REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE 247 OF 2004

KENYA POWER & LIGHTING COMPANY LTD……....……PLAINTIFF

VERSUS

AMERICAN LIFE INSURANCE COMPANY (K) LTD…….....DEFENDANT

R U L I N G

The Defendant has moved this court by way of a Chamber Summons brought pursuant to the provisions of Order 6 Rules 13(1) (b) and (d); and Rule 16 of the Civil Procedure Rules.

It is the Defendant's prayer that the Plaintiff's suit be struck out for being frivolous and/or vexatious and/or an abuse of the court's process. The contention of the Defendant is that the suit was barred by contractual limitation, as it was not brought within twelve (12) months after the Defendant had disclaimed liability under the insurance policy.

The suit herein emanates from a "Group Personal Accident Insurance Policy" contract dated 7th September 1999. Under the terms of that contract the Plaintiff paid premiums to the Defendant, for the purposes of insuring all the Plaintiff's employees against accidental bodily injuries, resulting in disablement or death. In other words, if the Plaintiff's employees were injured and became disabled or died, the defendant was to pay the benefits outlined in the Schedule to the insurance policy.

Whilst the policy was still in force, the Plaintiff lodged various claims, on behalf of its employees, in accordance with the terms of the policy of insurance.

In response to the claims, the Defendant wrote back to the Plaintiff on 2nd November 1999, threatening to close all pending files on the claims lodged by the Plaintiff. The closure of those files was to take place within fourteen days of the letter dated 2nd November 1999. But even prior to the notice which was issued by the Defendant, that it would close the files, the Defendant had repudiated its obligations under the Policy of Insurance.

The foregoing facts are set out by the Plaintiff, in its Plaint dated 12th May 2004. Thereafter, when the Defendant filed its Defence, on 10th June 2004 it admitted all the facts above-cited.

Therefore, the parties are both agreed on the facts.

Relying on the said facts, the Defendant now prays for the following Orders from this court;

"1. **THAT the Plaintiff's suit herein be struck out for being frivolous and/or vexatious and/or an abuse of the court's process;**

2. THAT the costs of the application and the entire suit be borne by the Plaintiff"

In the Replying Affidavit filed in response to the application, the Plaintiff states that the Defendant's closure of its files did not amount to a disclaimer of liability.

However, the Defendant says that that deposition is a clear contradiction to the pleadings in the Plaint. The reason for so saying is to be found in paragraph 7 of the plaint, says the Defendant. That paragraph reads as follows:-

"**In breach of the contract, the Defendant by its letter dated 24.09.1999 wrongfully repudiated its obligations under the Policy of Insurance and confirmed that it was closing its files."**

When faced with that answer from the Defendant, the Plaintiff submitted that repudiation was not the same thing as disclaimer.

But then again, the Defendant contends that it mattered not whether the term used was "**disclaimer**", or "**refusal**" or "**repudiation**", provided that the message relayed to the Plaintiff was to the effect that the Defendant would not honour its obligations, to make payment under the Policy of Insurance. Once that stage was arrived at, said the Defendant, the Plaintiff had twelve (12) months within which to institute legal action against the Defendant. Instead, the Plaintiff waited until 12th May 2004, before instituting these proceedings. For that reason, the Defendant pleaded as follows at paragraph 3 of its defence:

"**The Defendant further avers that the Plaintiff's claim does not lie as it is not commenced within 12 months after disclaimer of liability under the policy**."

It is that line of defence which the Defendant invoked in this application. And, Mr. Majanja, advocate for the Defendant submitted that this is a fit and proper case for striking out.

However, Mr. Kipkorir, advocate for the Plaintiff holds a different view. Indeed, he believes that the application was fatally defective. He submitted that under Order 6 rule 13 (1) there are four grounds upon which an application for striking out pleadings can be founded, but that the applicant must then choose which of those grounds to rely on.

In my considered opinion, it is necessary to set out the wording of Order 6 rule 13(1), so as to better understand the point being put forward. The said rule reads as follows:

" **At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that –**

(a) it discloses no reasonable cause of action or defence; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court,

and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be."

In this application, the Plaintiff has invoked sub-rule (b) and (d) above. It is the contention of the Defendant it was wrong to join the two sub-rules. But the Defendant did not elaborate on that contention.

However, in my understanding of the law, there is no bar to the joining of any two or three of sub-rules (b) (c) and (d), provided that the applicant can then demonstrate the point to the court, by tendering

evidence.

On the other hand, an applicant who invokes sub-rule (a), would not normally join it with any other sub-rule, because rule 13(2) expressly prohibits an applicant from tendering any evidence if he contends that the pleading does not disclose any reasonable cause of action or defence.

I have to ask myself if the plaint is scandalous, frivolous or vexatious. I also have to ask myself if the plaint is otherwise an abuse of the process of the court.

In the case of **MPAKA ROAD DEVELOPMENT CO. LTD V. ABDUL GAFUR KANA t/a ANIL KAPURI PAN COFFEE HOUSE, HCCC NO. 318 of 2000,** Ringera J. (as he then was) discussed at length the meanings of the words scandalous, frivolous and vexatious. I am persuaded that his said discussion correctly brings out the meanings, and I can do no better than to reproduce herein his words, as follows:-

"**I would hold that a matter would only be scandalous if it would not be admissible in evidence to show the truth of any allegation in the pleading which is sought to be impugned. Such would be the case where an imputation is made of a character of a party when the character is not in issue. And I would say a pleading is frivolous if it lacks seriousness. If it is not serious then it would be unsustainable in court. A pleading would be vexatious if it annoys or tends to annoy. Obviously it would annoy or tend to annoy if it was not serious or it contained scandalous matter which were irrelevant to the action or defence. In short, it is my discernment that a scandalous and/or frivolous pleading is ipso facto vexatious."**

I have looked closely at the eleven paragraphs in the plaint herein. I find nothing it is which is either scandalous, frivolous or vexatious. I also failed to find any pleading which could be said to be an abuse of the court process. By suing for Kshs. 55 million, which the Plaintiff avers to be payable in respect of outstanding claims under a Group Personal Accident Insurance Policy, the Plaintiff cannot be said to have done anything which would be tantamount to abusing the process of the court. I think it is important to emphasize that even if a party had a weak case, he would be entitled to have his day in court, and his case should then not be seen as being an abuse of the process of the court simply on the grounds of its weakness, as may be perceived by the opposite party.

Yes, there is nothing in law which can void the contract simply because it contained a limitation period which was lesser than that stipulated by the Limitation of Actions Act (Cap. 22). Also, just because the Plaintiff's claim is for the compensation of employees who may have been injured or who died, would not be reason enough to keep the suit alive, if it was otherwise not deemed sustainable.

In **AGRICULTURAL FINANCE CORPORATION & ANOTHER v. KENYA ALLIANCE INSURANCE COMPANY LIMITED, HCCC No. 1882 of 1999**, the court expressed itself thus:-

"**Secondly, I can see nothing unreasonable or unconscionable, in clauses limiting the time within which parties must make their claims on the contract between them or file suit as the case may be. If contractual limitation periods were held to be unfair, unreasonable or unconscionable, the statutes of limitations would fair no better. And I cannot see that the nature of the event or the magnitude of the claim has any bearing on the issue."**

In this case, the Plaintiff submits that there was no provisions in the contract requiring it to make documents available within 30 days. It is said that the Defendant purported to vary the contract of insurance by introducing the requirement that documents be made available within 30 days. That averment is spelt out in paragraph 6 of the Plaint.

The Plaintiff says that the Defendant purported to repudiate the claims, on the basis of the Plaintiff's failure to provide documents within a time frame which was not contractual. It is the Plaintiff's case that a party cannot repudiate a contract on issues which were extraneous to the contract.

Annexed to the affidavit of Len Amolo, the Defendant's Claims Manager, are copies of the policies in issue. Both policies have a clause headed "Claims Notification", which provides as follows:-

"**Notice must be given to the company in writing as soon as practicable of any occurrence which may give rise to a claim under this Policy but notice of death must be given forthwith and The Company shall have a post mortem examination of the body."**

There is an express requirement for timely notification of any occurrences which may give rise to any claims. That requirement is embodied in the contract. Therefore, in my considered view, when the Defendant later indicated to the Plaintiff that it required it to report new claims within thirty (30) days, and to provide documentation within ninety (90) days, that cannot be termed a variation of the terms of the contract. Indeed, in my view, by allowing the Plaintiff upto 30 days to notify it of new claims, the Defendant was being generous. I say so because the contractual requirement for notifying the insurer of any death was that it be done forthwith, whilst for other claims it was to be "**as soon as practicable**". But in the event that I am wrong in that regard, and that the Defendant did actually unilaterally vary the contract by spelling out the specific durations for notifying it of claims and also for providing documentation, I would still hold that the said amendment was an implied stipulation, which was necessary to give efficacy to the contract, as envisaged by the Court of Appeal in **KENYA BREWERIES LTD V. KIAMBU GENERAL TRANSPORT AGENCY LTD [2000] 2 EA 398 at p. 410.**

All said and done, I think that this application should not be determined on the basis of whether or not the Plaintiff has a good claim. If I were to do so, I would be going into the merits of the case, and effectively trying it without the benefit of witnesses testifying and being cross-examined. I think that that is not the role I should play in this application.

In this case the Defendant has pleaded limitation, as a defence. It has said that the Plaintiff should have instituted proceedings within twelve (12) months from the date when the Defendant repudiated liability.

In other words, the repudiation itself may have been either right or wrong. It would have been right if the Plaintiff had breached a fundamental term of the contract of insurance. But, it would have been wrong if the Defendant invoked a non-existent clause in the contract.

But as I understand the matter, the Defendant is inviting the Court not to delve into the merits of the case, because it was filed late. In that regard, I can see no answer to the Defendants assertion that the suit was time-barred.

In paragraph 7 of the Plaint, it is expressly pleaded that the Defendant repudiated its obligations on 24th September 1999. That is an averment by the Plaintiff itself, therefore the Plaintiff is bound by it. It cannot now be permitted to say that the action of the Defendant did not amount to repudiation, when the Defendant had admitted that fact, in its defence. In effect, it is not in issue as to whether or not the contract was repudiated. Both parties are in agreement that the contract was repudiated.

If the repudiation was wrongful, as asserted by the Plaintiff, he was entitled to institute proceedings to claim the benefits arising from the policy. In order to do so, the Plaintiff should have complied with the provisions of the said policy. One such provision reads as follows:-

"**In the event of the Company disclaiming liability in respect of any claim and an action or suit not being commenced within twelve months after such disclaimer or, in the case of an arbitration taking place within twelve months after the arbitration shall have made his award, all benefit under this Policy in respect of such claim shall be forfeited."**

In my understanding of that provision, once the Plaintiff failed to institute action within twelve months from the date when, by its own admission, the contract was repudiated, the contract was forfeited. For that reason, I hold that this is a fit and proper case for striking out the Plaint. Accordingly,

the Plaint is duly struck out, with costs to the Defendant.

Dated and Delivered at Nairobi this 15th day of July 2005.

FRED A. OCHIENG

JUDGE