



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 185 OF 2015

JACKSON MIRING’U KIMANI.....PLAINTIFF

-VERSUS-

CANNON ASSURANCE LIMITED.....DEFENDANT

RULING

Before this court for determination is the Notice of Motion dated the 7th day of June, 2017 by the Plaintiff/Applicant. The same has been brought under Order 7 Rule 5, Civil Procedure Rules and Sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act. The applicant has sought for the orders;

1. THAT at the pretrial conference this Honourable Court deem it fit to order the statement of defence dated 17th day of June, 2015 and filed on the 24th day of June, 2015 on behalf of the defendant be struck out and judgment be entered in favor of the plaintiff as prayed for in the plaint.

2. THAT cost of this application be paid by the defendant.

It is based on the grounds set out on its body and on the annexed affidavit sworn by the plaintiff, Jackson Miring’u Kimani, on the 7th day of June, 2017.

The applicant has sought for orders striking out the defence filed on 24th day of June, 2015 on the ground that the same is a mere shell, it lacks substance and that it is an abuse of the court process. In his supporting affidavit, he avers that he filed Hcc. Number 4511 of 1990 (*Jackson Miring’u Kimani vs. Richard Githenya Gichuru*) wherein, he obtained judgment for damages in an accident claim. That the defendant in the said suit was the registered and/or beneficial owner of motor vehicle registration number KNR 047 which was involved in the accident.

He averred that in the police abstract produced as an exhibit in that case, the defendant herein was identified as having insured the aforesaid motor vehicle vide policy number 8817/3788.

He further averred that prior to the filing of the case, ie. HCCC no. 4511/1990 his advocates had given a statutory notice to the defendant as required by the law which notice was duly received by the defendant.

The applicant depones that judgment in that case was entered in his favour and he was awarded kshs. 1,340,000/= following which, the defendant herein was informed of the same and of his intention to file a declaratory suit but it failed to settle the decretal sum.

The applicant contends that the defendant/respondent has failed to comply with the legal requirements necessary while filing its defence in that it filed a defence without any witness statement and/or supporting documents and that the defence filed herein is a shell and lacks substance. That the defendant has failed to comply with Order II of the Civil Procedure Rules and therefore, it is only fair and just that judgment be entered for him as prayed in the plaint.

The respondent has opposed the application by way of grounds of opposition filed on the 5th day of July, 2018, in which it avers that;

a. The application is premature and unmerited.

b. There is a defence on record whose merits need to be considered before a decision can be made and that the matter has never been set down for case conference.

c. The application is bad in law and it should be dismissed.

The application was disposed off by way of written submissions which the court has duly considered. The applicant seeks to strike out the defence for the defendant's failure to comply with Orders 7 and 11 of the Civil Procedure Rules. He has also averred that the defence is a mere shell for the reasons that have been outlined in the affidavit in support of the application. The application is based on two main grounds that;

i. The defendant has failed to comply with order 11.

ii. The defence filed by the defendant is a mere shell.

I will start by considering the first ground. Pre-trial Directions and Conferences are provided for under Order 11 Rule (1) which stipulates that pre-trial directions shall apply to all suits except small claims or such other suits as the court may by order exempt from this requirement. It is not in dispute that Order 11 is applicable to the case herein.

For a defendant to comply with Order 11, he/she is required to file such documents as stated in Order 7 Rule 5 to accompany the defence or counter claim. In the case at hand, the defendant was required to file a list of witnesses to be called at the trial, written statements signed by witnesses except the expert witnesses and copies of documents to be relied on at the trial.

The applicant contends that the defence is a mere shell as it was filed without the supporting documents and/or statements. In this regard, the court has perused the record and it's true that the defendant has not filed statements of witness and documents if any. However, it filed a list of witnesses but not their statements. As submitted by the applicant, the respondent was given time by the court to comply but failed to do so. Though Order 7 Rule 5 of the Civil Procedure Rules provides for time within which to file the statements with the leave of the court, it does not state the consequence of failure to file within the prescribed time. In the circumstances of this case, it would be unfair to strike out the defence on that account considering also that the defendant has partially complied with Order 11.

On the 2nd ground, the applicant seeks striking out of the defence as the same is a mere sham. The principles which guide our courts in determining applications for summary judgment are very clear. In the case of *Industrial and Commercial Development Corporation Vs. Daber Enterprises Limited (2000) IEA 75*, the court stated that the purpose of the proceedings in an application for summary judgment is to enable a plaintiff to obtain a quick judgment where there is plainly no defence to the claim. To justify summary judgment, the matter must be plain and obvious and where it is not plain and obvious, a party to a civil litigation is not to be deprived of his right to have his case tried by a proper trial.

In the case of *Dhanjal Investments Limited vs. Shabaha Investments Limited, Civil Appeal No. 232 of 1997*, the court earlier stated as follows regarding summary judgment;

“The law on summary judgment procedure has been settled for many years now. It was held as early as in 1952 in the case of Kandnlal Restaurant –vs- Devshi and Company [1952] EACA 77 ...and followed by the court of appeal for Eastern Africa in the case of Sonza Figuerido & Co. Limited vs. Mooring Hotel Limited (1952) EA 425 that, if the defendant shows a bonafide triable issue, he must be allowed to defend without conditions.....

Regarding what constitutes a triable issue, in *Kenya Trade Combine Limited vs. Shah Civil Appeal No. 193/1999* the court of appeal stated as follows;

“In a matter of this nature, all a defendant is supposed to show is that a defence on record raises triable issues which ought to go for trial. We should hasten to add that in this respect a defence which raises triable issues does not mean a defence that must succeed.”

Similarly, in the case of *Velji Shah vs. Chemafrika Limited (2014) eKLR* which quoted the case of *Saudi Arabian Airlines Corporation vs. Sean Express Services Limited (2014)eKLR*, the court laid out the test in a case for summary judgment in the following manner;

“I need not re-invent the wheel on the subject of striking out a defence. A great number of judicial decisions have now settled the legal principles which should guide the court in determining whether to strike out a pleading except, I can state comfortably that these principles now draw, not only from judicial precedent, but from the principles of justice enshrined in the constitution especially in Article 47, 50 and 159. The first guiding principle is that every court of law should pay homage to its core duty of serving substantive justice in the judicial proceedings before it, which explains the reasoning by Madan J. in the famous DT DOBIE case that the court should aim at sustaining rather than terminating suit. That position applied mutatis mutandis to a statement of defence and counter- claim.

Secondly, and directly related to the foregoing, constitutional principle and policy, is that courts should recognize the act of striking out a pleading (plaint or defence) completely divests a party of a hearing, thus, driving such a party away from the judgment seat; which is a draconian act comparable only to the proverbial drawing of the “sword of the Damocles” Therefore, the power to strike out a suit or a defence should be used sparingly and only in the clearest of cases where the impugned pleading is demurer or some thing worse than a demurer” Beyond redemption and not curable by even an amendment.

Thirdly, in case of a defence, the court must be convinced upon looking at the defence that it is a sham; it raises no bonafide triable issue worth a trial by the court. And a triable issue need not be one which will succeed but one that passes the SHERIDAN J TEST IN PATEL vs. EA CARGO HANDLING SERVICES LIMITED (1974) EA 75 AT P 76 (DUFFUS P) (That; “..... a triable issues is an issue which raises a prima facie defence and which should go for trial for adjudication. Therefore, on applying the test, a defence which is a sham should be struck out straight away. “

The court has considered the pleadings in this matter and in particular, the plaint and the defence filed herein. The plaintiff prays for a declaration that the defendant is bound to honor the Decree and costs in Civil Suit Number 4511 of 1990, an order to the defendant to pay the aforesaid decretal amount in the sum of Kshs. 1,340,000/= plus costs and interest.

The plaintiff alleges that the defendant was the insurer of motor vehicle registration number KNR 057 under Policy Number 8817/3788 which was at all material times valid and still subsisting when the vehicle was involved in a road traffic accident on the 26th March, 1988 along Nairobi - Kiambu road and the plaintiff was seriously injured. He avers that prior to the filing of the said suit, a demand notice was duly served on the owner of the aforesaid motor vehicle, one Richard Gathenya Gichuru, being the insured. He further avers that, he issued a statutory notice of the institution of the suit which notice was served upon the defendant herein in compliance with the law and the same was duly acknowledged by the defendant. He also avers that before filing the current suit, the defendant was served with a notice of intention to institute a declaratory suit.

In the defendant's defence filed on 24th June, 2015, it is averred that the plaintiff's suit is time barred pursuant to the provisions of Section 4(1) (d) of the Limitations of Actions Act.

The defendant has also denied that it had insured the aforesaid motor vehicle at the material time of accident; that a demand letter was served on the owner of the motor vehicle and that it was served with a statutory notice as alleged by the plaintiff.

Further, the defendant denies that their insurer was sued in Civil Case Number 4511 of 1990. It contends that the plaintiff has no cause of action against it in that, the defendant in Civil Suit 4511 of 1990 is a stranger to it.

With that caution in mind, it is however, trite law that where a pleading has absolutely no substance and a party is only trifling with the court, it is the clear duty of the court to strike out that pleading and accordingly dismiss or enter judgment for the plaintiff as the case may be. In the English case of Anglo Italian Bank vs. Wells, 38 LT at page 201 Jessel, M. R. stated that;

“When a judge is satisfied that not only there is no defence but no fairly arguable point to be argued, on behalf of the defendant it has a duty to give judgment for the plaintiff”

The object of striking out pleadings was stated by Lord Buckley in Carl – Zeiss –stiftung vs. Rayner (1969) 2ALL ER 897 at 908 thus;

“.....to ensure that the defendants should not be troubled by claims against them which are bound to fail, having regard to the uncontested facts. In principle if there is any room for escape from the law, well and good; it can be shown. But, in the absence of that, it is difficult to see why a defendant should be called onto pay a large sum of money and a plaintiff permitted to waste large sums of his own or somebody else's money in an attempt to pursue a cause of action which must fail. The object is to prevent parties from being harassed and put to expense by frivolous vexatious or hopeless litigation”

As the court held in the case of Yaya Towers Limited vs. Trade Bank Limited, CA No 35 of 2000 (2000) LLR 3633 (CAK).

“On an application to strike out a plaint under Order 6 Rule 13(1) (a) of the Civil Procedure Rules on the ground that it discloses no reasonable cause of action the truth of the allegations contained in the plaint is assumed and evidence to the contrary is inadmissible(see order 6 rule 13(2) of the Rules). This is because the court is invited to strike out the claim in Limine on the ground that it is bound to fail even if all such allegations are proved. In such a case, the courts function is limited to a scrutiny of the plaint. It tests the particulars which have been given of each averment to see whether they support it, and it examines the averments to see whether they are sufficient to establish the cause of action. It is not the court's function to examine the evidence to see whether the plaintiff can prove his case or not assess its prospects of success”.

Being guided by that proposition which I duly agree with, it is the defendant's contention that it was not served with a statutory notice before the institution of the primary suit and that the defendant in the primary suit was not served with a demand letter. In this regard, the court has perused the annexures attached to the affidavit in support of the application. The deponent who is the plaintiff herein has attached a demand letter dated 25th day of March, 1990. The same is addressed to Richard Gathenya Gichuru who was the defendant in the primary case. Though the defendant denies that the same was served upon the said Richard Gathenya Gichuru, the source of that information has not been disclosed and Richard Gathenya Gichuru himself has not sworn an affidavit denying service and therefore, the allegation by the defendant herein that the defendant in the primary suit was not served with a demand letter remains a mere allegation.

With regard to the statutory notice, annexure 3 is a letter dated 29th May, 2008 written to the defendant herein informing it about the judgment obtained in the primary suit and asking it to pay, failing which, the plaintiff would institute legal proceedings against it. The defendant has denied service of statutory notice upon it while the plaintiff has contended that the same was served. As I have observed in the case of Yaya Towers Limited (supra) at this point, this court cannot be able to tell if indeed the statutory notice was served upon the defendant or not. The court will have to take evidence to establish the true position in that regard.

The court also notes that the defendant has raised the issue of limitation and has contended that the plaintiff's suit is time barred. In view of the foregoing, I do not find merit in the plaintiff's application and hereby dismiss the same but with no orders as to costs.

It is so ordered.

Dated, signed and delivered at NAIROBI this 6th day of February, 2020

.....

L. NJUGUNA

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant