



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 486 of 2005

LUKA MUSYIMI MUSAU.....PLAINTIFF

VERSUS

UNITED INSURANCE CO. LIMITED..... RESPONDENT

RULING

The Notice of Motion herein dated 1/7/05, under Order 35 Rule 1 (1) (a); (2); (3) and Section 3A of the Civil Procedure Rules, seek the following orders:

1. The defence dated 24/5/05 be struck out;
2. Judgment be entered against the Defendant as prayed in the plaint.
3. Costs.

The application is supported by an Affidavit by Luka Musyimi Musau, and is on the grounds that;

- (a) The defence is a mere denial and offends the Civil Procedure Rules;
- (b) The defence is evasive, vague and is only meant to delay and prolong this case for no good reason.
- (c) The defence does not disclose any defence to the claim herein and should be struck out.
- (d) The defence is a sham and an abuse of the court process.
- (e) To allow the defence to go to trial would be denial of the Plaintiff's fruits of his judgment.

In its grounds of opposition the Defendant avers:

1. The defence raises triable issues that call for a full hearing.
2. The Plaintiff has not satisfied the mandatory requirements of Insurance Motor Vehicle Third Party Risks Act, Cap. 405.
3. The application is pre-mature, misconceived and materially and fatally defective.

Having very closely perused the pleadings herein; considered the submissions by learned counsel for both sides, and the authorities cited and relied upon, I have reached the following findings and conclusions.

The actual Defendants – tortfeasors – SALIM & CHIRA who owned vehicle KAC 943E, were properly served with the summons and the Plaintiff – LUKA MUSYIMI MUSAU. The Defendants were jointly and severally found liable by this court in HCCC No. 2715/1998 vide G.B. Kariuki, J. on 19/12/03 where the quantum, special and general damages, plus costs were assessed and awarded for K.Shs.4,186,921/- to the Plaintiff.

Put differently, the question of liability has been finally determined, at least at the level of the High Court. No appeal was or has been preferred against that judgment.

The current Defendant – United Insurance Company Limited – were the insurers of the Defendant’s vehicle and that is why the Plaintiff sought Declaratory orders, vide his suit, filed in court on 27/4/05, against the Defendant/insurers.

Looking at the Defence in the current suit, I must observe that even in an adversarial system, like ours, there is minimum decency expected of the parties. Justice cannot be advanced by denials of that which a party knows about and has admitted in a separate document, under his/her own signature.

For instance, the Defendant/Insurer has shamelessly denied that it was the insurer of the Defendant’s vehicle at the material time.

That is strange because on 8/3/2004, the Defendant, vide their Claims Manager, wrote to their Advocates, in which letter they state, in part:

“Judgment was entered against the Defendants [our insured] on 19/12/03 for a total sum of K.Shs.4,186,921/- plus costs and interest.”

The Defendants went on, in the same letter, and stated:

“Our urgent instructions therefore, are that you kindly proceed to court and have this judgment set aside”

From the above, it is clear that the defendants, in their defence, are trying to deny what they have already admitted, namely, that the defendant was their insured; that they had failed to enter defence, hence the **exparte – default judgment** for a certain figure. Further, in the letter, they admit and give the reason why they had not entered their defence or appearance – **“their Advocate had traveled out of the country the time the hearing was scheduled”**.

The above affirms that the Defendant were given Notice, by the Plaintiff, being a copy of a letter addressed to the Defendants – SALIM & CHIRA, dated 6/11/1998, and copied to M/S United Insurance Co. Limited. That Notice complied with the requisite provisions of Cap. 405, Laws of Kenya

h the Defendants herein, deny receiving.

I have accordingly concluded that the so called defence is a sham, and a mere denial of admissions by the Defendant/insurers. Further, it is obvious to me that there is no triable issue to warrant the matter to go for a full trial.

Order 35 rule 1(1) (a) under which the application is brought provides as under:

“In all suits where a Plaintiff seeks judgment for a liquidated demand with or without interest...the Plaintiff may apply for judgment for the amount claimed or part thereof.....”

I find and hold that the Plaintiff has met all the tenets of the above order and rules, for summary judgment.

Accordingly, the application succeeds; and I strike out the defence as being mere waste of court time and

lacking in any merit. The Defence raises no single triable issue; and is an abuse of the court process.

As was held in **GUPTA V. CONTINENTAL BUILDERS LTD.** [1978] KLR, 83 at P.87:

“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 it is 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 out to be rejected peremptorily”

I therefore enter judgment for the Plaintiff/Applicant as per the prayers in the Plaint herein, in prayer Nos. (a) (b) (c)

I further order that the Defendant/Insurance Company do pay costs of this application, with interest at court rates, from the date of filing the application till payment in full.

DATED and delivered in Nairobi on 21st Day of June, 2007.

O.K. MUTUNGI

JUDGE