



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
Civil Case 2212 of 2000**

**NATIONAL CEREALS AND PRODUCE BOARD .....  
PLAINTIFF**

**VERSUS**

**UAP PROVINCIAL INSURANCE COMPANY LIMITED & 3 OTHERS.....  
DEFENDANT**

The plaintiff's Notice of Motion, dated 15<sup>th</sup> August 2005, is brought under order 6 Rule 13 (1) and Order 14 Rule 2 of the Civil Procedure Rules.

The application seeks the following orders: -

1. That this suit be struck out with costs to the defendant on the grounds that
  - a. The policy of insurance on which the claim is founded does not include cover for loss or damage occasioned by: -
    - i. War, invasion, act of foreign enemy, hostilities or warlike operation and civil war.
    - ii. Or in consequence of explosion occurring in the manner as therein exempted.
    - iii. Acts of terrorism
  - b. it is frivolous, vexatious and otherwise an abuse of the process of the court, and;
2. in the alternative, the issue raised in paragraphs 5 to 8 of the defendants defence namely, whether the plaintiff's claim is time barred by reason:
  - a. of failure to notify the defendant of the occurrence of the incident
  - b. failure to commence proceedings within three months of the rejection of its claim by the defendant, be determined as a preliminary issue on the grounds that:
    - i. the facts of giving rise to this issue are in dispute;
    - ii. it is convenient that this issue be decided before the other issues are dealt with since the determination of this issue may render it unnecessary to have the other issues determined, and;
    - iii. the costs involved in having the trial of all issues will be substantial.

The plaintiff's claim is that by policies of insurance dated 26<sup>th</sup> October 1994, which policies were renewed every year, the defendants jointly and severally agreed to insure the plaintiff's property against fire and other special perils. That during the currency of the said policies the plaintiff's specially designed and built stores situated on Enterprise Road, in Industrial Area, Nairobi, were extensively damaged as a result of earth vibration and tremors occasioned by the bomb blast which targeted the United States Embassy on Hailesassie Road in Nairobi.

Defence counsel argued in support of the defendant's application that the policies excluded liability on damage and loss occasioned by certain act. That by clause 6 (c ) and (d) the insurance cover did not loss and damage occurred by:

**“(C ) war, invasion, act of foreign enemy, hostilities or warlike operations (whether war be declared or not) civil war.**

**(d) Mutiny, riot, military or popular rising, insurrection, rebellion, revolution, military or usurped power, martial law or state of siege or any of the events or causes which determine the proclamation or maintenance of martial law or state of siege.”**

Defence counsel argued that those excluded acts included acts of terrorism, and since the plaintiff stated that the damage the plaintiff suffered was a consequence of the tremors and vibrations caused by the bomb targeting the American Embassy, the plaintiff's claim was caught by that exclusion.

Defence further argued that the plaintiff was required under the policies of insurance with the defendants to give notice to the defendants within 15 days of any loss or damage covered by the policy. The limit of the notice period is in clause 11 of the policy, which provides:

**“On the happening of any loss or damage the insured shall forthwith give notice thereof to the company, and shall within 15 days after the loss or damage, or such further time as the company may in writing allow in that behalf, deliver to the company: -“ a claim in writing.**

The bomb which the plaintiff alleges caused the damage to its property occurred on the 7<sup>th</sup> August 1998. The plaintiff notified the defendants on 26<sup>th</sup> May 1999, notice was by the plaintiff's brokers. That this notice was in breach of clause 11 as aforesaid.

Defence further argued that within three months of repudiation by the defendants. The defendant's repudiated the claim by their letter dated 7<sup>th</sup> September 1999, and the plaintiff failed the present claim on 15<sup>th</sup> December 1998.

The defendant also argued that by virtue of clause 19 the plaintiff was obligated to file its claim within twelve months of the happening of the loss. Clause 19 provides:

**“In no case whatever shall the company be liable for any loss or damage after expiration of twelve months from the happening of the loss of damage unless the claim is the subject of pending action or arbitration.”**

As stated before the loss would have occurred on 7<sup>th</sup> August 1998 but the action was instituted on 15<sup>th</sup> December 1999. The plaintiff has never instituted an arbitration.

For the reasons given above the defendant stated that the plaintiff's action was frivolous, vexatious and was not sustainable.

Defence relied on the case of DR MURRAY WATSON – RENT A PLANE LTD and 2 others HCCC NO. 2180 of 1994 and particularly to the definition, thereof, of words frivolous or vexatious.

**“The plain meaning of these words is “lacking in seriousness and tending to annoy”. A frivolous**

**claim is ex post facto vexatious for nobody can fail to be vexed by a frivolous allegation against him.”**

Defence also relied on the case of KENYA BUS SERVICES LTD – V – THE KENYA ALLIANCE INSURANCE COMPANY LTD HCCC NO. 247 OF 2003 where it was a condition precedent that any dispute between the parties be referred to arbitration before action could be filed. It was stated in that case:

**“In total, the plaintiff has no cause of action against the defendants, and the claim that the plaintiff may have had against the defendant is now deemed to have been abandoned. That is the contract, which the parties made between themselves, and that is the contract, which the court will enforce between the parties. The law allows it, and the court grants it. I am satisfied that no life can be breathed into the pleadings herein without offending the contract freely entered into between the parties.”**

In the case of AGRICULTURAL FINANCE CORPORATION & ANOTHER – V – PAN AFRICAN INSURANCE CO. HCCC NO. 1882 OF 1999 where there was a time limit within which parties could file a claim it was held:

**“.....I can see nothing unreasonable, unfair 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.”**

Defence submitted in support of the second alternative prayer of its application and stated that if the same was granted it would shorten the time taken at the trial.

Before embarking on the plaintiff’s argument it is essential to state that the plaintiff had previously filed another Notice of Motion application dated 7<sup>th</sup> march 2005. The said application’s prayer No. 1 is similar to the present application No. 1. The prayer No 2 differ in that whilst the defendants sought in the application of 7.3.2005 a preliminary hearing on the issues in paragraph 10 of the defence, in the present application the defendant seek that issues in paragraphs 5 and 8 of the defence to be dealt with in the preliminary.

The application of 7.3.2005 was fully argued before Justice Emukule and in his ruling dated 29<sup>th</sup> July 2005, the judge upheld the plaintiff’s objection to the defendant’s exhibits, in support of that application, for not being attested by a commissioner of oaths. The end result of that finding was that the prayer No. 1, of that application was struck out with costs to the plaintiff and an order was made that the issues in paragraph 10 of the defence be **“fixed for hearing and determination as a preliminary issue at a time and date mutually convenient to all the parties.....”**

The plaintiff in opposition to the present application started by saying that the present application was caught by the doctrine of res judicata. That it was similar to the application dated 7<sup>th</sup> March 2005. That that application of 7<sup>th</sup> March 2005 was fully argued before Justice Emukule whereby a ruling was delivered. In this regard plaintiff relied on GREENHALG – AND – MALLARD [1947] 2 ALL E.R. 255. It was decided in that case that if a party **“has chosen to put his case in one of the two ways, he cannot, thereafter bring the same transaction before the court put his case in the other way, and say he is relying on a new cause of action.”**

Plaintiff submitted that there should be end of litigation and accordingly this present application should be dismissed on basis of being res judicata.

Plaintiff further submitted that the affidavit in support of the defendant’s application, one sworn by **MARYANNE MUNG’ARA** contained statements sworn which were not on the knowledge of the deponent. Plaintiff counsel said that in view of the order sought to strike out the plaintiff’s case, the application cannot be regarded as interlocutory, this is because it seeks conclusive orders against the plaintiff suit. That indeed was the holding of the case HCCC NO. 1275 OF 2001 (MILIMANI) GEN

(RTD) J.K. MULINGE – V – LAKESTAR INSURANCE CO. LTD.

Plaintiff also stated that the parties had agreed on issues for trial and the defendant cannot say that there are no issues to be tried by seeking striking out the plaint.

Mr Kiragu advocate in short response on behalf of the defendants stated that the drafting of issues cannot be used as estoppel to subsequent applications. Defence further stated that although the orders it sought in its application led to final orders the application remained interlocutory. On the affidavit in support defence said that it cannot be expected that all documents had to be produced by their maker, in affidavits and accordingly stated that there was no basis for the objection raised by the plaintiff.

Defence finally stated that its application was not res judicata because the previous application had not been decided on merit. In support of that response defence relied on WANGUHU – V – KANIA [1987] KLR 51. Platt – judge of appeal stated:

**“The first application was not decided upon its merit. It was dismissed after an application for an adjournment was refused and neither side was heard upon the merits. It was therefore not res judicata.”**

Defendant also relied on CIVIL APPEAL NO. 199OF 1999. KENYA COMMERCIAL BANK LTD – AND – JOSHUA AGGREY OBURI AND ANOTHER, where the court of Appeal held: -

**“The learned judge held that the second application was res judicata as the first one stood dismissed. But that was not the case. The learned judge had not heard the first application on merit and when such was the case the doctrine of res judicata does not apply even if there is a dismissal ordered. The learned judge strictly ought to have (if he was right) ordered striking out rather than dismissal.”**

I will start by considering the issue of res judicata first for if indeed I do uphold the plaintiff’s argument then the court need not look beyond that in consideration of the defendant’s application.

As stated before prayer No. 1 of the previous (one dated 7.3.2005) application is similar to the present application. However what is very clear is that Justice Emukule in his ruling dated 29<sup>th</sup> July 2005 in considering of prayer NO. 1 of the previous application did not consider it on merit. The judge considered the objection raised by the plaintiff to the defendant’s supporting affidavit to the previous application and the judge struck out exhibits annexed thereof and the judge stated:

**“...so prayer No. 1 of the Notice of Motion dated 7.3.2005 cannot be left dangling in the air without the support of the affidavit with its exhibits. Being of this persuasion therefore, prayer No. 1 of the said Notice of Motion is struck out with costs to the plaintiff.”**

It is clear from the above that prayer NO. 1 of that application of 7.3.2005 was not considered by the said judge on merit. The judge was of the view that that prayer could not be considered without the struck out exhibits in the supporting affidavit. In view of the holding in KENYA COMMERCIAL BANK LTD – AND – JOSHUA AGGREY OBURI (Supra) the said prayer cannot be said to be res judicata; Justice Emukule did not decide the same on merit.

I therefore make a finding that prayer No. 1 in the present application is not res judicata.

However in respect of prayer No. 2 in the present application is to my mind caught by the doctrine of res judicata. Prayer No. 2 is the application of 7.3.2005 was granted, that is the defendants were granted an order for preliminary determination on paragraph 10 of the defence hereof. The defendant by the present application again seeks preliminary determination on paragraph 5 to 8 of the defence. The present application I find is caught by the doctrine of res judicata and particularly explanation No. 4 of section 7 Civil Procedure Act. For the reason stated herein therefore the prayer No. 2 of the present application is dismissed for being res judicata to prayer No. 2 of the application of 7.3.2005.

The plaintiff did fault the defendants application for lumping together Order 6 Rule 13 (1) (b), (c) and (d). The defendants in the present application stated that the plaintiff's plaint is frivolous, vexatious or otherwise an abuse of the court process. In the case of GENERAL (RTD) J.K. MULINGE – AND – LAKESTAR INSURANCE CO. LTD (Supra) Justice Ringera stated:

**“That muddle is unacceptable and I hold that the application is incompetent for that reason alone”.**

This statement was made in respect of mixing together paragraphs (a), (b), (c) and (d) of Order 6 Rule 13 (1).

On my part I respectfully do not agree with that finding. I am of the view that putting together the paragraphs (b) and (d) caused the plaintiff no prejudice and accordingly the plaintiff's objection is rejected.

The defence argued that by virtue of clause 6 (c) and (d) of the insurance policy the plaintiff's claim was caught by the exclusion of claims falling under the category of war, invasion, acts of foreign enemy, etc. I am of the view that the bombing U.S.A. Embassy was not an act of war, invasion of an act of the enemy of Kenya. This is because the bombing was targeted at the USA Embassy and not the Kenyan society. The defendants argument on this clause is rejected for that reason.

The defence argument with regard to clause II, relating to 15 days notice that the plaintiff ought to have given to the defendants; clause No. 13, relating the period within which the plaintiff ought to have filed an arbitration or suit within three months of repudiation; clause No. 19 which limited the period within which a suit could be brought, that is within twelve months of the happening of damage; I am of the view that due to failure to comply with these provisions the plaintiff's case does find itself liable to be struck out for being frivolous and vexatious. It finds itself being frivolous and vexatious because it is incapable of succeeding in view of its failure to abide by the contractual requirements. The plaintiff did not file a replying affidavit in response to the defendants application and accordingly the defendants submissions of non compliance with paragraph 11, 13 and 19 is accepted as submitted by the defendant.

The court's finding is that the plaintiffs application ought to be struck off in view of what is stated herein before.

Accordingly the orders of this court are: -

**(1) That the plaintiff's suit be and is hereby struck out with costs to all the defendants.**

**(2) That the defendants are awarded half the costs of the Notice of Motion dated 15<sup>th</sup> August 2005.**

**MARY KASANGO**

**JUDGE**

Dated and delivered this 5<sup>th</sup> June 2006

**MARY KASANGO**

**JUDGE**