REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT
MILIMANI COMMERCIAL COURTS, NAIROBI
CIVIL CASE 47 OF 2004

GEORGE KURIA KINYANJUI……..…...…PLAINTIFF

- V E R S U S-

STANDARD ASSURANCE KENYA LTD. …….……DEFENDANT

R U L I N G

The application before the court is brought by way of a chamber summons dated 8th July, 2004 under O.V1 rules 13 and 16 of the Civil Procedure Rules and S.3A of the Civil Procedure Act. It seeks from the court orders that the defence filed herein be struck out and judgment entered for the plaintiff as per the plaint, and that costs be in the cause. The grounds upon which it is based are that the defence is scandalous, frivolous and vexatious and may prejudice the fair trial and disposal of the case; and that it is a sham and only meant to delay the hearing of the matter. The application is also supported by the annexed affidavit of GEORGE KURIA KINYANJUI, the plaintiff/applicant.

The application is opposed. On 9th September,2004, the defendant/respondent company's legal officer, ISAAC KITUR, swore a replying affidavit which was filed in court on 10th September, 2004. He sets out in that affidavit the defendant's version of events and concludes by summarising the triable issues as perceived by the defendant.

At the oral hearing of the application, Mr. Kahindi appeared for the applicant while Ms. Nyaga appeared for the respondent. Mr. Kahindi argued that the defendant has not denied providing comprehensive insurance cover for motor vehicle registration No.KAQ 731G which is the subject matter of this suit. The defendant further does not deny that the amount of premium was Ksh.722,000/=, or that the insurance was in force when the accident occurred. Furthermore, the defendant admits paragraph 5 of the plaint which says that the plaintiff should be compensated for loss of user of the vehicle. Counsel therefore submitted that the defence consists of a mere denial which is meant to delay and deny the plaintiff his rightful dues. He relied on the supporting affidavit of the plaintiff and asked the court to grant the orders as prayed.

Opposing the application, Ms. Nyaga for the respondent relied on the replying affidavit of Isaac Kitur. She submitted that the defence raises triable issues which include questions as to whether there was the alleged delay in the repairs of the motor vehicle; whether any spare parts were lost as alleged by the applicant; whether the applicant refused to collect the vehicle after it had been repaired, and the other issues summarised in paragraph 8 of Mr. Kitur's affidavit. As much as the defendant has not denied insuring the vehicle comprehensively, there were some other issues such as exemption to cover, the excess which has never been paid to date, which are also triable, and which should be determined at a full hearing. Ms. Nyaga then referred to **MENZE & ORS. v. MATATA**[2003] 1 E.A. 147 (HCK) and submitted that the application was in any event defective since the applicant had not specified the actual paragraph of O.V1 rule 13(1) under which the application was brought. She also referred to **D.T. DOBIE & CO. (KENYA) LTD. v. MUCHINA** [1982] 1 KLR 1 as an authority for what should be taken into consideration before striking out the pleadings. In view of the many triable issues which can only be addressed at a full hearing, counsel prayed that the application be dismissed with costs.

In his reply, Mr. Kahindi submitted that the motor vehicle was auctioned on 12th October, 2004. He requested the court to exercise its inherent jurisdiction as a court of law since no justice had been done to his client.

After considering the application and hearing both counsel, I find that the issue of the sale of the motor

vehicle raised by counsel for the applicant in his reply has not been raised anywhere in the pleadings. For that reason, it should not be raised from the bar and then only in reply.

Counsel for the respondent also argued that this application is defective as it does not specify the paragraph of rule 13 (1) under which it is brought. This argument derives support from the case of **MENZE & ORS**. v. **MATATA** [2003] 1 E.A. 147 in which it was held that a party who seeks to strike out a pleading under O.V1 rule 13 of the Civil Procedure Rules has to specify which part of subrule (1) he is relying on and the reason for striking out. I have two observations to make on that submission. The first one is that under O.L rule 12, while every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, no objection should be made and no application should be refused merely by reason of a failure to comply with that rule. Such failure is therefore curable under O.L rule 12. The second observation is that one of the grounds upon which the application is based is that the defence is allegedly scandalous, frivolous and vexatious and may prejudice the fair trial and disposal of the case. In my view, these words clearly point to O.V1 rule 13(1)(b) and (c), and from that perspective I don't think the respondent was misled into believing that the application was grounded on any other paragraph, nor was it prejudiced in any way. For these reasons, I don't think that the application suffers from any such defect as would warrant it to be struck out.

Coming to the substance of the application, it is important to point out that if a defence discloses any one bona fide triable issue, the defendant must be allowed to proceed to the trial of the action. Looking at the pleadings herein, it is clear from the face thereof that the defence raises many more than one triable issue. In paragraph 4 of the plaint, the plaintiff alleges that he paid Ksh.766,880/= by way of premiums while the defendant states in paragraph 3 (ii) of the defence that the plaintiff paid a premium of Sh.722,186/= only. In view of the premium payment warranty clause in the policy which states **"… it is hereby understood and agreed that the indemnity provided by this policy will only apply on payment of full premium to the company…"** the amount of premium payable under the policy and the amount actually paid become triable issues.

In paragraph 13 of the plaint, the plaintiff claims the sum of Ksh.18,000/= on account of towing charges. But in paragraph 5 (c) of its defence, the defendant states that it arranged to have the vehicle towed, brought to Nairobi and delivered to Autofine Limited for repairs. The question as to who paid the towing charges becomes a triable issue as the plaintiff's prospects of recovering the towing charges are dependent upon it. In the same paragraph, the plaintiff states that the value of the vehicle as insured was Ksh.3,000,000/= while in paragraph 3 (i) of its defence the defendant say it was Ksh.2,960,000/=. That is a triable issue.

In the plaintiff's affidavit sworn on 6th May, 2004, the deponent avers in paragraph 10 thereof that from the time the vehicle was delivered to Autofine Limited, he only visited their garage to see, out of anxiety, how he could mitigate his losses. On their part, the defendants allege in paragraph 5 (f) and (g) of their defence that unknown to them and without their consent, the plaintiff sub-contracted the repair work to another garage and this sub-contracting occasioned delay, unsatisfactory works and loss of parts for which the plaintiff was responsible and liable. This raises a few issues – e.g. did the plaintiff sub-contract the work? If so, who was responsible for the payment of the subcontracted work? If it was the defendant, then on what basis?

A very serious issue is raised in paragraph 11 of Mr. Kinyanjui's affidavit in which he avers that from April, 2003 to the date of his affidavit, which was 6th May, 2004, no repair had been carried out on the vehicle. But in paragraph 5 (h) of their defence, the defendants say that they were informed by Autofine Limited that despite the repairs having been completed in or about July, 2003, and the plaintiff being informed thereby, he had refused and or neglected to collect the said vehicle. Was the vehicle repaired? Was the plaintiff informed? Did he collect the vehicle? All these are matters which need to be addressed at a full hearing.

Lastly there is also the issue of the sum of the plaintiff's loss of earning from the use of the vehicle at the rate of Ksh.25,000/= per day which amounted to Ksh.5,250,000/= by the time of the filing of the plaint. In my view, more evidence is required to substantiate that figure of Ksh.25,000/= per day, and this

can only be done at the trial.

By reason of the foregoing, I don't find the defence filed herein either scandalous, frivolous or vexatious as alleged or at all. On the contrary, I find that it does raise some genuine and bona fide triable issues which must therefore go for trial. The application to strike out the defence accordingly fails and is hereby dismissed with costs to the defendant. It is so ordered.

Dated and delivered at Nairobi this 14th day of July 2005

L. NJAGI

JUDGE