

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

Civil Case 114 of 2005

MARY ADHIAMBO ONYANGOPLAINTIFF

VERSUS

JUBILEE INSURANCE CO. LTD.DEFENDANT

RULING

The plaintiff, Mary Adhiambo Onyango has filed an application under Order 6 Rule 13 (1) (c) & (d) of the Civil Procedure Rules and Section 3 A of the Civil Procedure Rules seeking the orders of this court to strike out the defence filed by the defendant, Jubilee Insurance Company Ltd. She has further prayed for judgment to be entered in her favour as prayed in the plaint. The grounds in support of the application are on the face of the application. They are that the defence filed is frivolous and vexatious and is meant to delay the just determination of this suit. She further contended that the defence filed contained mere denials and did not disclose any reasonable defence against the plaintiffs claim. She further contended that the defence filed was a sham and did not disclose any triable issues. The application is supported by the annexed affidavit of the plaintiff. The application is opposed. The defendant's Manager, Legal department, Dinah Ogulla swore a replying affidavit in opposition to the application. In summary, she deponed that the defence filed by the defendant raised triable issues. Among the triable issues raised was the fact that the plaintiff had not issued the defendant with the mandatory statutory notice as contemplated by Section 10 (2) of the Insurance (Motor Vehicle Third Party Risks) Act (Cap 405 Laws of Kenya

re the suit was filed. She further contended that the notice of institution of suit which was annexed to the plaintiff's application was not received by the defendant. She therefore urged this court to dismiss the application with costs.

At the hearing of the application, I heard the submissions made by Mr. Meroka learned counsel for the plaintiff and the response made thereto by Mr. Oloo, learned counsel for the defendant. In his submissions before court, Mr. Meroka submitted that the defendant's defence had not raised any triable issues that would enable this court order the case to go to full trial. He submitted that the plaintiff had filed a declaratory suit against the defendant as contemplated by the Insurance (Motor Vehicle Party Risks) Act (Cap 405 Laws of Kenya). He submitted that the plaintiff had complied with the legal requirement that required her to give fourteen (14) days statutory notice to the defendant upon filing the suit. The plaintiff annexed the notice and the certificate of posting which confirmed that the defendant had been served with the said statutory notice. He submitted that the defendant had denied that it had issued the policy of insurance in respect of the motor vehicle which was involved in the accident where the plaintiff was injured. He however submitted that the plaintiff had annexed the certificate of insurance in her supporting affidavit which confirmed that the said motor vehicle had been insured by the defendant. Mr. Meroka referred this court to several decided cases in support of his submissions. He urged this court to allow the application with costs.

Mr. Oloo for the defendant opposed the application. He submitted that an application for summary judgment cannot be allowed where the defendant has raised serious triable issues. He submitted that it was the defendant's defence that it has not received the statutory notice as contemplated by the law. In his view, this was a weighty triable issue which should be allowed to go to full trial. He submitted that this court should hesitate to grant the application for summary judgment where a defendant has raised at least

one triable issue. He submitted that the power of the court to strike out pleadings should be exercised sparingly and urged the court to always lean towards deciding cases on merits after a full trial. He referred this court to several decided cases in support of his submissions. He urged this court to dismiss the application with costs.

I have carefully considered the rival submissions made by the counsel for the plaintiff and by the counsel for the defendant. I have also read the pleadings filed by the parties in this suit. The issue for determination by this court is whether the plaintiff has established a case so as to enable this court grant her application to strike out the defence filed by the defendant. Both the plaintiff and the defendant appreciated the principles to be applied by this court in determining whether or not to allow the application to strike out the defence filed by the defendant. In DT Dobie & Co. (K) Ltd. vs. Joseph Muchina [1982] KLR 1 Madan J. A held at page 9 as follows:

"The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits "without discovery, without oral evidence tested by cross examination in the ordinary way".... No suit should be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of the case before it".

In Gupta vs. Continental Builders Ltd., [1980] KLR 83 at page 87, the Court of Appeal held that;

"The appellant has appealed to this court against this ruling. The first thing to say is that this was an application for Summary judgment. If a defendant is able to raise a prima facie triable issue, he is entitled in law to unconditional leave to defend. On the other hand, if no prima facie triable issue is put forward to the claim of the plaintiff, it is the duty of the court forthwith to enter summary judgment for it is as much against natural justice to shut out without proper cause a litigant from defending himself as to keep a plaintiff out of his dues in a proper case. Prima facie triable issues ought to be allowed to go to trial, just as a sham or bogus defence ought to be rejected peremptorily".

In the present application, the applicant has argued that the defence filed by the defendant is a sham and ought to be struck out as it discloses no triable issue. On the other hand, the defendant contends that the defence it has filed raises weighty triable issues. I have perused the said defence filed by the defendant. In the first place, the plaintiff contends that it did not insure the motor vehicle that the plaintiff was traveling in when she was involved in the accident that caused her to sustain the serious injuries. Its second defence is that it did not receive the statutory notice before or soon after the plaintiff filed the said suit against its purported insured.

Although the plaintiff annexed a certificate of insurance and further annexed a notice purportedly sent to the defendant, in light of the denial by the defendant that it did not insure the motor vehicle which the plaintiff was traveling as a fare paying passenger, it is only right that the issues in dispute between the plaintiff and the defendant be ventilated in a full trial. This court cannot, on affidavit evidence placed before it, reach a conclusive determination that the issues raised by the defendant in its defence are not triable. On the contrary, it is the finding of this court that the defendant has established that its defence raises triable issues which ought to be heard by a court in a full trial. The defendant is thus given unconditional leave to defend its suit.

The upshot of the above reasons is that the plaintiff's application cannot succeed at this stage of the proceedings. It is hereby dismissed with costs.

DATED at KERICHO this 22nd day of March, 2007

L. KIMARU

JUDGE