



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
CIVIL SUIT NO. 291 OF 2015
STARGENT ENTERPRISES LIMITED.....PLAINTIFF
AND
CANNON ASSURANCE LIMITED.....DEFENDANT
RULING

1. By an application dated 3rd December 2015 the plaintiff asked the court to enter summary judgement against the defendant.
2. The plaintiff also asked the court to dismiss the defence, so that thereafter, judgement could be entered as prayed in the plaint.
3. Thirdly, the plaintiff invited the court to compel the defendant to honour the Discharge Voucher dated 19th February 2015, pursuant to which the defendant had declared its agreement to pay Kshs. 17,700,000/- to the plaintiff.
4. Finally, the plaintiff urged the court to restrain the defendant from repudiating the claim.
5. In the face of the plaintiff's claim, the defendant lodged an application dated 23rd February 2016. The said application sought the dismissal of the plaintiff's application dated 3rd December 2015.
6. When canvassing their application, the plaintiff pointed out that the defendant, **CANNON ASSURANCE LIMITED**, had issued a Policy of Insurance to cover the plaintiff.
7. Prior to the issuance of the policy, the vehicle which was the subject matter of the application was valued by assessors who had been appointed by the defendant.
8. Whilst the policy of Insurance was still subsisting, the vehicle was involved in an accident.
9. The defendant appointed assessors, who conducted a process of assessing the value of the vehicle.
10. Notwithstanding the process undertaken by its own assessors, the defendant refused to compensate the plaintiff. The defendant is alleged to have turned round and accused the plaintiff of giving to it, a wrong valuation for the vehicle.
11. But as the plaintiff insists that the valuation was conducted by the defendant's own assessors, it is the

plaintiff's prayer that the court should compel the defendant to settle the claim.

12. In answer to the application, the defendant pointed out that it had a "*cross-application*", which sought the dismissal of the plaintiff's application for summary judgement.

13. The defendant's main contention is that an application for summary judgement cannot be brought after a Defence had been filed in a case.

14. Secondly, the defendant pointed out that the issue of misrepresentation had been raised by the Defence. In its view, the said line of defence was arguable. Therefore, the defendant submitted that the court ought not to grant summary judgement, as this was not a clear case.

15. In **ALNA ENTRPRISES Vs. KENYA METHODIST UNIVERSITY Hccc No. 248 of 2011**, Mutava J. held as follows;

"The defendant's amended Defence does therefore raise triable issues which render it not hopeless. The case for striking out the Defence under Order 2 Rule 15 of the Civil Procedure Rules, 2010 therefore fails. In the same vein, Order 36 Rule 1 of the Civil Procedure Rules does not contemplate that summary judgement can be entered where a defence has been filed. The application for summary judgement fails as well".

16. In that case, the plaintiff had sought the striking out of the Defence and Summary Judgement.

17. Meanwhile, in the case of **JAMES KIPKOECH KOSGEI Vs HILLARY KIPKOSGEI KIBOINET T/A SEETLAND LTD E & L No. 448 of 2013**, Munyao, J. said that the application for summary judgement must fail;

"...for the sole reason that it was filed after a defence was already placed on record contrary to the provisions of Order 36 Rule 1".

18 The said rule provides as follows;

"In all suits where a plaintiff seeks judgement for –

a. a liquidated demand with or without interest; or

b . the recovery of land, with or without a claim for rent or mense profits, by a landlord from a tenant whose term has expired or been determined by notice to quit or been forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser, where the defendant has appeared but not filed a defence, the plaintiff may apply for judgement for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits".

19. The plaintiff in this case has invoked the provisions of Order 36 Rule 1 (a) of the Civil Procedure Rules. Therefore, the plaintiff would be expected to comply with the terms of that rule. In effect, the plaintiff could only have brought the application pursuant to that rule, if the defendant had not yet filed a defence.

20. Judge Sila Munyao also made the following very useful observations in the case of **JAMES KIPKOECH KOSGEI Vs. HILLARY KIPKOSGEI KIBOINET T/A SWEETLAND LTD** (*above-cited*);

"However, it will be seen from the above, that one can only apply for summary judgement where the defendant has appeared but not filed a defence. It follows that one cannot apply for summary judgement where there is a defence on record. But this provision (of O. 36 rule 1) does not appear to affect any application brought pursuant to Order 2 Rule 15, where the

court has discretion to strike out pleadings and enter judgement accordingly, if the pleadings disclose no reasonable cause of action or defence, are scandalous, frivolous or vexatious, or may prejudice, embarrass, or delay the fair trial of the action, or the pleadings are an abuse of the process of the court.

It therefore behoves a party to make an election, on whether to proceed under Order 2 Rule 15 or to proceed under Order 36 Rule 1. One cannot combine the two, since under Order 36, there is no defence to strike out. Order 2 Rule 15 presupposes that there is a defence file, for one cannot strike out a pleading that does not exist”.

21. I have deemed it appropriate to cite those words because the plaintiff in this case asked the court to “dismiss” the defence, and to then enter judgement in its favour.

22. Therefore, the plaintiff appeared to be combining an application which can only be made when there is no defence filed, with an application which presupposes the existence of a defence. That was improper. The plaintiff ought to have made an election, whether to apply for the striking out of the defence (*pursuant to Order 2 Rule 15*) or to seek summary judgement (*pursuant to Order 36 Rule 1*).

23. By now it must be obvious that the plaintiff’s claim for summary judgement is not sustainable. It is therefore dismissed, with costs to the defendant.

24. Meanwhile, in relation to the defendant’s application, I hold the considered view that it was superfluous. It is not necessary for a party to bring a separate application for the sole purpose of seeking the dismissal of the application brought by the opposing party.

25. The successful opposition to an application would ordinarily lead to its dismissal. And when an application was dismissed, costs usually follow the event.

26. There was no reason either in law or in fact to warrant the filing of the defendant’s application dated 23rd February 2016. Therefore, I order that it be struck out, with no order as to costs.

DATED, SIGNED and DELIVERED at NAIROBI this 7th day of March 2017.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

.....for the Plaintiff

.....for the Defendant

Collins Odhiambo – Court clerk.