

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CIVIL SUIT NO. 42 OF 1997

DR. GERALD NJOROGE NJUGUNA.....PLAINTIFF

VERSUS

UNITED INSURANCE CO. LTD.....DEFENDANT

RULING

The Plaintiff applied by way of a Chamber Summons dated 7th January, 2004 that the Defendant's defence date 21st February, 1997 be struck out and judgment be entered for the Plaintiff as prayed in the plaint dated 1st January, 1997.

The application was made on the grounds that the defence was a sham and did not disclose any cause of defence. The defence was also said to be scandalous, frivolous vexatious and prejudicial and embarrassing to the Plaintiff and to this court. the application was supported by the Plaintiff's affidavit sworn on 7th January, 2004.

In his affidavit, the Plaintiff deponed that his motor vehicle registration number KAD 465K which was insured by the Defendant, got a self involving accident sometimes in 1996 and was extensively damaged. He stated that the Defendant thereafter instructed M/S Auto Consultants to assess the repair costs of the said motor vehicle which was a commercial lorry and the same were assessed at Kshs.1,210,069.50. Meanwhile, the Plaintiff was sued by the financiers of the said motor vehicle, M/S Diamond Trust Kenya Ltd. in Nakuru HCCC No. 348 of 1996 claiming payment of the balance of the purchase price amounting to Kshs.4,382,035.80 and judgment was entered as prayed. The Plaintiff then filed suit against the Defendant praying among other prayers, for a declaration that the Defendant should satisfy the judgment or decree in the aforesaid suit. The decretal amount as at 21st August 2003 amounted to Kshs.9,486,514.80. The Plaintiff claimed that he was put in the present situation by the Defendant's failure to repair his motor vehicle after the said accident although his problems were worsened by a fire outbreak in his saw mill which destroyed the business completely.

The Plaintiff relied on HCCC No. 2986 of 1994 at Nairobi **EDITH MUTHONI VS JUMA MUCHIMI & 2 OTHERS** and Court of Appeal Civil Appeal No. 37 of 1978 **D. T. DOBIE & CO. KENYA LTD VS JOSEPH MBARIA & ANOTHER**.

The respondent did not file any replying affidavit but relied on grounds of opposition filed on 22nd March, 2004. The respondent stated that the defence filed had merits and disclosed triable issues. The respondent's learned counsel Mr. Githinji, referred to paragraph 2 of the respondent's defence where it was averred that the Defendant was a stranger to the alleged civil suit HCCC 348 of 1996 between Diamond Trust Bank Kenya Ltd. and the Plaintiff herein and said that the respondent cannot be compelled to pay any sums adjudged therein as that would be tantamount to condemning the respondent unheard. He submitted that the aforesaid argument was a triable issue. He also cited paragraph 3 of the defence as an example of the many triable issues which were raised in the respondent's defence. In the said paragraph, the respondent denied that its policy of insurance with the Plaintiff included such terms as meeting all claims arising from any accident involving the Plaintiff's motor vehicle and defending the Plaintiff against claims such as the one which was brought by Diamond Trust Bank Kenya Ltd.

Mr. Githinji pointed another triable issue as contained in paragraph 9 of the defence, that is the Plaintiff's declaratory suit was premature because such a suit could only be commenced after judgment in this suit had been entered. He agreed with the authorities cited by the applicant's counsel but also sought to buttress his submissions by citing **HCCC NO. 1165 OF 2001 CHRISTOPHER MUSYOKA MUSAU VS DAIMA BANK & ANOTHER.**

I have carefully considered the pleadings in this matter as well as the submissions made by counsel. The Court of Appeal in **D. T. DOBIE & COMPANY (KENYA) LIMITED AND JOSEPH MBARIA MUCHINA** stated that;

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with zeal life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”

The defence cannot be said to be a sham one at all. It raises several triable issues as pointed out by Mr. Githinji. I have to warn myself that I am not the trial judge and therefore I cannot express a strong opinion regarding either the Plaintiff's case or the defence case as that may prejudice a fair trial. Suffice to say that I am not in agreement with the plaintiff that the defence is scandalous, frivolous or vexatious. While the Plaintiff may have availed to the Defendant the proceedings of Nakuru HCCC 248 of 1996 which gave rise to this matter, it is obvious that the defendant was not a party to that suit and it cannot be summarily compelled to satisfy a decree of almost Kshs.10 million by striking out its defence.

The insurance policy that subsisted between the Plaintiff and the Defendant will also have to be examined closely to see what rights and obligation it gave to the parties and I believe these are important triable issues.

For these reasons I dismiss with costs the Plaintiff's application.

DATED, SIGNED & DELIVERED at Nakuru this 6th day of April, 2004. DANIEL K. MUSINGA

AG. JUDGE

6/4/2004