



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

**MILIMANI LAW COURTS
HIGH COURT CIVIL CASE NO. 1186 OF 2000**

DORCAS AYIETA AMUNGA.....PLAINTIFF

V E R S U S

UNITED INSURANCE COMPANY LIMITED.....DEFENDANT

R U L I N G

The Plaintiff/Applicant herein had sued **Johali Baya Salim & Another in High Court Civil Suit No. 3215 of 1997** for special and general damages under the Law Reform Act (Cap. 26) and the Fatal Accidents Act (Cap. 32). She had brought that suit as the legal representative of her deceased husband under a Limited grant of Letters of Administration. That suit was for the benefit of the deceased's estate, herself and her child. Judgment was entered in favour of the Plaintiff for Shs. 550,000/= in general damages by the Honourable Lady Justice Ang'awa on 29th April, 1999. The Defendant in the instant suit failed to pay the said amount and was sued as the insurer of the accident vehicle KAG 279L. In the Chamber Summons Application dated 8th May, 2001, the Plaintiff seeks to strike out the defence filed in this Court on 31st August, 2000. To this Application, the Defendant has raised a preliminary objection dated 9th July, 2001.

The grounds of objection are that the verifying affidavit sworn on 20th May, 2000 is incurably defective and ought to be struck out as it alleges to verify the facts contained in a plaint that was not in existence at the time when the verifying affidavit was sworn. Accordingly, a valid verifying affidavit does not accompany the plaint dated 25th May, 2000. Secondly, that the affidavit in support of the application has inadmissible exhibits annexed thereto this being part of "Without Prejudice" correspondence and some of the exhibits annexed are not mentioned and/or referred to in the affidavit. The same therefore ought to be expunged from the Court records. The Company contends that the application, and the suit generally, are fatally defective for offending the mandatory provisions of the law.

At the hearing of 10th July, 2001, Mrs. Guserwa argued that some of the points raised in the preliminary objection had been corrected by the Amended Plaint filed on 18th April, 2001, and the present Application did not contain "without prejudice" correspondence. The Plaintiff had made a similar Application on 10th November, 2000 but the same was withdrawn by consent on 4th April, 2001. Mrs. Guserwa further contended that there was an insurance policy in force at the time of the accident and since no disclaimer had been filed under Section 10(4) of the Insurance Act (Cap. 405), the Plaintiff should be granted the prayers sought. She did not address the issue of the Plaintiff's capacity in the present suit.

Mr. Muri for the Defendant argued that the Plaintiff had not stated in what capacity she was suing; that

paragraph 4 of the Affidavit in the Plaintiff's Application relies on information which is only permissible in an interlocutory application and on this point Counsel relied on the case of **Gilbert v. Endean [1875] 9 Ch. B. 259** which held that evidence on information and belief should not finally determine the rights of the parties. That information related to service of the Statutory Notice upon the Defendant under the Insurance Act (Cap. 405) and was supplied by the Plaintiff's Advocate.

The verifying affidavit objected to and the plaint are both dated 20th May, 2000. It is titled "Supportive Affidavit" and from the contents, it is clear that it is a Verifying Affidavit under Order VII Rule 1(1) (b). That defect is cured by invoking Rule 7 of Order XVIII which states:-

"The Court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form thereof."

With respect, the contention that the Affidavit is invalid for having being sworn before the institution of the suit is misplaced since both are even dated. The Verifying Affidavit takes effect on the date the Plaint is filed therewith. The remaining objection is based on a letter marked

"Without Prejudice" annexed to the Plaintiff's Affidavit. It must be stated that the mere marking of correspondence as "Without Prejudice" does not automatically render them inadmissible.

"Such statements are not excluded unless they are made in the course of negotiations for the settlement of a dispute." – Per Prof Nokes, Cocks's Cases and Statutes on Evidence (9th Edition) 1959 at p. 53.

However, such documents can only be admitted with the consent of the parties (see **Walker v. Wilsher [1889] 23 Q.B.D. 335**). Thus, the letter dated 11th May, 2000 requesting for a certified copy of a Court order to enable payment to the Plaintiff is hereby expunged from the Court's records.

To strike out the defence is a rather drastic action and since I am satisfied that it raises triable issues, I hereby dismiss the Plaintiff's Application. The Preliminary Objection also fails and the costs shall be in the cause.

DATED and DELIVERED at NAIROBI this 31st day of July, 2001.

ALNASHIR VISRAM

JUDGE.