REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

Civil Case 46 of 2003

PATRICK GITONGA MBAKA …….....…… PLAINTIFF

VERSUS

BLUE SHIELD INSURANCE CO. LTD …….. DEFENDANT

RULING

The suit herein was brought by the present applicant against the respondent for a declaratory order that the respondent is bound in law to satisfy a decree in CMCC No. 1718 of 1994. It is a suit in which the applicant obtained judgment in the sum of Kshs. 153,610/= in an accident claim against an owner and driver of a lorry which was involved in an accident in which the applicant was injured.

The applicant now seeks in this suit that the respondent, being the insurer of the lorry pays the decretal sum. The respondent filed a statement of defence in which it denied being the insurer of the lorry and maintained that it was not, therefore bound to satisfy the claim.

The applicant has now brought the instant application seeking that that defence be struck out and judgment entered in favour of the applicant in terms of the plaint. The applicant seeks that the defence be struck out on the grounds that it discloses no reasonable cause of action; that it is vexatious, frivolous and scandalous and hence abuse of the court process. The application is supported by an affidavit sworn by counsel for the applicant, Joash Ondieki Ontita.

I propose to deal with the issue of this affidavit first as a two pronged objection has been raised in its regard. It has been argued in the respondent's replying affidavit and its counsel's submissions that the affidavit offends order 6 Rule 13(2) of the Civil Procedure Rules which declares that no evidence shall be admissible on an application under sub rule (1) (a). It is trite that an application to strike out a defence under Order 6 Rule 13 can be made only on four grounds namely:-

(i) that the defence discloses no reasonable cause of action or defence, or

(ii) that it is scandalous, frivolous or vexatious, or

(iii) that it may prejudice, embarrass or delay the fair trial of the action, or

(iv) it is otherwise an abuse of the process of the court.

It is also a requirement that the application must state concisely the grounds on which it is made. Indeed

therefore an applicant may rely on all the four grounds but state them concisely, I believe in the manner they are set out in Rule 13 (1), (a), (b), (c) and (d). But where an application is brought exclusively under Rule 13 (1) (a) that the defence discloses no reasonable cause of action or defence, then by dint of Rule 13(2) no affidavit in support of the application ought to be sworn.

In the instant case, the applicant relies on three (3) grounds under (a) (b) and (d). But those grounds are not concise. Grounds (b) and (d) are combined in one thereby departing from the requirement of Rule 13(2).

I also find that the supporting affidavit is necessary to support the other grounds, since this application is not grounded exclusively on (1) (a).

I turn to consider the substance of this application. On the proof of any of the grounds outlined above, the court may do two (2) things; strike out the pleadings or order amendment of the same. Where the court opts to strike out the pleadings, it can order the suit stayed or dismissed or enter judgment.

Considering the grounds upon which the application is premised, I find nothing scandalous, vexatious or frivolous in the application. It has also not been stated how it amounts to an abuse of the court process. That leaves the ground that the defence discloses no reasonable cause of action.

The emphasis is on the word "reasonable". It is now settled that the jurisdiction of the court to strike out pleadings is one which is not exercised as a matter of course. It is exercisable in very rare situations.

It was stated in **D.T. Dobie & Co. Ltd V. Muchina and Another** (1982) KLR I that:-

"***No suit ought to be dismissed unless it appears hopeless that plainly and obviously discloses no cause of action and is so weak as to be beyond redemption and incurable by amendment."***

To emphasis this point, I would like to cite one more authority, **Dhanjal Investments Ltd V. Shabana Investments Ltd,** Civil Appeal No. 1232 of 1997 in which the law was stated thus:-

"***The law on summary judgment procedure has been settled for many years now. It was held as early as in 1952 in the case of Kundanlal Restaurant V. Detshi & Co. Ltd (1952) 19EACA 77 and followed in the Court of Appeal for Eastern Africa in the case of Souza Figueredo & Co. V. Moorings Hotel (1959) EA 425 that if the defendant shows a bona fide triable issue he must be allowed to defend without condition."***

In this matter, the respondent in the defence has denied that it issued an insurance policy to the owner of the lorry which caused the accident. It has argued that no statutory notice was ever served on it.

These are serious triable issues. Evidence must be led by both sides in order to ascertain the truth. That is not an exercise for this court at this stage but reserved for the trial.

For these reasons, the application fails and is for dismissal. It is hereby dismissed with costs to the respondent.

Dated and delivered at Meru this 12th ….day of …May… 2008.

W. OUKO

JUDGE