



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO.E 126 OF 2018

KK LODGIT LIMITED..... PLAINTIFF

- VERSUS -

GEMINIA INSURANCE COMPANY LIMITED.....1ST DEFENDANT

AFRO-ASIAN INSURANCE SERVICES LIMITED...2ND DEFENDANT

RULING

1. In this Ruling I am called upon to consider two applications. One application is filed by the 1st defendant and it is dated 13th December 2018. It is brought under Order 2 Rule 15 and Order 13 rule 2 of the Civil procedure Rules. The 1st defendant, by that application, prays for the striking out of the plaintiff's plaint. The second application, brought under the same provisions of the law as the first one, is filed by the 2nd defendant and is dated 7th January 2019. The 2nd defendant, by that application, prays for the plaint and the reply to the 2nd defendant's defence, filed by the plaintiff, to be struck out with costs for non-disclosure of cause of action against the 2nd defendant.

2. The plaintiff is in the business of cash transit services. The plaintiff by this claim pleaded that it retained the 2nd defendant as its insurance broker. In this regard the plaintiff signed a letter whereby it appointed the 2nd defendant as its "sole and exclusive broker". The plaintiff pleaded that by so doing the 2nd defendant led the plaintiff to believe that it was entitled to carry on business of insurance brokerage in Kenya. That as the plaintiff's broker the 2nd defendant procured from the 1st defendant an insurance policy and further arranged re-insurance of that policy in international markets and other re-insurances. The plaintiff further pleaded that it communicated with the 2nd defendant that its cars, used in the cash transit business, were not armoured. That after the plaintiff had purchased insurance policy with the 1st defendant the plaintiff suffered four incidents of loss but on making a claim to the 1st and 2nd defendants the claims were rejected on allegation that the plaintiff had mis-represented that its vehicles were armoured. It is the plaintiff's case that it negotiated premiums with the 2nd defendant on the basis that its vehicles were not armoured. The Plaintiff has alleged, by this claim, fraud and breach by both defendants. The plaintiff's final prayer is for judgment for Ksh.108,969,362, being the cash lost in the four incidents, the Plaintiff suffered. The plaintiff has also claimed for general and punitive damages.

3. The 1st defendant, by its defence, pleaded the insurance policies issued by both defendants were unenforceable because they were procured contrary to the Insurance Act. Further that the plaintiff's failure to fill in question 55 in the questionnaire, which question required the plaintiff to disclose whether its vehicles were armoured, was in bad faith and it induced the 1st defendant to underwrite the contract which it would not have done had it known the full facts. The defendants submitted that the plaintiff lacked utmost good faith. Further that if the plaintiff's intention was to enter into a contract of insurance of un-armoured vehicle, parties then were not ad idem to the terms of the contract and accordingly that the contract is unenforceable. The 1st defendant argued that if the contract of insurance is enforceable then the plaintiff was in breach of condition 6 and 12 of the contract and the 1st defendant is therefore entitled to reject the plaintiff's claim. Further that the plaintiff's misrepresented to the 1st defendant that it had armoured vehicles by answering, without qualification, questions 11(b), 12, 13, 17, 45,47, and 55 in part, of the proposal form. Finally, the 1st defendant termed the plaintiff's claim as an abuse of the court process which ought to be struck out.

4. The 2nd defendant by its defence pleaded that it is a Lloyd accredited broker focusing on international placement of insurance and that it has a registered liaison office in Kenya which is authorised to provide international brokerage services. That it is not and has never been registered to offer or provide insurance in Kenya. Further that on being appointed by the plaintiff as its sole exclusive broker it successfully placed the plaintiff with Munich Re, an international reinsurance company based in Germany.

ANALYSIS AND DETERMINATION

5. Both applications by the 1st and the 2nd defendants were brought under Order 2 Rule 15 (1) (a) of the Civil Procedure Rules (hereafter the Rules). That Rule provides:

1. At any stage of the proceedings the court may order to be struck out or amended any pleadings on the ground that-

a. it discloses no reasonable cause of action;

6. Order 2 Rule 15 (2) of the Rules forbids an applicant, who relies on Order 2 Rule 15 (1) (a) of the Rules, to rely on affidavit evidence. Accordingly, both applications are not supported by affidavit evidence. In support of the application the 1st defendant's learned advocate stated that the claim is defeated by the fact that parties are not at ad idem. The basis of that submission is because the plaintiff sought insurance cover for unarmoured vehicles while the defendants, both of them, required the vehicles be armoured.

7. It is often stated that striking out of pleadings is a draconian step: see the case **Isat Africa Limited Fzc -v- Commcarrier Satellite Services Limited (2015) eKLR**, where it was stated:

“This was a conclusion that was arrived at in the case of **Geminia Insurance Co Limited vs Kennedy Otieno Onyango [2005] eKLR** where Musinga J (as he then was) had the following to say:-

“It is trite law that striking out pleadings is a draconian step which ought to be employed in the clearest of cases and particularly where it is evident that the suit is beyond redemption.”

8. In the case **D. T. Dobie and Company (Kenya) Limited -v- Muchina (1982) eKLR**. The court of appeal sounded caution in consideration of an application such as this nature. It was stated in that case:

“the power to strike out should be exercised after the court has considered all facts, but it must not embark on the merits of the case itself as it is solely reserved for the trial. On an application to strike out pleadings no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial judge in disposing the case.”

9. In my view the court cannot determine, from the pleadings alone, that there was no ad idem between the plaintiff and the 1st defendant, as argued by the advocate for the 1st defendant. The court can only reach that conclusion after receiving evidence at trial. For that reason, I reject the submissions of the 1st defendant.

10. Similarly, the court cannot determine that there is no cause of action, shown in the pleadings, against the 2nd defendant. The pleadings themselves show that there were various issues that need determination and which issues relate to the case against the 2nd defendant. To begin with, the 1st defendant, supported the plaintiff's claim, when it pleaded in its defence that the 2nd defendant “sourced” them (the 1st defendant) for the plaintiff. That is precisely the plaintiff's claim against the 2nd defendant. Two issues, amongst others, that I find will need to be determined at trial, as between the plaintiff and the 2nd defendant is: did the 2nd defendant place insurance cover on behalf of the plaintiff with the 1st defendant, and secondly, did the plaintiff represent to the 2nd defendant that their vehicles were armoured.

11. It also need to be stated that the court cannot make a finding, at this juncture while entertaining the interlocutory applications, that is what effect, if any, the lack of registration of the 2nd defendant to practice as a broker in Kenya had on the transaction between the parties. That determination can only be after the trial.

12. On the whole my finding is that the plaintiff's case is not so hopeless that it ought to be struck out. There are many issues which arise from the parties' pleadings. It is for that reason that I find and hold that the two applications lack merit.

13. Although parties had in their contract a choice of law and jurisdiction clause. Where they chose the exclusive jurisdiction of England and Wales, that choice was defeated when the defendants, both of them, filed unconditional appearance and defences to the plaintiff's claim. In this regard see the case **Universal Pharmacy (K) Limited -v- Pacific International Lines (PTE) Limited & another (2015) eKLR**, where it was held thus:

“Another important reason why the application must fail is because the Defendants entered unconditional appearance. This court dealt with the issue of jurisdiction where the Defendant entered an unconditional appearance in the case of **PETRA DEVELOPMENT SERVICES LIMITED V EVERGREEN MARINE (SINGAPORE) PTE LTD & ANOTHER [2014] eKLR**. This court stated as follows:

“The summons in this case required Defendants to enter an appearance within 15 days. The appearance was due on or before 12th June 2014. Defendants filed an Appearance on 20th June 2014. That Appearance was in the following terms-

“MEMORANDUM OF APPEARANCE

Please enter appearance for EVERGREEN MARINE (SINGAPORE) PTE LIMITED and GULF BADAR GROUP (KENYA) LIMITED, the Defendants herein whose physical address for service is S.K.A. House, Dedan Kimathi Avenue, and whose postal address is P.O. Box 83156-80100, Mombasa.

DATED at MOMBASA this 20th day of June, 2014.

ANJARWALLA & KHANNA

ADVOCATES FOR THE DEFENDANTS.”

As it will be seen that was an unconditional Appearance. The Court of Appeal in the case **KANTI & CO. LIMITED** (supra) held that once such an Appearance is filed a party has then submitted itself to the jurisdiction of the Court. Black’s Law Dictionary defines Appearance as-

“A Defendant’s act of taking part in a Law suit, whether formally participating in it or by answering, demurrer, or motion ...”

In that definition the dictionary in attempting to give further explanation of Appearance stated –

“... appearance, which is not mere presence in court, but some act by which a person who is sued submits himself to the authority and jurisdiction of the Court.”

It therefore follows that as at 20th June 2014 Defendants submit themselves to the authority of this Court. That means the Defendants as at that date submit to this Court to have authority over the Plaintiff’s claim for the release of Bills of Lading and for damages incurred.”

14. Accordingly, the Notice of Motion applications dated 13th December 2018 and 7th January 2019 are dismissed with cost to the plaintiff.

15. This case shall be mentioned on 29th July 2020 on which date parties will have complied with the case management requirements.

DATED, SIGNED and DELIVERED at NAIROBI this 6th day of MAY, 2020.

MARY KASANGO

JUDGE

ORDER

In view of the measures restricting court operations due to the **COVID-19 pandemic** and in light of the Gazette Notice No 3137 of 17th April 2020 and further parties having been notified of the virtual delivery of this decision, this decision is hereby virtually delivered this **6th** day of **May, 2020**.

MARY KASANGO

JUDGE