



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CIVIL CASE NO. 4 OF 2017

MARTIN MWANGI NDIRANGU.....PLAINTIFF

VERSUS

INVESCO ASSURANCE CO. LIMITED.....DEFENDANT

RULING

In this application brought by way of Notice of Motion dated 5th February, 2018 filed by the plaintiff under Order 2 Rule 15 (1) (a), and Order 13 (2) of the Civil Procedure Rules and Section 3 A of the Civil Procedure Act Cap 21, this court has been asked for the following orders;

- 1. That the defendants statement of defence dated 8th December 2017 be struck off.**
- 2. That in the alternative judgment on admission be entered in favour of the plaintiff as against the defendant.**
- 3. That the costs of the application be provided for.**

The application has grounds on the face of the Notice of Motion which are that the defence of the defendants is frivolous, vexatious and scandalous and that it is aimed only at prejudicing or delaying fair and expedient determination of the suit.

The application was filed with a supporting affidavit sworn on 5th February, 2018 by the plaintiff, in which he annexed several documents relating to Garissa High Court Civil Case No. 11 of 2013 between Martin Mwangi Ndirangu and Ismail Abdi Hassan trading as Wamo Express, in which judgment was entered by consent against Ismail Abdi Hassan for Kshs.6, 438,005 less 20% giving a net amount of Kshs. 5,150,404/=.

The application has been opposed through a replying affidavit sworn by Mugambi Sande described as Meru Branch Manager of the defendant Invesco Assurance Co. Limited in which he swore that the defence of the defendant was not frivolous, vexatious and scandalous and that there were triable issues to be considered by the court.

The plaintiff's counsel filed written submission to the application on 25th April, 2018. The defendant's counsel filed their written submissions earlier on 4th April 2018. Both counsel on record agreed to rely on the written submissions filed. They cited a number of case authorities.

Having considered the application and the submissions on both sides, and the consent judgment or decree in Garissa High Court Civil Case No. 11 of 2013, I am of the view that the application will not succeed.

The first reason is that the defendant in the 2013 case is not the defendant in the present case. I appreciate that there is indication that the defendant herein was the insurer of Ismael Abdi Hassan. However, Ismael Abdi Hassan is a separate legal person from the present defendant.

Secondly, the consent judgment did not state specifically who was to pay the amount. Thirdly, it is important to note that in the present case, the defendant in the 2013 case is completely omitted as a defendant.

In my view therefore, it cannot be said that there are no triable issues in the defence herein. In the case of **Patel –Vs- EA Cargo Handling Services Limited (1974) EA 75** the Court of appeal clearly stated what a triable issue is. It is an issue which raises a prima facie defence and which should go to trial for adjudication. It is not an issue that must succeed in the adjudication but an issue that requires to be considered by the court after hearing all parties.

With our present Constitution also in which Article 50 requires fair trial, the requirement for parties to be heard before dismissal of

proceedings on technicalities is emphasized. In my view therefore, the present application and all prayers therein lack merit. Consequently, I dismiss the application. Costs of the application will follow the results of the determination of the suit herein. The plaintiff herein should expedite the case so that it is given priority hearing dates. It is so ordered.

Dated, and delivered at Garissa this 6th day of June, 2018.

George Dulu

JUDGE