REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 1146 OF 2003

RUTH MUTINDI……1ST PLAINTIFF/APPLICANT

ERIC MUTHINI (a minor suing through

Ruth Mutindi as next friend)…….2ND PLAINTIFF/APPLICANT

VERSUS

UNITED INSURANCE COMPANY LTD…..DEFENDANT/RESPONDENT

RULING

This application by Chamber Summons, dated 26th March, 2004 was filed on 20th April, 2004. It was brought under Order VI rule 13(1), (b), (c) and (d) of the Civil Procedure Rules. Its prayers were:

(i) that, the Court be pleased to strike out the Defendant's defence as being scandalous, frivolous or vexatious and an abuse of the process of the Court;

(ii) that, the Court be pleased to enter judgement against the Defendant as prayed in the Plaint;

(iii) that, the costs of the application be provided for.

The stated grounds for the application were as follows:

(a) that, Judgement had already been entered against the Defendant's insured;

(b) that, the Defendant is obliged to satisfy the Judgement sum having been the insurer of motor vehicle registration No. KAH 658 J in civil suit number 1165 of 2003;

(c) that, the defence filed is just a mere denial.

Ruth Mutindi, the first Plaintiff, has sworn a supporting affidavit in the following terms:

(i) that, the deponent and her minor son were on 22nd December, 2001 involved in an accident while being passengers in motor vehicle registration number KAH 658 J owned by Evans Magata;

(ii) that, the deponent through her Advocates filed suit against Evans Magata, in civil suit No. RMCC 1165 of 2003;

(iii) that, the Defendant filed a Defence on 13th May, 2003;

(iv) that, the said suit was heard on 3rd October, 2003 and consent Judgement was entered in favour of the Plaintiffs for Kshs.217,225/= inclusive of costs and disbursements;

(v) that, the Defendant agreed to pay the decretal sum by three monthly instalments of Kshs.72,500/= each from January, 2004 but to-date no payment has been made;

(vi) that, since the Defendant failed to pay the decretal sum he (the Plaintiff) filed suit against the present Defendant who was the insurer of the subject motor vehicle at the time of the accident;

(vii) that, the Defendant insurance firm has filed a Defence which is no more than a mere denial;

(viii) that before filing the initial suit against the insured, notice under Chapter 405 of the Laws of Kenya had been duly served upon the Defendant.

The hearing took place on 1st July, 2004 in the absence of the Respondent who, however, had been duly served with hearing notice. Mr. Bernard Munyasya a duly authorized process server filed an affidavit of service dated 14th June, 2004 showing beyond doubt that the Respondent was aware of the hearing date.

Counsel submitted that since the Plaintiff/Applicant was already the judgement-creditor, arising from Civil Suit No. RMCC 1165 and that suit had been preceded by notice to the Defendant herein as insurer, by virtue of Chapter/405, Laws of Kenya it followed that the Defendant insurer has an obligation under the law to satisfy the Judgement. The terms of the consent Judgement in the Magistrate's Court was that the insured was to pay up in accordance with certain terms. Counsel argued that as the insured had failed to comply with the prescribed terms and payment had not been duly made as ordered, the obligation fell immediately upon the Defendant to pay up the decretal sums.

Mr. Korongo for the Plaintiff/Applicant contended that the Defence filed on 10th December, 2003 raises no triable issues and consisted of mere denials of the assertions in the Plaint and consequently was a sham and should be struck out.

It is clear to me that the foundation of this suit is Civil Suit No. RMCC 1165 of 2003 which had resolved the primary dispute in favour of the Plaintiff. The moment that determination was made by the learned Magistrate, and in the absence of an appeal – and indeed there was none – then automatically it became the responsibility of the Defendant to ensure the decretal sum was paid.

Rather than do the right thing and pay up the decretal sum, the insurer started disputing the claim and defending against foundations of fact which had, as a matter of law, been resolved in the Magistrate's Court. In principle, this kind of defence is untenable and the contentions made could only have been raised on appeal.

It is apparent that as a consequence of overlooking the principle described in the above paragraph, the Defendant raised a Defence that was not tenable in law. For example, paragraph 3 of the Defence asserts:

"Without prejudice to paragraph 2 hereof the Defendant denies paragraph 4 of the Plaint, and in particular denies that it issued the alleged or any policy of insurance in respect of motor vehicle registration number KAH 658 J as therein alleged or at all, and the Plaintiff is put to strict proof thereof."

Now this is a factual matter already resolved in the consent Judgement recorded by the learned Magistrate. It is now too late to deny it, considering in particular that notice had been duly served on the insurer at the time of the earlier suit.

In paragraph 4 of the Defence it is asserted:

"Without prejudice to paragraph 4 [sic] hereof the Defendant avers that if the alleged or any policy

of insurance was issued as alleged (which is denied) the Defendant was not at risk in respect thereof and the Defendant avers that any such policy was void for total failure of consideration and the Plaintiffs are put to strict proof of any allegation to the contrary."

Once again, the argument now being raised belongs to the hearing stage before the learned Magistrate.

It suffices to state that the Defence does not appear to be properly guided on any legitimate basis for disputing the assertions in the Plaint.

From the general tenor of the Defence, I have formed the impression that it does not present a triable case, but merely seeks to buy time and to ensure that the Plaintiff's case is not expeditiously prosecuted to completion.

I am thus inclined to agree with the Applicant's case, that the Defence is frivolous and vexatious. It is not impertinent, in this regard, that the Respondent had no answer to the Chamber Summons application of 26th March, 2004 and neither did the Defendant have representation at the hearing, even if only to argue on basic points of law such as might favour the Defendant's case.

I must, in these circumstances, respond to the Plaintiff's application by making the following Orders:

1. The Defendant's Defence herein is hereby struck out for being frivolous, vexatious and an abuse of the process of the Court.

2. Accordingly, Judgement is hereby entered for the Plaintiff/Applicant who will proceed to take a date at the Registry for formal proof – and the same shall be given on the basis of priority and shall be timeously served.

3. The Plaintiff's costs in this application shall be borne by the Defendant/Respondent.

DATED and DELIVERED at Nairobi this 17th day of September, 2004.

J. B. OJWANG

Ag. JUDGE

Coram: Ojwang, Ag. J.,

Court Clerk: Mwangi

For the Plaintiff/Applicant: Mr. Korongo, instructed by M/s. Malonza & Co. Advocates

Defendant/Respondent: Not represented.