at the request of the insured any person (other than the person driving) in or getting into or out of the motor vehicle against all sums including claimant's costs and expenses which the insured shall become legally liable to pay in respect of:

- c) Death or bodily injury to any person**
- d) Damage to property”**

9. The Plaintiff's claim is that the Defendant's motor vehicle was at the material time being used for commercial purposes by an unauthorized driver. The Defendant maintains that at the material time, the driver was authorized to drive the motor vehicle within the context of social and professional purposes which is covered under the policy. Is there a triable issue raised in the Plaintiff's claim? The policy of insurance provides the parameters within which the motor vehicle could have been used. I have gone through the provisions of the policy and I see no triable issue requiring this matter to proceed on trial.

10. Accordingly the Plaintiff's claim is struck off; Judgment is entered in favor of the Defendant as per prayer Nos. (a) And (b) of the Amended defence and Counterclaim amended on 20th January 2010. Prayer Nos. (c) And (d) will have to proceed for formal proof for the Defendant to establish the claims sought therein. The Defendant will also have costs of this application.

RULING READ AND SIGNED ON THE 24TH SEPTEMBER 2010.

**M. K. KOOME
JUDGE**