



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mafair Insurance Company Limited v Ndumbu (Civil Case  
46 of 2022) [2023] KEHC 22228 (KLR) (14 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 22228 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL CASE 46 OF 2022  
F WANGARI, J  
JULY 14, 2023**

**BETWEEN**

**MAFAIR INSURANCE COMPANY LIMITED ..... PLAINTIFF**

**AND**

**NGALA NDUMBU ..... DEFENDANT**

**RULING**

1. The Plaintiff filed this suit on 19<sup>th</sup> July 2022 seeking the following orders;
  - a. A declaration that the Plaintiff is entitled to avoid policy of insurance No. 02/COMP/01/0700/3052/2021.
  - b. A declaration that the Plaintiff has effectively avoided the policy of insurance No 02/COMP/01/0700/3052/2021 and is not liable to pay any claims arising out of the accident of 14/11/2012 involving motor vehicle registration number KCN 774 H make, Toyotas Ractis including but not limited to judgment and /or and decree that may arise from Mombasa RMCC No. E 713 of 2022.
  - c. Cost of his suit
  - d. Any other relief the court deems fit to grant.
2. The Plaintiff stated that they covered the Defendant's motor vehicle KCN 774 H Toyota Ractis vide policy No. XX/3052/201 from 25<sup>th</sup> January 2021 to 24<sup>th</sup> February 2022. The motor vehicle was involved in an accident on 14<sup>th</sup> November 2021. The Plaintiff in the primary suit, Kennedy Owino Odor, was injured and filed a suit in Mombasa PMCC 713 of 2022 to recover damages.
3. They stated that their investigations report revealed that there was breach of express terms of contracts that the insured was not to carry passengers for hire or reward. The particulars of breach of the



Insurance Policy and particulars of misrepresentation and material non-disclosure were set out in paragraphs 9 and 10 of the plaint.

4. The prayers sought by their very nature are declarations. The Defendant denied this averment and stated that the said motor vehicle was insured by the defendant and has never used it as commercial vehicle for purposes of carriage of goods used as a taxi.
5. The defence fall within the perfect brief defences covered by the case of *Ragbbir Singh Chatte v National Bank of Kenya Limited* [1996] eKLR, where the court of Appeal stated as doth: -

“The main object of this rule and r.14 is to bring the parties by their pleadings to an issue, and indeed to narrow them down to definite issues, and so diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing (per Jessel M. R. in *Thorp v Holdworth* (1876) 3 Ch. D. 637). This object is secured by requiring that each party in turn should fully admit or clearly deny every material allegation made against him. Thus, in an action for a debt or liquidated demand in money, a mere denial of the debt is wholly inadmissible”, (underling supplied).

I will also add that the crucial deficiency of a general denial which I have already described, also applies to the evasive, inconsistent and contradictory alternative general traverse in the appellant’s defence. This was that if the respondent had extended any overdraft facilities without stating the amount involved, to the appellant which was moreover, denied, then the same and here again, without stating how and when, had been paid. Such a spurious pleading in the alternative cannot give any merit to the defence and so also makes it one which discloses no reasonable defence for all purposes including that of 0 6 r 13(1)(a).”

6. The Plaintiff filed an application dated 6<sup>th</sup> September 2022 seeking to have the statement of defence struck out and judgment entered in their favour, and costs of the suit, on grounds that the defence had no triable issues.
7. The Defendant replied thought the affidavit dated 10<sup>th</sup> November 2022 sworn on an unknown date. The parties were directed parties to file written submissions and the same was complied with. I have considered the rival submissions as filed.
8. The law on striking out is setting out in the case of *DT Dobie & Company Ltd vs Muchina* [1982] eKLR it was stated thus;

“The Court ought to act very cautiously and carefully and consider all the facts of the case without embarking upon a trial before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the Court. At this stage, the Court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the Court itself is not usually fully informed so as to deal with the merits without discovery, without oral evidence tested by cross-examination in the ordinary way. As far as possible indeed, there should be no opinions expressed upon the Application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks right.”

9. In *Simon Kirima Muraguri & another v Equity Bank (Kenya) Limited & another* [2021] eKLR, Justice E. C. Mwita, had this to say: -

“The jurisdiction to strike out pleadings is discretionary and must be exercised judicially. In *Postal Corporation of Kenya v I. T Inamdar & 2 Others* [2004] 1 KLR 359, the court stated



that the law is now well settled that if the defence filed by a defendant raises even one bona fide triable issue, then the defendant must be given leave to defend.

In *The Co-operative Merchant Bank Ltd. v George Fredrick Wekesa* (Civil Appeal No. 54 of 1999) the Court of Appeal stated: Striking out a pleading is a draconian act, which may only be resorted to, in plain cases...Whether or not a case is plain is a matter of fact...Since oral evidence would be necessary to disprove what either of the parties says, the appellant's defence cannot be said to present a plain case of a frivolous, scandalous, vexatious defence, or one likely to prejudice, embarrass or delay the expeditious disposal of the respondent's action or which is otherwise an abuse of the process of the court.

In *Yaya Towers Limited v Trade Bank Limited (In Liquidation)* (Civil Appeal No. 35 of 2000) the same court expressed itself thus: A plaintiff (defendant) is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant (plaintiff) can demonstrate shortly and conclusively that the plaintiff's claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court, it must be allowed to proceed to trial...It cannot be doubted that the Court has inherent jurisdiction to dismiss that, which is an abuse of the process of the Court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved.”

10. A party should not easily be driven out the seat of justice, even if he has one issue. In this matter, the defence is that the party did not use the motor vehicle in issue for hire or reward. This is a sufficient defence.
11. The Defendant's submissions were fairly comprehensive. The Defendant stated that a defence cannot be struck out merely because it demurred. A pleading can only be struck out if no averment can cure the same.
12. The Defendant relies on the authority of *Aaron Fredrick v Crown A. Industries and another*. The Applicant filed submissions stating that they have made a case for striking out. They rely on the locus classicus case of *Ragbbir Singh Chatte v National Bank of Kenya Limited* [supra] eKLR.

### Analysis

13. In the case of *Angaluki Muaka v Beryl Awinja Sakwa* [2016] eKLR, the court stated as follows;

“That maybe so, however, I still find that the issues in the Defence are prima facie triable since the answers to the issues raised by the Plaintiff are not plain and obvious.

The issue of the terms and conditions of the agreement between the parties would require an interpretation by the court and an analysis of the facts presented to the court. Therefore, it is my finding that the same are not issues that can be determined based on affidavit evidence at this stage.

In the foregoing my evaluation of the matter is that the defence on record is not without substance or fanciful. The same could only be vexatious if it was lacking in bona fides or is hopeless or offensive, but there is no firm basis laid for such conclusions.”

14. Further, there is a triable issue. A trial issue is that which it is not a must that it succeeds but is capable of trial. I have perused the replying affidavit and note that the application has been adequately answered.



15. Even if I was to strike out the defence, the court cannot enter default judgment. The plaintiff must proof its case. In fact, it is the plaintiff who has not had basis for entry of judgment. There is no annexure showing the motor vehicle was used as s taxi or for hire or reward.
16. Therefore, I do not find any merit in the application. The subject matter is less than Ksh. 20,000,000 and the matter should be heard by the Chief Magistrates' Court in Mombasa.
17. Lastly, on the issue of costs, the same follow the event as guided by section 27 of the Civil Procedure Act. The Respondent being the successful party is entitled to costs and I so award.
18. Following the foregone discourse, the upshot is that the following orders do hereby issue: -
  - a. The application dated 6<sup>th</sup> September, 2022 is has got no merits and is hereby dismissed.
  - b. Matter is hereby transferred to the Chief Magistrate's Court at Mombasa for hearing and final disposal.
  - c. Parties to fix a mention date before the said court for directions.
  - d. Costs of the application awarded to the Respondent.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 14<sup>TH</sup> DAY OF JULY, 2023.**

.....

**F. WANGARI**

**JUDGE**

**In the presence of;**

Anangwe Advocate for the Plaintiff

Kai Advocate for the Defendants

Abdullahi, Court Assistant

