



Campon (Suing as the Holder of the Power of the Attorney for Bautista Valentin and Maria Doloves Martinez as the Administrator to the Estate of the Late Esther Buendia Martinez) v Lion of Kenya Insurance Co. Ltd & another (Civil Case 76 of 2018) [2023] KEHC 24622 (KLR) (18 October 2023) (Ruling)

Neutral citation: [2023] KEHC 24622 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL CASE 76 OF 2018
A. ONG'INJO, J
OCTOBER 18, 2023**

BETWEEN

ALEJANDRO CAMPON (SUING AS THE HOLDER OF THE POWER OF THE ATTORNEY FOR BAUTISTA VALENTIN AND MARIA DOLOVES MARTINEZ AS THE ADMINISTRATOR TO THE ESTATE OF THE LATE ESTHER BUENDIA MARTINEZ) PLAINTIFF

AND

**LION OF KENYA INSURANCE CO. LTD 1ST DEFENDANT
ICEA LION GENERAL INSURANCE KENYA CO. LTD 2ND DEFENDANT**

RULING

Application

1. By an application dated 14th November 2022, the Plaintiff/Applicant sought that judgment on admission to the tune of Kshs. 3,000,000/= plus interest at court rates from 31st May 2016 to 25th September 2018 plus costs be entered for the plaintiff against the defendant. That alternatively, the defence herein dated 8th October 2018 and filed in court the same day be struck out for being otherwise an abuse of the court process to the extent that it disputes being liable to pay Kshs. 3,000,000/= judgment be entered against the defendant as prayed for Kshs. 3,000,000/= plus interest at court rates from 31st May 2016 to 25th September 2018, plus costs.
2. The application was supported by the grounds on the face of the application and the affidavit sworn by Alejandro Campon, a family friend and holder of the power of attorney from Bautista Buendia Valentin and Doloves Martinez being the father and mother of the late Esther Buendia Martinez herein also referred to as the deceased, and the administrator of the estate of the and brings this cause for



the benefit of the dependants of the deceased under the [Fatal Accidents Act](#) and for the benefit of the deceased estate under the [Law Reform Act](#) Chapter 26 Laws of Kenya.

3. The grounds and averments in the Supporting Affidavit were to the effect that the defendant had admitted part of the claim and paid up to the tune of Kshs. 3,000,000/= and that the defence herein discloses no triable issue and is otherwise an abuse of the court process.

Response by Respondent

4. The application was opposed by the Replying Affidavit of Betty Isoe, the Legal Officer of the Defendant/Respondent herein sworn on 9th February 2023 and filed on 10th February 2023 in which she stated that the applicant, pursuant to the insurance policy agreement dated 22nd May 2007 and the provisions of Section 34 of the *Finance Act, 2006* agreed to insure Mash Bus Services Limited against liability in respect of death or bodily injury to any one person subject to the applicable statutory limitations.
5. The Respondents argued that vide the letter dated 14th September 2018, the Plaintiff's advocate was informed of the Respondents' willingness to discharge the liability of Kshs. 3,000,000/= within 15 days and therefore sought the Plaintiff to refrain from filing a declaratory suit as a means of avoiding escalation of costs.
6. The Respondents further argued that subsequently, the respondents vide the letter dated 27th September 2018 in good faith and in compliance with provisions of Section 5 (b) (iv) of the [Insurance \(Motor Vehicle Third Party Risks\) Act](#), Chapter 405 Laws of Kenya made the payment of Kshs. 3,000,000/= in discharge of their liability as final payment of the Plaintiff's claim tabulated as follows: -
 - a. Cheque No. 075967 – Kshs. 850,000/= dated 25th September 2018
 - b. Cheque No. 075968 – Kshs. 800,000/= dated 25th September 2018
 - c. Cheque No. 075969 – Kshs. 450,000/= dated 25th September 2018
 - d. Cheque No. 075970 – Kshs. 900,000/= dated 25th September 2018Total Kshs. 3,000,000/=
7. The respondents stated that they have fulfilled their statutory duty and the applicant's remedy if any on the alleged interests and costs lies elsewhere and not against the respondents. That the question of the provisions of Section 5 (b) (iv) of the [Insurance \(Motor Vehicle Third Party Risks\) Act](#), Chapter 405 Laws of Kenya on the capping of payments of third party claims at Kshs. 3,000,000/= is a triable issue that can only be dealt with at full trial.

Applicant's Submissions

8. The plaintiff/applicant submitted that the salient facts of the case are not in dispute as the issue is only whether the defendant should only pay a maximum of Kshs. 3,000,000/= or Kshs. 3,000,000/= plus costs of the suit herein and interest between date of primary suit judgment (31st May 2016) and (27th September 2018) the date when the Defendant discharged its obligation as an insurer in a claim as per Section 5 of the [Insurance \(Motor Vehicle Third Party Risk\) Act](#), Chapter 405 Laws of Kenya as read together with Section 10 of the said [Act](#) on requirements in respect of insurance policies and the duty of insurer to satisfy judgments against persons insured.
9. The plaintiff/applicant argued that the defendant having been the offending party that failed to pay up occasioning accrual of interest and further costs in filing of the declaratory suit after delivery of the



judgment in the primary suit and issuance of the demand cannot be protected from its own mischief of non-payment or seek to use it on a defence.

10. The plaintiff/applicant contended that the principle was discussed in the case of *Mutete Ndongye v Muli Munyao & 4 Others* (2012) eKLR where it was held as follows: -

“A party cannot be allowed to benefit from her own mischief on account of the provision of law. It is just harsh and unconscionable ... This is good for the rule of law and accords well with the dictates of public policy. A court should not be called in aid of a party who is guilty of unlawful acts. In the circumstances of this case, I decline to entertain the thought that the aforesaid provisions were intended to protect fraud as perpetrated on the defendants by the plaintiff. Obviously it is against public policy and order, for a court of law to protect instances of fraud regardless of the justification.”

11. The plaintiff/applicant submitted that the defendant cannot run away from the consequence of failing to perform its statutory obligation to the plaintiff under Chapter 405 Laws of Kenya on time. That this will mean it pays up the interest and the costs occasioned by its delay, which are not triable issues. That the court in *Peter Gichibi Njuguna v Jubilee Insurance Co. Limited* HCCC No. 57 of 2013 held that the insurance company will be liable for the accrued interest from the date of the judgment in the primary suit until it pays up and also for the cost of the declaratory suit even if the interest and costs take the total amount beyond Kshs. 3,000,000/=. That the position was further reiterated in *Britam General Insurance Co. (K) Ltd v Lazarus Sagini Nyangau & Eunice Nyaboke Sagini (Suing as legal representatives of the estate of Wyclief Osingo Sagini)* HCCC No. 220 of 2019.
12. The plaintiff/applicant stated that the upshot is that an insurer that fails to perform its duty of paying its statutory obligated amount becomes liable for the accrued interest on the Kshs. 3,000,000 and the costs of a declaratory suit if its filed like in the instant case. That these are pure issues of law that can be determined summarily and cannot be said to be triable issues. That for those reasons, the plaintiff's notice of motion application dated 14th November 2022 should be allowed as prayed.

Respondents' Submissions

13. The respondent submitted that the issues for court's determination herein are whether the applicant has met the threshold for striking out pleadings and/or the statement of defence herein, and who should bear the costs of the application.
14. The respondent argued that the procedural positions that guide the striking out of pleadings are found under Order 2 Rule 15 (1) (a) of the *Civil Procedure Rules*, 2010 which states that at any stage of the proceedings, the court may order to be struck out or amend any pleadings on the ground that it discloses no reasonable cause of action or defence in law.
15. The respondent relied on the decision in the *Delphis Bank Limited v Caneland Limited* (2014) eKLR where the court outlined the cases dealing with applications for striking out and summary judgment that: -

The leading local case on interpretation of Rule 13 of Order VI of the *Civil Procedure Rules* on which the application striking the defences was based is perhaps *D.T. Dobie & company (Kenya) Ltd vs Muchina* which counsel for the appellant referred to us. In the case, Madan JA, as he then was, opined in an obiter dictum that;

“The power to strike out should be exercised only after the court has considered all the facts, but it must not embark on the merits of the case itself as this is solely



reserved for the trial judge. On an application to strike out pleadings, no opinions should be expressed as this would prejudice the fair trial and would restrict the freedom of the trial judge in disposing the case.”

16. The respondent pointed out that Justice R. E. Ougo in *UAP Insurance v Lameck Bororio Mwene (Suing as the legal representative of Brian Lameck Momanyi – Deceased)* (2019) eKLR on the issue of striking out a defence in a declaratory suit had this to say: -

“Without going to the merits of the case, a look at the appellant’s defence filed in the trial court reveals two issues which ought to have been determined after the hearing of the declaratory suit. The issues raised by the appellant’s defence are in regard to the ownership of the motor vehicle and service of the requisite notice as stipulated by Section 10 of the Act, which issues can only be determined after the conduct of a full trial. All the defendant is supposed to show is that a defence on record raises triable issues which ought to go for trial and the triable issues raised does not mean a defence that must succeed (see *Kenya Trade Combine Ltd vs Shah CA 193/99*). The Appellant’s defence contains bona fide triable issue and the Defendant should thus be allowed to defend the suit.”

17. The respondent argued that the issues raised in the defence constitutes triable issues which cannot be adjudicated upon at this stage. That the main ground on which the applicant seeks to be paid costs and interest over and above the statutory limit of Kshs. 3,000,000/= is that the respondent only paid a sum of Kshs. 3,000,000/= after the applicant had already filed the suit herein and therefore incurred further costs on the same.

18. The respondent submitted that at paragraph 6 of its Replying Affidavit stated that the applicant vide a letter dated 14th September 2018 was informed of the respondent’s willingness to discharge its obligations and therefore ask the applicants to refrain from filing a declaratory suit which would only lead to unnecessary escalation of costs. That the issue of whether or not the applicant was informed by the respondent of their intention to settle the decretal sum before filing the declaratory suit, and the issue of costs and interests are both triable issues.

19. On who should bear the costs of the application, the respondent relied on the case of *Orix Oil (Kenya) Limited v Paul Kabuu 2 Others* (2014) eKLR where the court stated that: -

“... the court should have been guided by the law that costs follow the event, and the Plaintiff being the successful party should ordinarily be awarded costs unless its conduct is such that it would be denied the costs or the successful issue was not attracting costs. None of those deviant factors are present in this case and the court would still have awarded costs to the Plaintiff, which I do.”

Determination

20. In Mombasa High Court Civil Case No. 247 of 2011, judgment was entered in favour of the Estate of Esther Buendia Martinez as follows: -

- i. Lost years Euros 180,960
- ii. pain and suffering Kshs. 30,000,
- iii. loss of expectation of life Kshs. 150,000
- iv. special damages Kshs. 645,978

Costs were also awarded on the damages as follows: -



- a. Special damages from the date of filing suit till payment in full.
 - b. General damages from that date of the judgment till payment in full.
 - c. Costs of the suit to the plaintiff.
21. Following the entry of the judgment on 31st May 2016, the Plaintiff brought Civil Suit No. 76 of 2018 on 18th September 2018 against *Lions of Kenya Insurance Co. Ltd and ICEA Lion General Insurance Kenya Co. Ltd* praying that judgment be entered against them jointly and severally as follows: -
- a. Award for general damages and costs in Kshs. 860,000/= with interest at court rates from 31st May 2016
 - b. Award for special damages in Kshs. 645,000/= with interest at court rates from 17th August 2017
 - c. Award in Euros at 180,960 with interest from 31st May 2016 (on 17th September 2018 the exchange rate of Kshs. to the Euro was 117.8197 making this Kshs. 21,320,652.912)
 - d. Costs
22. By a letter dated 7th August 2017, the Plaintiff's counsel demanded from the defendants herein Kshs. 2,056,259.93/= and Euros 212,628/= and by another letter dated 10th September 2018, they demanded for Kshs. 2,055,183/= and Euros 231,621.80/=. By a letter dated 27th September 2018, Kishore Nanji Advocate forwarded 4 cheques totaling Kshs. 3,000,000/= drawn by the 2nd Defendant in favour of the Plaintiff in full and final settlement of the defendant's liability to the plaintiff under the *Insurance (Motor Vehicle 3rd Party Risk) Act* Cap 405 Laws of Kenya in respect of the decretal amount payable under the judgment in the High Court No. 248 of 2011.
23. When by an application dated 19th December 2018, the Defendants sought that the plaint herein be struck out, the trial judge dismissed the application with costs for lack of merit on account that there were triable issues raised by both the plaintiff and the defendant in the plaint and defence in regard to the payable decretal sum.
24. The trial Judge having found in the application dated 19th December 2018 that both the plaintiff and the defendant in the plaint and defence had raised triable issues in regard to the payable decretal sum and the said ruling not having been appealed against, this court finds that the application by the plaintiff is an abuse of the court process. An order for striking out is a drastic one that should be exercised with extreme caution and only where issues are very clear. 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.
25. The application dated 14th November 2022 therefore lacks merit and is dismissed with costs to the defendant.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,
THIS 18TH DAY OF OCTOBER 2023**



HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of: -

Mr. Jengo Advocate for the Plaintiff/Applicant

Mr. Weloba Advocate for the 1st and 2nd Defendants/Respondents

Mr. Weloba Advocate: We pray for a copy of the ruling

Order: Mention on 8.11.2023 before Magare, J. for further directions. Notice of mention to be served by Defendants.

HON. LADY JUSTICE A. ONG'INJO

JUDGE

