REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Case 224 of 2007

FRANCIS KIMANI KARIUKI……...….PLAINTIFF

VERSUS

INTRA AFRICA ASSURANCE CO. LTD.…DEFENDANT

RULING

What I have before me in this suit is an application by the plaintiff brought under **Order 6 Rule 13(1) (a) (b)** and **(c)** of the **Civil Procedure Rules** and **Section 3A** of the **Civil Procedure Act** seeking the striking out of the defence and entry of judgment in favour of the plaintiff with costs as prayed in the plaint. The application is based on the grounds that the defence filed herein is a sham which discloses no or no reasonable cause of action and is merely intended to delay and prejudice the expeditious dispose of this suit and that it is vexatious, scandalous and frivolous.

The facts of the case are that on or about 11th June 1987 while the plaintiff was driving motor vehicle registration number KWN 619 along Nakuru/Gilgil Road he was involved in a collision with motor vehicle registration number KXU 197 owned by one H. W. Kamulamba which was at the material time insured by the defendant and negligently driven by the said H. M. Kamulamba's driver and servant or agent. After filing Nakuru High Court Civil Case No. 37 of 1990 (the earlier case) against the said H. M. Kamulamba the plaintiff served the defendant with notice under Section 10 of the Insurance (Motor Vehicles Third Party Risks) Act Cap 405 of the Laws of Kenya (the Act). However, the defendant refused to defend that suit. After hearing the plaintiff obtained judgment aginst the defendant's unsured, H. M. Kamulamba, for a sum of Kshs.1,600,000/-. He claims that despite demand made to it, the defendant has refused to settle the decree in that case hence this declaratory suit to compel it to do so.

In its defence the defendant denies having, at the material time, insured the vehicle KXU 197 and avers that even if it had, this suit is bad in law for failure to set out the policy of insurance issued by the defendant or the period of cover. In its view this suit does not therefore disclose any or any reasonable cause of action against the defendant and should be struck out. It further avers that it was not notified of Nakuru RMCC No.37 of 1990 (which should be Nakuru HCCC No.37 of 1990) (the earlier suit) or served with the requisite notice under the Act. Without prejudice to that defence the defendant avers that the vehicle KXU 197 was, at the material time, insured by the Kenya Motor Insurance Pool (1985 Ltd) (the Motor Pool). In the alternative it further avers that if it insured the vehicle at the material time then it is entitled to repudiate liability as its insured was in breach of the contractual agreement under the policy and the defendant is therefore not bound to indemnify him for the alleged loss to the plaintiff.

The plaintiff does not think highly of that defence. In his opinion that is no defence to be taken to hearing hence this application.

Relying on the pleadings in this case and in particular on the affidavit in support of the application Mr. Karanja, counsel for the plaintiff, submitted that it is not in dispute that the plaintiff was involved in the accident giving rise to the earlier suit in which he has obtained judgment against the defendant's insured. He said that prior to the institution of that suit due notice had been served upon the defendant under **Section 10** of the **Act** and the defendant is therefore duty bound to settle the decree in that case. He referred me to a copy of the certificate of insurance issued by the defendants in respect of the vehicle KXU 197 and dismissed the defendant's claim that the vehicle was, at the material time, covered by the Motor Pool. And the defendant having not instituted proceedings under **Section 8** of the **Act** to repudiate liability, he concluded that there is therefore nothing in this case to take to the hearing and urged me to allow the application as prayed.

Mr. Mbigi, counsel for the defendant, started by attacking the competency of this application itself. He cited the case of **Apidi Vs Shavil & Another [2003] KLR 588** and submitted that as this application based on all the paragraphs of **Order 6 Rule 13** of the **Civil Procedure Rules** is fatally defective and therefore bad in law. He also submitted that this application is bad in law as it is supported by an affidavit and yet the law forbids adducing of evidence in such an application. In any case, he said, the contents of the affidavit in support of the application are hearsay and offend **Order 18 Rule 4(b)** of the **Civil Procedure Rules** in that the correspondence annexed to the affidavit was exchanged between counsel for the parties and was not copied to the plaintiff himself. The plaintiff is therefore not competent to say anything about it and whatever he has deposed to is hearsay. That correspondence, counsel added, is in any case denied and even if it was exchanged as alleged it raises a triable issue – whether or not notice was given - which should go to trial. He cited the cases of **D.T. Dobie & Company (Kenya) Ltd Vs Muchina [1982] KLR 1** and **Giciem Construction Company Vs Amalgamated Trade and Services [1983] KLR 156** as authority for the proposition that where a defence raises even one triable issue, even if the court is skeptical about it, it should not be struck out and the matter should go to hearing.

Besides notice, Mr. Mbigi further submitted that the other triable issue is whether or not the defendant insured the vehicle at the material time. He said the defendant has denied insuring the vehicle and stated that even the number of the policy of insurance stated in paragraph 7 of the plaint is wrong. He claimed that the defendant issued the certificate of insurance referred to as an agent of the Motor Pool. In his view therefore this suit should have been filed against the successor in title of the Motor Pool.

Relying on the cases of **Blue Shield Insurance Company Ltd Vs Caroline Andisa, Civil Appeal No. 795 of 2001** and **Gurbaksh & Sons Ltd Vs Njiri Emporium Ltd [1985] KLR 695,** Mr. Mbigi submitted that this being a declaratory suit, judgment cannot be entered against the defendant as sought in prayer 2 of the application without a hearing. He urged me to dismiss it with costs.

In his riposte, Mr. Karanja submitted that this being a liquidated claim judgment can be entered as prayed in the application. He also said that failure to state the period of insurance or the correct policy number is not fatal as what is required for purposes of such a suit is the certificate of insurance. He saw nothing wrong with the supporting affidavit as it is based on information from the plaintiff's advocates.

I have considered these arguments in conjunction with the pleadings in this case. The first issue for determination is whether or not this application is incompetent as contended by Mr. Mbigi for the defendant. He says the application is incompetent because, contrary to **Order 6 Rule 13(2),** it is supported by affidavit evidence.

With respect this contention is totally misconceived. That provision outlaws evidence where the application is brought only under **Rule 13(1) (a)** of that **Order,** that is, on the ground that a pleading discloses no or no reasonable cause of action or defence. Where an application, in addition to **Rule 13(1) (a),** is also based on other grounds evidence is admissible.

Mr. Mbigi's also contended that the Application is incompetent because it is based on all the grounds in Order 6 Rule 13. There is nothing in that Rule to suggest that an application made thereunder can only be based on one of the grounds therein stated. The Court of Appeal made that clear in the case of **Desai Vs**

Patel [2001] KLR 120 at 123 where, while quoting from its earlier decision in **Melika Vs Mbuvi (Civil Appeal No. 267 of 1997)(unreported**), it stated:-

"We at the same time note that there is no bar to such an application to strike out a pleading being based on any or all of the grounds mentioned in the rule, provided that such grounds have been specified."

As stated at the beginning of this ruling this application is brought under **Order 6 Rule 13(1) (a) (b)** and **(c)** and the grounds are specified. That contention is also therefore misconceived and totally unmeritorious.

Counsel's other contention is that the averments in the affidavit in support of the application are hearsay because the correspondence, copies of which are annexed thereto, was exchanged between counsel and not between the parties themselves. Again, with respect, that contention has also no merit. This is because the correspondence concerned the deponent's own case and one of the counsel involved in it was the deponent's own advocate. It was therefore readily available to him. In any case he states clearly in paragraphs 5, 6, 7 and 8 of that affidavit, in which some of the correspondence is referred to, that the letters were written by his advocate thus giving its source.

The last point taken by Mr. Mbigi on the competency of the application was that this being a declaratory suit, judgment cannot be entered as sought in prayer 2 of the application. On that contention he based himself on the authority of the Court of Appeal decision in **Gurbaksh Singh & Sons Ltd Vs Njiri Emporium Ltd [1985] KLR 695** and the High Court decision in **Blue Shield Insurance Co. Ltd Vs Caroline Andisa Nairobi HCCA No. 795 of 2001**. I have read the reports on the two cases. With respect the decisions in those cases do not support that contention. Although the latter was a declaratory suit and a contention like the one Mr. Mbigi has made was also made, Justice Aganyanya did not decide the point. He allowed the appeal on the ground that the defence in the lower court case was not a sham. The issue in **Gurbaksh Singh & Sons Ltd case** was what liquidated damages are. It was not an appeal from a declaratory decree. For my part I know of no authority that in a declaratory suit an unsustainable defence cannot be struck out and judgment accordingly entered in favour of the plaintiff.

For these reasons I find that the application is competent and I now wish to consider it on its merits.

The powers given to the court to strike out pleadings under Order 6 Rule 13 of the Civil Procedure Rules, sometimes referred to as summary procedure, are draconian, coercive and drastic. And because a party may thereby be deprived of his right to a plenary trial, the court should exercise those powers with the greatest of care and circumspection and only in the clearest of cases as regards both the facts and the law. The summary procedure under this provision should only be adopted when it can be clearly seen that a claim or answer is on the face of it obviously unsuitable or where the case is unarguably clear and beyond doubt. This was made clear in the old English case of Dyson Vs Attorney General [1911] 1 KB 410 at page 419 in which Fletcher – Moulton L J said:

"To my mind it is evident that our judicial system would never permit a plaintiff to be driven from the judgment seat … without any court having considered his right to be heard, excepting in cases where the cause of action was obviously and almost incontestably bad."

Our law reports are replete with authorities on this proposition. Suffice it to cite DT Dobie & Company (Kenya) Ltd Vs Muchina [1982] KLR 1 in which this caution was also explicitly stated. Waki J (as he then was) reiterated the caution in Bank of Credit & Commerce International (Overseas Limited) Vs Giorgi Fabrise & Another, Mombasa HCCC No. 711 of 1985 in the following words:-

"**In a matter that alleges that the suit is scandalous, frivolous and vexatious and otherwise an abuse of the court process,…[the court] must be satisfied that the suit has no substance or is fanciful or the plaintiff is trifling with the court, or [that] the suit is not capable of reasoned argument; it has no foundation, no chance of succeeding and is only brought merely for the purposes of annoyance or to gain fanciful advantage and will lead to no possible good. A suit would be an abuse of the process of court where it is frivolous and vexatious."**

With that caution in mind it is, however, trite law that where a pleading has absolutely no substance and a party is only trifling with the court, it is the clear duty of the court to strike out such pleading and accordingly dismiss the action or enter judgment for the Plaintiff as the case may be. In the English case of **Anglo Italian Bank Vs Wells, 38 L.T. at page 201** Jessel, M.R. stated that:-

"**When the judge is satisfied that not only there is no defence but no fairly arguable point to be argued on behalf of the defendant it is his duty to give judgment for the plaintiff**."

The object of striking out pleadings as was stated by Lord Buckley in **Carl-Zeiss-stiffung Vs Rayner [1969]2 ALL ER 897 at 908** is:-

"…to ensure that the defendants should not be troubled by claims against them which are bound to fail having regard to the uncontested facts. In principle if there is any room for escape from the law, well and good; it can be shown. But in the absence of that, it is difficulty to see why a defendant should be called on to pay a large sum of money and a plaintiff permitted to waste large sums of his own or somebody else's money in an attempt to pursue a cause of action which must fail. … The object is to prevent parties being harassed and put to expense by frivolous vexatious or hopeless litigation."

As I have pointed out this application is brought under **Rule 13(1) (a), (b)** and **(c).** The grounds stated in those paragraphs are that the defence does not disclose any or any reasonable defence; that it is scandalous, frivolous or vexatious; or that it may prejudice, embarrass or delay the fair trial of the action.

A pleading is said to have no or no reasonable cause of action or defence when, upon examining it, the court is satisfied that it discloses no reasonable cause of action or defence, as the case may be, and that no amendment, however ingenious, will correct or cure the defect. Where the court is so satisfied, it will strike out such pleading and dismiss the action or enter judgment as the case may be.

Where the only ground on which the application is made is that the pleading discloses no reasonable cause of action or defence, it is trite law that only the particular pleading is looked at and no evidence is admissible. **Order 6 Rule 13(2)** makes that very clear. In **Nyagah Vs Nyamu & Another [1976] KLR 73** Mustafa JA said:

"In dealing with a submission of no cause of action, it is trite law that only the plaint is to be looked at".

The truth of the allegations in the particular pleading is assumed. Lakha JA expressed himself thus on this point in **Yaya Towers Ltd Vs Trade Bank Ltd, CA No. 35 of 2000,[2000] LLR 3633 (CAK).**

"**On an application to strike out a plaint under Order 6 Rule 13(1)(a) of the Civil Procedure Rules on the ground that it discloses no reasonable cause of action…the truth of the allegations contained in the plaint is assumed and evidence to the contrary is inadmissible (see Order 6 Rule 13(2) of the Rules). This is because the court is invited to strike out the claim *in limine* on the ground that it is bound to fail even if all such allegations are proved. In such case the court's function is limited to a scrutiny of the plaint. It tests the particulars which have been given of each averment to see whether they support it, and it examines the averments to see whether they are sufficient to establish the cause of action. It is not the court's function to examine the evidence to see whether the plaintiff can prove his case, or to assess its prospects of success."**

However, in applications based on this and any of the other grounds mentioned in the rule or where the inherent jurisdiction of the court is invoked, affidavit evidence may be and is ordinarily used.

I have at the beginning of this ruling set out the defendant's defence. The first point raised in the defence is that the defendant had not, at the material time, insured the vehicle KXU 197. According to the defendant the vehicle was, at the material time, insured by the Motor Pool against which this suit should have been filed. The defendant also avers in the defence that even if it had insured the vehicle, this suit is bad in law for failure to set out the policy of insurance issued by the defendant and/or the period of cover. On the face of it, without looking at the evidence in this case, I cannot say that this defence discloses no

or no reasonable cause of defence. The application can not therefore succeed on this ground.

As I have said on the other grounds on which this application is made evidence is admissible. The second ground is that the defence is scandalous, frivolous and vexatious. I concur with the decision of Ringera J (as he then was) in **Dr. Murry Watson –vs- Rent –A- Plane Ltd & 2 Others. NRB HCCC No. 2180 of 1994** that a pleading is scandalous when it alleges indecent, offensive, or improper acts, or motives against an adversary which are unnecessary in the proof of the action pleaded and that it is frivolous if it is "lacking in seriousness and tending to annoy. A frivolous claim is *ex post facto* vexatious for nobody can fail to be vexed by a frivolous allegation against him." The learned judge reiterated the same view in **Mpaka Road Development Ltd Vs Kana [2000] LLR 1011 (HCK)**.

Looking at the defence in this case I can not find anything scandalous about it. It is, however, with respect, totally unmeritorious. I know of no legal requirement that for a suit like this to succeed the plaintiff must set out the particulars of the policy of insurance. Be that as it may, I appreciate, as stated by Mr. Mbigi, that wrong policy numbers are given in the plaint and in the affidavit in support of the application. But that error was caused by the defendant itself. By its letter dated the 14th March 1990 addressed to the plaintiff's advocate by none other than the defendant's own managing director, the defendant talked of "OUR POLICY NO. 519/85/NPC/0060-H. W. KAMULAMBA." That is the same Policy No. said in paragraph 7 of the plaint and H.W. Kamulamba is stated in paragraph 3 as read together with paragraph 6 of the plaint to be the defendant's insured. I agree with Mr. Karanja that the error in stating the correct Policy No. is a typographical one and has caused no prejudice to the defendant as the correct policy number is stated on the certificate of insurance exhibited by the defendant and on the police abstract report. Nowhere in the correspondence exchanged before action did the defendant deny insuring the said H.W. Kamulamba's vehicle registration No. KXU197.

True the proposal form completed in respect of that insurance was that of the Motor Pool. That does not, however, avail the defendant any defence as what is important for the purposes of a suit such as this is a certificate of insurance which **Section 7(1)** of the Act requires to be issued by the insurer of the vehicle. The section states:

"Section 7(1) A certificate of insurance shall be issued by the insurer to the person by whom a policy of insurance is effected.

(2) Such certificate shall be in the prescribed form and shall contain such particulars of any conditions subject to which the policy is issued and of any matters as may be prescribed, and different forms and different particulars may be prescribed in relation to different cases or circumstances."

In this case the defendant has itself exhibited through the replying affidavit a certificate of insurance covering H.W. Kamulaba's vehicle KXU 197 from 19th September 1986 and 14th September, 1987. The accident giving rise to this suit occurred on 11th June 1987 during the currency of that cover. It does not therefore lie in the defendant's mouth to say that it did not insure that vehicle at the material time.

The defendant has further averred in its defence that it was not notified of Nakuru HCCC No.37 of 1990 or served with the requisite notice under the Act. That defence is of obviously put forward pursuant to **Section 10(2)(a)** of the Act which provides that:

"**No sum shall be payable by an insurer under the foregoing provisions of this section –**

(a) in respect of any judgment, unless before or within fourteen days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings;"

That defence also does not hold any water for the simple reason that the plaintiff's advocates' demand letter dated 17th August 1987 was copied to the defendant as the insurer of the vehicle. The defendant's

said letter of 14th March 1990 was in response to the plaintiff's advocates' letter of 2nd February 1990 forwarding to the defendant a notice of institution of suit (NAKURU HCCC NO. 37 OF 1990) and a copy of the plaint thereof. It is therefore dishonest of the defendant to say that it was not given the requisite notice.

The last point raised in the defence is that if the defendant insured the vehicle at the material time then it is entitled to repudiate liability as its insurer was in breach of the contractual agreement under the policy and the defendant is therefore not bound to indemnify him for the loss suffered by the plaintiff. **Section 8** of the Act demolishes this defence. It reads:

"**Any condition in a policy of insurance providing that no liability shall arise under the policy, or that any liability so arising shall cease, in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to a claim under the policy, shall, as respects such liabilities as are required to be covered by a policy under section 5, be of no effect:**

Provided that nothing in this section shall be taken to render void any provision in a policy requiring the persons insured to repay to the insurer any sums which the latter may have become liable to pay under the policy and which have been applied to the satisfaction of the claims of third parties."

Besides this provision, Section 10(4) of the Act requires the action to avoid liability to be commenced before or within three months after the commencement of the proceedings in which the judgment the insurer is called upon to settle was given and the insurer has obtained a declaration that he is not bound to settle that judgment.

It is now over 20 years since the accident giving rise to this suit occurred and over two years since judgment in the other case was obtained and yet the defendant is talking of wishing to take action to avoid liability. The defendant is clearly trifling with the court. Its defence is hollow and has been thrown in to obfuscate issues in this matter. It can not hold any water at all.

Bearing in mind all these factors I find that there is no defence to take to hearing. It is, in a nutshell, frivolous, vexatious and is intended to delay the fair trial of this case. Such defence is also an abuse of the process of the court. I accordingly strike it out.

Having struck out the defence what option am I left with other than to enter judgment for the Plaintiff as prayed in the plaint?

Section 10(1) of the Act requires that:-

"**If, after a policy of insurance has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of section 5 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgment."**

I have already said that the plaintiff has obtained judgment in the earlier suit against the defendant's insured. The defendant is therefore bound under this provision to settle the decree in that suit and I so declare. In the circumstances I enter judgment for the plaintiff as prayed in the plaint. The plaintiff shall also have the costs of this application.

DATED and delivered this 25th day of September, 2008.

D.K. MARAGA

JUDGE