REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

Civil Appeal 29 of 2003

PAN AFRICA CO. LTD…….....……..APPELLANT

V E R S U S

GRACE WASHO…….....……...…..RESPONDENT

(An appeal from the Ruling of the Hon. Aggrey Muchelule, Chief Magistrate

delivered on the 31st January 2003 in KakamegaS.P.M.C.C. No. 152 of 2002)

JUDGEMENT

This is a judgement in the appeal from a ruling of the Chief Magistrate at Kakamega (Aggrey Muchelule Esq.) delivered on 31st January 2003 in suit No. Kakamega S.P.M.C.C. No. 152 of 2002 striking out the defence filed in that suit by the Appellant which was the Defendant. The Respondent herein was the Plaintiff. Following the striking out of the defence, the Appellant was called upon to satisfy the decree that ensued. The claim by the Respondent was for a declaration sought in paragraph 12 of the Plaint in which the Respondent pleaded:-

"12 and the Plaintiff's prayer is for a declaration that the Defendant is liable to pay to her a total of Kshs.228,173/= together with costs and interest of this suit."

The Respondent's claim in the suit in the lower court was ostensibly premised on Insurance (Motor Vehicles Third Party Risks) Act Cap 405 on the basis that the Appellant's insured, one Stephen Kiptoo, had on 8/9/1999 caused loss and damage to the Respondent through negligence while driving motor vehicle Reg. No. KAH 960K, a bus. The claim followed the suit by the Respondent against the insured, Stephen Kiptoo, in which the Respondent had obtained against the insured judgement for Shs.150,000/= as general damages and Shs.2,600/= as special damages. The declaratory suit by the Respondent against the Appellant was Kakamega CMCC. No. 152 of 2002. The Respondent sought a declaratory judgement on the basis that motor vehicle reg. No. KAH 960K was at the time of the said accident insured by the Appellant under Certificate of Insurance No. MCP.117700K. It was the Respondent's contention that the Appellant was liable to indemnify the said insured against the third party claim.

The Respondent had pleaded in paragraphs 4, 5, 6, 7, 8 and 9 of the Plaint as follows:-

4. The said MV Reg. No. KAH 960 K was insured by the defendant.

5. The plaintiff sued the said STEPHEN KIPTOO in Kakamega CMCC No.232 of 2000.

6. A notice of the intended suit was given to the said STEPHEN KIPTOO on the 28th January 2000 and copied to the defendant herein.

7. Upon institution of the suit aforesaid in paragraph 5 hereof the plaintiff gave notice of the said institution to the defendant herein.

8. The Plaintiff was awarded Kshs.150,000/= general damages, Kshs.2,600/= special damages plus costs and interest in the suit aforesaid in paragraph 5 hereof.

9. Notice of entry of judgment was given to the defendant both in the suit aforesaid in paragraph 5 hereof and in this suit.

In the Defence which the trial court struck out, the Appellant had pleaded in paragraphs 2, 3, 4, 5, 6 and 7 of the Defence as follows:-

2. The Defendant denies that it insured Motor vehicle Registration numbers KAH 960 K belonging to one Stephen Cheptoo and puts the Plaintiff to strict proof thereof.

3. The Defendant denies that it was aware of the accident that occurred on the 8th of September 1999 involving Motor vehicle Registration Number KAH 960 K and puts the Plaintiff to strict proof thereof.

4. The Defendant denies the contents of Paragraphs 4 and 5 of the Plaint and puts the Plaintiff to strict proof thereof.

5. The Defendant denies the contents of Paragraphs 6 and 7 of the Plaint and particularly the fact that it was given a statutory Notice notifying it of the occurrence of the said accident and further the filing of the said suit and puts the Plaintiff to strict proof thereof.

6. The Defendant denies being aware of the judgement as stated in paragraph 8 and 9 of the Plaint and puts the Plaintiff to strict proof thereof.

7. The Defendant denies that it was notified of the judgement as required by the land and puts the Plaintiff to strict proof thereof.

The Ruling appealed from was made by the trial court following the hearing of the application dated 29.7.2002 on the part of the Respondent. The said application sought orders that the Appellant's defence be struck out as frivolous and as intended to delay the fair trial of the suit. It was supported by an affidavit of the Respondent's advocate, Paul K. Kamau Esq. One of the points highlighted in that affidavit was that while the Appellant did not deny having issued Insurance Policy No. MCP 117700K, the Appellant had denied the allegations in paragraphs 4, 5, 6, 7, 8 and 9 of the Plaint, but admitted in paragraph 3 of its replying affidavit sworn by its claims manager, Bessie Ambunya, that the Appellant had insured motor vehicle reg. No. KAH 960 K belonging to Stephen Cheptoo and not Stephen Kiptoo and that the Appellant became aware of the accident when it was served with the Plaint and Summons to enter appearance in the declaratory suit. The appellant averred that Stephen Cheptoo was dead and could therefore not settle the claim in absence of Letters of Administration issued in his estate.

In his ruling striking out the Appellant's defence which is the subject of the appeal herein, the trial magistrate found as follow:-

"*It is deponed the defendants were not notified of the accident by the insured. That does not affect the rights of the third party as the duty to inform the insurers of the occurrence of the accident rested with the insured. It was deponed that the defendants were not notified of the institution of the suit, however the annextures to the affidavit in support of the application clearly show notice was sent. It is deponed that the insured and his driver are both deceased and therefore the defendants cannot settle the claim. It was not deponed that they died before the primary suit was determined. In any case, the defendants can seek indemnity from the estate of the insured.*"

The trial court also found:-

"*I consider that in defence the defendants denied insuring this vehicle which in replying affidavit admitted insuring the vehicle. They are therefore not being honest or candid, so that when they said they did not receive the notice above one must treat the denial with a pinch of salt."*

The trial court further found:-

"*However, in the circumstances of this case, the defendants have no defence to the suit. They insured the vehicle, it had a negligent accident, the plaintiff was injured by the same, they were notified of the accident and intention to sue and they are legally (sic) to meet the judgment in the primary suit. To find otherwise would be to delay the course of justice. I allow the application, strike out the defence and declare that the defendants are liable to pay the money in question. Costs and interest will follow the event. Orders accordingly."*

When the appeal came up for hearing, Mr. Maiyo, the learned counsel for the Appellant, argued grounds 1, 2, 3, 4 and 5 together and grounds 7, 9, 10 and 11 together. The 11 grounds of appeal were:-

1. The learned Chief Magistrate erred in law and in fact in striking out the Appellant's Statement of Defence when the same raised serious triable issues that could only be adjudicated upon after full trial.

2. The learned Chief Magistrate erred in law and in fact in not appreciating that the Appellant's insured Stephen Cheptoo and not Stephen Kiptoo who was erroneously sued was long dead and therefore the judgement, the subject of declaration, was incompetent and unenforceable.

3. The learned Chief Magistrate erred in law and in fact in not upholding that the Appellant's insured Stephen Cheptoo was never sued and that an unknown person Stephen Kiptoo had been sued, the factual verification of which warranted full trial.

4. The learned Chief Magistrate erred in law and in fact in not upholding that the alleged Defendant in the original suit had not been served with court process as he was non-existent and therefore the ex-parte judgement was unenforceable and liable to be set aside ex debito justiae as in any event a non-existent or dead Defendant can never be aware of a suit against him.

5. The learned Chief Magistrate erred in law and in fact in failing to hold that in the absence of the Policy of Insurance being presented to Court, the identity of the insured therein, which was disputed was unclear and not proved and had to await the adduction of evidence.

6. The learned Chief Magistrate erred in law and in fact in applying wrong principles of law and thereby misdirecting himself.

7. The learned Chief Magistrate erred in law and in fact in striking out the Appellant's Defence and entering judgement for the Respondent without evaluating the serious issues raised on behalf of the Appellant

8. The learned Chief Magistrate erred in law and in failing to consider issues urged before him and relying on extraneous and irrelevant issues in coming to his decision.

9. The learned Chief Magistrate erred in law and in fact in failing to appreciate that there was no competent suit and judgment that could be the subject of a declaratory suit against the Appellant.

10. The learned Chief Magistrate erred in law and in fact in failing to hold that the Appellant's Statement of Defence provided an answer to the Respondent's claim by raising triable issues and that the Respondent's application was in any event incurably incompetent thereby occasioning a serious miscarriage of justice.

11. The learned Chief Magistrate erred in law and in fact in failing to appreciate that the Appellant's insured had never been notified of the original suit as in any event he was long dead.

In his submission, Mr. Maiyo contended that the judgement in the primary suit was against a stranger, namely Stephen Kiptoo instead of Stephen Cheptoo. He contended that service was disputed and that the Appellant had not been joined in the suit No. SPMCC No. 152 of 2002. It was Mr. Maiyo's submission that there were triable issues and therefore defence should not have been struck out as striking should be only in obvious cases. He relied in his submissions on the cases of *TRADE BANK LTD. v. KERSAM LTD. & ANO. - NRB H.C.C.C. NO. 6662 OF 1991,* and *D.T. DOBIE & CO. (KENYA) LTD. v. MUCHINA (1982) KLR1*. In the former case, the court stated with regard to the power to strike out a pleading under Order VI Rule 13 (1):-

"*The exercise of this summary power to strike out a pleading is only in plain and obvious cases when the pleading in question is on the face of it unsustainable. Counsel for the Plaintiff has not convinced me that the defence is a sham and has no substratum. At this stage as Madan J.A. said in D.T. Dobie & Company Ltd. –vs- Joseph Mbaria Muchina and another (C.A. No.37 of 1978 unreported) "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."*

On his part, Mr. P. K. Kamau, learned counsel for the Respondent, defended the Ruling of the Chief Magistrate and pointed out that the defence which was struck out had contradictions and that service had been shown to have been effected.

I have perused the record of Appeal and given due consideration to the submissions of both counsel. The Chamber Summons application leading to the Ruling appealed from was premised on Order VI Rule 13 (1) (b) and (c). While Rule 13 (1) (a) excludes adduction of evidence, rule 13 (1) (b) allows reliance on evidence in an application for striking out on that ground.

The court has power under Order VI Rule 13 (1) to strike out a pleading. The policy of the court is to sustain rather than terminate a suit summarily. It goes without saying that Rule 13 (1) of Order VI is drastic and implies summary procedure. It is precisely for that reason that the policy of the court is that only in plain and obvious cases should recourse be had to it.

The Power conferred by Rule 13 (1) of Order VI is discretionary and ought to be exercised where the case is beyond doubt, such as where the defences raised are not arguable and the court is so satisfied.

Madan, J.A., as he then was, expressed the view that "the power to strike out should be exercised only after the court has considered all the facts, but must not embark on the merits of the case itself as this is solely reserved for the trial judge." See *D.T. DOBIE & CO. K. LTD. V. MUCHINA (1982) KLR 1.* He pointed out that:-

"*a suit should only be struck out if it is so weak that it is beyond redemption and incurable by amendment and that as long as a suit can be injected with life by amendment, it should not be struck out."*

It has been held that the summary remedy under Rule 13 (1) of Order VI should be invoked in plain and obvious cases where, in the case of striking out of a suit, it is one that cannot succeed, or is unarguable or, in striking out generally, a pleading is found to be clearly an abuse of the process of the court.

The court has power under Rule 13 (1) (b) to expunge scandalous matter in pleadings. The Supreme Court practice 1988 Vol. 1 at page 322 – 324 shows that the words "frivolous" or "vexatious" mean and refer to matters that are obviously unsustainable. Rule 13 (1) of Order VI of the Civil Procedure Rules is almost identical to the English Order 18 Rule 19 and that is why the English decisions on the point are of considerable persuasive authority. In George P. B. Ogendo v. James Nandasa - Kakamega H.C.C.C. No. 91 of 2002 this court pointed out that a defence that is evasive and vague from which the plaintiff cannot

know what defence is being pleaded will normally be struck out on the ground that it is wanting in seriousness and tends to annoy. A defence in a suit must show what line of defence is being pursued by a defendant. A defendant has no liberty to engage in too many expedients in pleadings. In the old days in England, a local sea lawyer is said to have advised the defendant to plead in an action brought against a neighbour for damaging a pony cart thus:- *"that the defendant had never borrowed the cart, and that the cart was damaged and useless when he borrowed it; and that he used the cart with care and returned it undamaged; and that he had borrowed the cart from some person other than the plaintiff; and that the plaintiff never had any cart, whether pony or otherwise, and so on and so forth."* That sort of pleading would be a recipe for instant striking out. These then are the principles to be applied in considering an application for striking out under order VI Rule 13 (1) (a) and (b) of the Civil Procedure Rules.

The Appellant was not a defendant in the original suit against the insured whose name the Appellant contended was Stephen Cheptoo and not Stephen Kiptoo. That suit was correctly filed against the insured because it was premised on tort and the insurer would at that stage have been a stranger to it. However, where judgement is obtained against an insured, the plaintiff is enjoined to file a declaratory suit under the Insurance (Third Party Motor Vehicles Risks) Act Cap 405 to enforce the decree against the insurer where the plaintiff has complied with the provisions of section 10 of Cap 405 by giving notice as therein stipulated.

In the struck out defence, the Appellant denied the occurrence of the accident although in the primary suit that had been determined as having occurred. The Appellant also denied that its insured was Stephen Kiptoo but conceded it had an insured by the name of Stephen Cheptoo. The Appellant which admitted having issued a policy to Stephen Cheptoo did not show that Stephen Kiptoo was a different person from Stephen Cheptoo as the vehicle was the same and it is hardly likely that if there were two different and separate persons, they would both have insured the same vehicle at the same time and for the same period covered by the policy. Although in paragraph 2 of the defence the Appellant had denied that it had insured the vehicle No. KAH 960 K belonging to Stephen Cheptoo, in paragraph 3 of the appellant's affidavit in reply to the application to strike out the defence, the Appellant confirmed that it had insured the said motor vehicle belonging to Stephen Cheptoo. In denying that it had insured the motor vehicle belonging to Stephen Cheptoo the appellant was splitting hairs for the simple reason that the policy related to the same vehicle and there was no evidence that Stephen Cheptoo was not one and the same person as Stephen Kiptoo. It was alleged by the Appellant that the former (Stephen Cheptoo) had died. Yet the Appellant offered no evidence to prove it which would have established whether the insured was a different person from the Defendant in the primary suit where negligence must have been established against him. The denial by the appellant in this regard did not show seriousness any more than its denial in paragraphs 4 of its defence that it had actually insured the said motor vehicle.

It was imperative for the Respondent to have given notice pursuant to S.10 of Cap 405. The Appellant denied service. But it did not deny the address used in the annextures Nos. PKK1, PKK2, PKK3 and PKK4 to the Respondent's supporting affidavit. The fact that the correct address was used on the said documents constituted prima facie evidence of service. Even if one were to have regard to the fact that letters can miscarry in the post office, that likelihood is diminished where the same address is used in many or several letters. One or several of such documents would be bound to reach destination. In the absence of evidence to rebut the evidence that the notices were sent as shown, the appellant must be deemed to have received the same and therefore to have been served on the dates indicated. The most cogent defence open to the Appellant in the declaratory suit in which the defence was struck out was, if proved, non-compliance with the provisions of S.10 of Cap 405. It is my finding that the matters raised by the Appellant in the defence with regard to insurance policy and service of notice under S.10 of Cap 405 were issues that could give rise to triable issues but having regard to the fact that there was no denial that the notices were sent to the Appellant's correct address, it is difficult for the Appellant to haggle out of the allegation that it was served. The Policy was admitted to have been issued by the Appellant. In the application to strike out the defence, the Appellant did not file a replying affidavit. It filed grounds of opposition. The allegations made by the Respondent remained uncontroverted. The defence was so weak that it could not succeed. In my view, it was unarguable. This was a clear and obvious case where recourse could be had to summary remedy under Rule 13 (1) of Order VI. Even if the suit were to go to full hearing, the issue of service would not change any more than the fact that there was an insurance

cover and as only one insured is likely to have taken it, and the Appellant had no evidence that Stephen Kiptoo was not that insured, the claim would be bound to succeed. There was simply no evidence that Stephen Kiptoo was not one and the same person as Stephen Cheptoo nor was there evidence that Stephen Cheptoo was dead. The burden of proving this reposed on the Appellant but it was not discharged. In the result, I find no merit in the appeal which I hereby dismiss with costs to the Respondent.

Dated at Kakamega this 21st day of June, 2007.

G. B. M. KARIUKI

J U D G E