



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL COURTS**

**CIVIL SUIT NO. 1071 OF 2001**

**JOHN MBURU MUIRURI )**

**JAMNADAS CREDIT LTD ) ..... PLAINTIFFS**

**VERSUS**

**KENYAN ALLIANCE )**

**INSURANCE CO. LTD . )..... DEFENDANTS**

**RULING**

Two applications are before me. The first one is by the Plaintiffs. It is dated 14th August 2001 and is seeking that the Defence herein be struck out and judgment be entered for the Plaintiff against the Defendant as per Plaintiff together with costs of this application and costs of the suit. It is based on three grounds namely that the Defence is a mere denial; that the defence is frivolous and an abuse of the court process and lastly that the Defence does not disclose any reasonable challenge to the Plaintiff. There is an Affidavit in support of it and six annexures to the same Affidavit. It is opposed and there is Replying affidavit sworn by Patricia Njuguna, the Claims Manager with M/S Kenyan Alliance Insurance co. Ltd, the Defendant.

The second application is Defendant's application dated 13th September 2001 seeking an order to strike out the Plaintiffs' plaint and further seeking costs on grounds that the Plaintiff is frivolous and vexatious, and that the Plaintiff is an abuse of the process of court. It is also supported by an affidavit of Patricia Njuguna and several annexures to the same Affidavit. This application was also opposed.

The parties did agree by consent to have these two applications heard together and they were heard together. I have considered both applications. Neither can be granted. In my humble opinion the defence cannot be said to be frivolous, and an abuse of the court process, neither can it be said to disclose no reasonable challenge to the Plaintiffs' claim because the Plaintiffs' claim is based on an insurance policy which the Defendant alleges cannot be enforced any more because of provisions of the same policy which it says have not been complied with. It further states that the Plaintiffs did not have an insurable interest in the motor vehicle the subject of this suit and the Defendant was not in any way at all liable to indemnify the Plaintiff against the loss or damage of the said motor vehicle. Those allegations are in my opinion bonafide and do raise reasonable Defence.

Turning to the application dated 14th September 2001, it will be clear that whether the Plaintiff has not complied with a provision in the policy or not is a matter of evidence. Further even if one goes by the provision one has to still ascertain that the disclaimer of liability has been properly conveyed to the Plaintiff. Further even if all these were proved still there is the question whether the provision saying that the "claim shall for all purposes be deemed to have been abandoned" is a rebuttable presumption or not and what would happen as is here where it is shown that it had not been abandoned? These are all matters for trial and no short-circuiting will do. Defendant's point based on the validity or otherwise of the verifying affidavit was not pressed at the hearing and is thus no longer available. Lastly there is the question of whether the Plaintiffs have insurable interest in the vehicle in question. These again cannot be satisfactorily decided without evidence.

These are the brief reasons why I say both Applications cannot succeed. Each is dismissed. Each party to bear its own costs. Orders accordingly.

Dated and delivered at Nairobi this 29th day of January 2002.

**ONYANGO OTIENO**

**JUDGE**