



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 378 of 2007

ADIEL MURIITHI PHILIP.....PLAINTIFF

VERSUS

OCCIDENTAL INSURANCE COMPANY LTD.....DEFENDANT

RULING

The application is a Chamber Summons dated 7th of September, 2007 brought under Order VI rule 13(1) (b) (c) and (d) of the Civil Procedure Rules. The Plaintiff is seeking to have the Defendant's statement of defence struck out and judgment entered against the Defendant as prayed in the plaint. It is the Plaintiff's contention that the Statement of Defence is frivolous and vexatious, that it may prejudice, embarrass and delay the fair trial of the case and that it is otherwise an abuse of the court process.

The application is supported by an affidavit sworn by the Plaintiff in the suit, dated 7th of September 2007. The affidavit annexes *inter alia* the pleadings in Meru HCCC No. 28 of 2001. The Plaintiff avers that Mulwa, J. gave judgment in his favour in the sum of Kshs.2,495,425 plus costs and interest out of which the Defendant paid Kshs.1,898,978/-, leaving a balance of Kshs.1,154,270/-, as at 6th of June 2007. The Plaintiff also avers that the Defendant has declined to pay the outstanding balance in the said suit on grounds that the parties entered into a consent judgment that adjusted the judgment of Mulwa, J.

This application is opposed. The General Manager of the Defendant Company, Mr. S. K. Singh has sworn a replying affidavit dated 8th of October, 2007. The gist of the affidavit is that the issues between the Plaintiff and the Defendant's insured in the Meru case, were conclusively dealt with and the matter fully settled. The General Manager also deposes that there is no outstanding balance to the Plaintiff and that in that regard the Statement of the Defence filed in the instant suit raises serious triable issues which ought to go to trial for full and final determination of the instant case. Mr. Singh also deposes that there is a pending application to amend the defence which he argues should be heard first as a priority before the matter is heard.

Mr. Ngoge argued this application on behalf of the Plaintiff/Applicant while Ms. Mwangi opposed the application on behalf of the Defendant. The facts of this case are not in dispute. The Plaintiff in the matter was walking along Meru-Nkubu road in Meru town, when a Mitsubishi Lorry Reg. No. KAH 885H hit him, occasioning him serious physical injuries. This was on the 28th of September, 2000. The Plaintiff commenced the civil proceedings in Meru HCCC 28 of 2001 (hereinafter referred to as the Meru case) where Judgment was entered in his favour against the Defendant's insured on the 15th of May, 2003. It is also not in dispute that after judgment was entered in the Meru case, the Advocates of the parties entered into a consent dated 20th of August, 2003 which compromised the judgment and the

decree of Mulwa, J. in the Meru case.

The issue between the parties in this application revolves around the consent of 20th August, 2003. Mr. Ngoge for the Plaintiff contends that the Defendant cannot rely on the consent judgment because at the time the consent was filed in court, the High Court was *functus officio*, since judgment had been entered in the suit. Mr. Ngoge's second argument is that in order to adjust the judgment of Mulwa, J. and the decree in the Meru suit, the parties should have filed a formal application under **Order XLIV** of the **Civil Procedure Rules** and **Section 8** of the **Civil Procedure Act**, in order to vary the judgment in the case. Mr. Ngoge relies on the case of **PETER NGANGA MUIRURI VS. CREDIT BANK LIMITED & OTHERS H.C. MISC. APPL NO. 203 OF 2006**. At page 19 of the Judgment, the Court of appeal discusses the general powers of the High Court vis-à-vis those of the Court of Appeal to extend time to lodge appeals. The Court also states that the High Court can re-open a concluded matter under **Section 80** of the **Civil Procedure Act** and **Order XLIV** of the **Civil Procedure Rules**.

Mr. Ngoge further submitted that the Respondent had filed an appeal against the decision of Mulwa, J. which appeal was still pending. He argued that the consent order was a contradiction of the appeal and that the Respondent should not be allowed to rely on the consent in the circumstances.

Mr. Ngoge's third argument is that the consent in question could not be relied upon because it was not acted upon by the Deputy Registrar, in accordance to **Order XLIX rule 2(a)** of the **Civil Procedure Rules** and is therefore a nullity. For this proposition Mr. Ngoge relies on the case of **Provincial Insurance Co. East Africa Limited vs. Mordekai Mwangi Nandwa, CA No. 179 of 1995**, where at page 7 of that judgment the Court of Appeal, while discussing the issue of entry of consent judgments in suits observed that parties to a suit could enter consent orders under **Order XLVIII rule 2A** on the Civil Procedure Rules which provides:

“Any order may, by consent of the parties evidenced in writing, be entered by the registrar or, in a subordinate court, by an executive officer so authorized by the Chief Justice.”

Mr. Ngoge argued that the judgment in the Meru case could not be set aside by consent as sought by the Advocates to the parties in the said suit but could only be set aside on appeal to the Court of Appeal. Mr. Ngoge argued that since the consent judgment was not entered by the Deputy Registrar of the Court it was null and void and therefore, the Defendant in the instant case has no defense and the same should be struck out and judgment entered in favour of the Plaintiff.

Ms. Mwangi has challenged the application on the grounds that the defense raises serious triable issues and is therefore not frivolous, vexatious or meant to delay the trial of the case. Ms. Mwangi submitted that the triable issues raised in the defense includes whether the parties can vary a judgment of the court, whether the Registrar has power to enter consent judgment after the suit has been heard and determined and that these issues should go to trial. Ms. Mwangi submitted that the Defendant's position in the matter is that it has paid in full whatever the Plaintiff seeks in the instant suit.

In regard to the consent order dated 20th August, 2003, Counsel submitted that the same was valid because it was signed by both Advocates to the parties in the suit and was filed in court as required. The learned counsel submitted that the Plaintiff is estopped from saying that he never intended to enter the consent. Ms. Mwangi submitted that pursuant to the filing of this consent, the Defendant had paid the sum consented to in full, as per the cheques annexed by the Plaintiff in his application, at pages 106 and 108 of the Plaintiff's bundle of exhibits. Ms. Mwangi submitted that having enjoyed the fruits of the consent, the Plaintiff should not be allowed to come back to the court.

In regard to the Memorandum of Appeal filed by the Defendant against the judgment in the Meru case, Ms. Mwangi submitted that the appeal was no longer necessary since the parties compromised the suit by the consent entered between them. Ms. Mwangi also submitted that parties have a right to reach an agreement and comprise a suit between them at any time. Counsel submitted further that if the Plaintiff was dissatisfied with the consent, they should have applied to have the same set aside, but he was not at liberty to challenge the consent through the application to strike out the defense as sought in the instant

application.

Ms. Mwangi relies on the case of **KUNDANLAL RESTAURANT VS. DEVSHI & COMPANY CA NO. 76 OF 1951, EACA** for the proposition that the principal upon which the courts act in applications to strike out a defense is to consider whether the Defendant has shown a bona fide triable issue and if the court is satisfied that this has been met, the Defendant should be allowed to defend the suit without condition.

I have considered the rival arguments of the Advocates in this application together with the application and the affidavits filed by both parties and the annexures thereto. This is an application to strike out the defence on grounds that it is frivolous, vexatious and an abuse of the court process and likely to embarrass, prejudice or delay the fair trial of the case. I have considered the Statement of Defence. In paragraph 5 of the Statement of Defence, the Defendant avers that by a consent dated 20th of August, 2003, the two parties in the suit compromised the judgment of Hon. Justice Kasanga Mulwa, made on the 15th May, 2003, and that all the monies payable by the Defendant to the Plaintiff have fully been paid. I understand the Defendant to be saying that the Plaintiff has no cause of action against the Defendant. Both counsels have made submissions regarding the consent order of 20th August, 2003 which I have considered. The question this court has to ask itself is whether the issue of the said consent is a triable issue that should entitle the Defendant to unconditionally defend the suit.

The general principles for the exercise of the summary powers to strike out pleadings are well settled. The summary procedure is only appropriate in cases which are plain and obvious, and where the court will not embark on the merits of the case, through a minute and protracted examination of documents and facts of the case, as that would usurp the position of the trial judge. It is a power that should be exercised with caution because it exercised without the court being fully informed on the merits of the case through discovery and oral evidence. It is a power that should therefore be used sparingly and cautiously. See **D.T. DOBIE & CO. (K) LIMITED VS. MUCHINA [1982] KLR 1, WEN LOCK VS. MALONEY & OTHERS [1965] WLR 1238.**

It is not frivolous or vexatious for the Defendant to aver that it has paid in full all the monies due to the Plaintiff. It is also not embarrassing or an abuse of the court process for the Defendant to rely on a consent order entered between the parties that compromised the suit as pleaded by the Defendant in this case. The Plaintiff has not denied that a consent order was entered into by the parties in the Meru case, neither is it denied that the parties in the Meru case involved the Plaintiff and the Defendant's insured, and that therefore it is not denied that the Plaintiff has fully enjoyed the fruits of the judgment in that case. The issue whether the consent order entered by the parties in the Meru suit is valid or not, is a matter that should be determined at the trial of this case. Even though I agree with the Defendant that if the Plaintiff wished to challenge the consent order, he should have done so by making an appropriate application to set aside the same in the Meru case itself, and not by filing the instant suit. It is still correct to find that the issue is a matter that is triable and which can be argued within the instant suit.

Having considered this application, I do find that there are triable issues in the Defendant's defense which entitle the Defendant to have a right to unconditionally defend the suit. This is therefore not a plain and obvious case and neither is it one that can be dealt with through summary procedure as suggested in the instant application.

Having come to this conclusion I find that the Plaintiff's application lacks in merit and should be dismissed with costs to the Defendant.

Dated at Nairobi this 27th day of June 2008.

LESIIT, J.

JUDGE

Read, delivered and signed in presence of:

Ms. Mukururi holding brief for Mr. Ngoge for the Plaintiff/Applicant

N/A Ms. Mwangi for the Defendant.

LESIT, J.

JUDGE