



**REPUBLIC OF KENYA**

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

**Civil Case 691 of 2005**

**YOBESH AMORO C/O B.A. OUMA ASSOCIATES ADVOCATES...PLAINTIFF**

**VERSUS**

**THE HERITAGE AII INSURANCE COMPANY LIMITED.....DEFENDANT**

**R U L I N G**

I have before me an application to strike out the defence and for judgment as prayed in the plaint. The application is expressed to be under Order VI Rule 13 1 (b) (c) and (d) of the Civil Procedure Rules Section 3A of the Civil Procedure Act and all enabling provisions of the law. There are grounds in the body of the application and in the supporting affidavit of the plaintiff sworn on 16.10.2006.

The application is opposed and there is a replying affidavit sworn by one John Henry Dalgarno Milne, the defendant's Managing Director on 13.3.2007.

The application was canvassed before me on 19.3.2007 by Mr. Kabage, learned counsel for the plaintiff and Mr. Waweru, learned counsel for the defendant. Counsel for the plaintiff recited the averments in that supporting affidavit and on the basis of the said averments contended that the defendant's defence is a sham, scandalous, frivolous, vexatious, bad in law and fact and meant to prejudice and delay the fair trial of the plaintiff's action and also amounts to an abuse of the process of the court. In the premises it should be struck out and judgment be entered for the plaintiff as prayed in the plaint.

Counsel for the defendant on his part took me through the affidavits and argued that the defence on record raises several issues that should go to trial. He placed reliance upon a decision of the High Court and one of the Court of Appeal. I have considered the two decisions in the light of the application at hand. I have also carefully considered the application, the affidavits both in support of and in opposition to the application. I have finally given due consideration to the submissions of counsel appearing. Having done so, I take the following view of the matter.

Order VI Rule 13 sub-rule 1 (b) of the Civil Procedure Rules gives the Court discretion at any stage of the proceedings to strike out or amend any pleading on the ground that it is scandalous, frivolous and vexatious and sub-rule 1 (c) gives similar discretion if any pleading is likely to prejudice, embarrass or delay the fair trial of the action while sub-rule 1 (d) gives the Court discretion to strike out or amend any pleading that is an abuse of the process of the court.

So should I strike out the defence on the ground that it is scandalous, frivolous or vexatious? A frivolous matter is one that has no legal basis or legal merit. In other words it is a matter that is not serious and a vexatious matter is one that *inter alia* would tend to annoy. A scandalous pleading would be one that would not be admissible in evidence such as making an imputation on character when

character is not in issue.

I have perused the defence sought to be struck out and must confess, I have not detected any averment that can be said to be scandalous as I understand that term. There is no imputation on the plaintiff's character. I cannot therefore strike out the defence on that ground. Is it frivolous or vexatious? My reading of the defence does not detect any averment that can be described as frivolous or vexatious. The affidavits filed in my view disclose serious issues with respect to the contract of insurance between the plaintiff and the defendant. One such issue which cannot be resolved by the affidavit evidence filed is raised in paragraph 10 of the defence. The paragraph reads:-

**“10. The defendant does not admit to the plaintiff's alleged loss as pleaded at paragraph 15 of the plaint or that the plaint is at all entitled to maintain the same for at the time of the of said incident the plaintiff was not residing at the said premises due to the legal proceedings affecting the property hence did not suffer the said loss as a result thereof and further that the delay in concluding the said investigation was occasioned by the plaintiff's lack of co-operation hence he is not entitled to maintain the same.”**

Serious allegations are made against the plaintiff in this paragraph. Yet in his reply the plaintiff does not react to the allegations specifically. He instead makes a general denial of one line in paragraph 9 of the reply. The allegations made by the defendant in paragraph 10 of the defence are not dealt with by the plaintiff in his affidavit in support of this application despite the fact that the defendant has repeated the issues in its replying affidavit.

In the premises, I cannot strike out the defence for being frivolous or vexatious. That being the position, I cannot strike out the defence for being an abuse of the process of the court either.

Finally, can I strike out the defence on the ground that it may prejudice, embarrass or delay the fair trial of the action? Ringera, J. (as he then was) in **Lynette B. Oyier and others v. Savings and Loan Kenya Limited**: HCCC No.891 of 1996 (UR) observed as follows:-

**“The function of the Court in its jurisdiction of striking out pleadings under Order VI rule 13 of the Civil Procedure Rules is not to determine whether the action or defence as framed will or will not succeed at the trial. That is the function of the trial court after hearing evidence and legal submissions. The function of the Court under that jurisdiction is to determine whether the pleadings have been formulated in accordance with the established rules of pleadings and to impose appropriate sanctions if they have not been so formulated.**

In Bullen and Leake's precedents of pleadings (12<sup>th</sup> Edition 1975) the learned editors in discussing the power to strike out a pleading which tends to prejudice, embarrass or delay the fair trial of any action ... state:-

**“The power is designed to prevent pleadings from being evasive or from concealing or obscuring the real questions in controversy between the parties and to ensure a trial on fair terms between the parties in order to obtain a decision which is the legitimate object of the action”**

I cannot describe the defence as drawn in this case as tending to embarrass, prejudice or delay the fair trial of this action.

The upshot is that the plaintiff's application is declined. Costs shall however, in the circumstances of this case be in the cause. It is so ordered.

**DATED and DELIVERED at NAIROBI this 4<sup>th</sup> day of May, 2007.**

**F. AZANGALALA**

**JUDGE**

Read in the presence of:-