REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAKURU

CIVIL CASE NO.88 OF 2014

NGURE EDWARD KAREGA.....PLAINTIFF

VERSUS

KENINDIA ASSURANCE CO. LTD.....DEFENDANT

RULING

Background to the application dated 25th April 2019 filed by the plaintiff.

1. This is a declaratory suit filed by the plaintiff against the Insurer of motor vehicle registration KV 2828 BA/OR 1479BB, Kenindia Assurance Co. Ltd. The insured in the primary suit was Yusuf Doran Nassir.

The primary suit is Nakuru HCCC No. 157 of 2012. Upon full hearing, Justice H. Omondi J found the Defendant, the insured 90% liable for the accident in which the plaintiff sustained very serious injuries, and proceeded to award special and general damages in the sum of Kshs.25,327,114/= less 10% contributory negligence, leaving Kshs.22,795,000/= plus costs and interest. That was on the 16th May 2014.

2. The court record shows that liability was agreed and recorded by consent at 10:90 basis against the defendant, the insured of Kenindia Assurance Company.

The defendant failed to pay the decretal sum necessitating the plaintiff to file this declaratory suit seeking a declaration that the insurance company settle the decretal sum in the primary suit **Nakuru HCC No. 157 of 2012**.

3. The defendant filed a statement of defence dated the 8th January 2015 denying liability, and in particular knowledge of the accident, the primary suit Nakuru HCCC No.157 of 2012 and being liable under **Sections 5 and 10 of Cap 405** nor the judgment thereof.

4. By the present **application dated 25th April 2019,** brought under **Order 2 rule 15 and Order 51 of the CPR** the plaintiff seeks an order that the defendants defence be struck out and judgment be entered in favour of the plaintiff.

It is based on grounds that

(i) The defence is an admission of the plaintiff's claim, and

(ii) it does not challenge the plaintiff's suit

(iii) the defence is frivolous, vexatious and raises no arguable case.

5. Further it is urged that the defence will delay the fair trial of the case.

The plaintiff has sworn an affidavit in support of the application.

6. In opposing the application a Replying affidavit sworn by one Winnie Awuor Paul, head of Legal Department of the defendant was filed on the 28th November 2018.

7. I have considered the affidavits for and in opposition to the application and submissions by the Advocates as well as the defence.

The application is brought under **Order 2 Rule 15 Civil Procedure Rules** that provides for striking out of any pleading that discloses no reasonable cause of action or defence in law or is scandalous, frivolous or an embarrassment or made to delay a fair trial of the suit.

8. The defence as filed consists of mere denials, literally denying everything about the occurrence of the accident, the injuries and the primary suit judgment.

The court in **Blue Shield Insurance Co. Ltd –vs- Joseph Mboya Ogutu (2009) e KLR** rendered that striking out a pleading that drives a party from the judgment seat should be used sparingly and only when the pleading is shown to be clearly untenable.

9. A triable issue raised in a defence if it constitutes a genuine defence ought to be interrogated in a trial not withstanding that it ends up being successful or not. However in clear and plain matters, the court should not shy away from striking out a pleading when justice demands so, and it is evident that such pleading is made to deny the opposite party expeditious disposal of the suit as rendered in the case **Five Forty Aviation Ltd -vs- Trade Winds Aviation Services Limited (2015) e KLR.**

10. It is trite and a constitutional imperative under **Articles 47, 48, 50 and 159 of the Constitution** that every person to a suit ought to be accorded access to justice. Summary procedure in trials is contrary to those tenets of fair trial.

In **D.T. Dobie & Company (Kenya) –vs- Muchina (1982) KLR 1** it was held that the court should aim at sustaining a suit rather than terminating it in a summary manner, as striking out a pleading – plaint or defence – completely denies a party of a hearing which is draconian.

11. I have satisfied myself that indeed the defendant at all material times had the knowledge of the accident evidenced by having been served by the plaintiff with

(1) The statutory notice pursuant to **Section 10 of Cap 405 Laws of Kenya** on the 14th May 2012 – notice duty received and stamped.

(2) Notice of judgment in the primary suit dated the 6th October 2014, received and stamped on the 7th October 2014.

12. I have considered the affidavits in opposition to the application. There are issues raised as to the competency of the primary suit.

These are

(i) Whether the primary suit was filed against a dead person (the defendant) and if so, whether the judgment obtained therefrom is enforceable in law.

(ii) Whether the defendant can legally satisfy the total decretal sum in view of the provisions of **Section 5 (b) (iv) of Cap 405** that caps liability against Insurance companies at Kshs.3,000,000/= in a single incident.

13. There is no dispute that if the court is satisfied that a defence raises no trial issues it ought be struck out, and summary judgment entered.

The principles to strike out a pleading are stated in the case **D.T. Dobie & Co. (Kenya) Ltd –vs- Muchina (1982) e KLR 1.**

The power thus given to the court is discretionary and should be exercised sparingly upon consideration of all facts, not just the defence or a plaint, and sorely at the trial court's discretion. The power to strike out should be exercised after the court has considered all the facts but must not consider the merits of the case itself as that is a preserve of the trial court. The power is also not mandatory. The power is also not mandatory.

The Court of Appeal expressed itself so in the matter of **Blue Shield Insurance Co. Ltd –vs- Joseph Mboya Ogutu (2009) e KLR.**

14. Having considered the totality of arguments by the parties thereof, I am not persuaded that striking out the defence would serve the interest of justice in the suit. I therefore find merit in the application dated 25th April 2019. I however direct that the suit be expeditiously fixed down for hearing on priority basis as execution of the decree in the primary suit has been held at abeyance since the 16th May 2014.

15. Costs of the application shall abide outcome of the suit.

Dated, delivered and signed at Nakuru this 11th Day of July 2019.

J.N. MULWA

JUDGE