REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 166 OF 2014

JOSEPH MWAURA NJOROGE.....PLAINTIFF/APPLICANT

VERSUS

MADISON INSURANCE CO. LTD.....DEFENDANT/RESPONDENT

R U L I N G

1. Before me is the Plaintiff's Notice of Motion dated 14th November, 2014 brought under Order 2 Rule 15(1) (b) & (c) and Order 36 Rule 1 of the Civil Procedure Rules, 2010 seeking the striking out of the defence and in addition or in the alternative, summary judgment in favour of the Plaintiff against the Defendant as prayed for in the Plaint.

2. The application is premised on the grounds on the face of the application and the supporting affidavit of the Plaintiff sworn on 14th November, 2014. The Plaintiff deponed that he filed CMCC No. 8034 of 2010 for recovery of damages following a road traffic accident. That the Defendant herein had insured the Defendant in CMCC No. 8034 of 2010 (***'the primary suit'***) as revealed by the police abstract annexed to the application. He filed a notice pursuant to Section 10 (2) of the Insurance (Motor Vehicle Third Party Risks) Act bringing the institution of the suit to the attention of the Defendant. That the Defendant was kept appraised of the developments in the suit throughout the entire proceedings and had paid KShs.400,000/= in partial satisfaction of the decretal sum. It is the deponent's position that the Defendant is duty bound to satisfy judgments against persons it has insured as an assumed risk in the course of its business. He stated that the Defendant has locus standi as the person entitled to the benefit of judgment entered in the primary suit to recover the judgment debt. He contended that the Defence lacks merit and is a stratagem contrived to delay the payment of what is rightfully owed to him and is scandalous, frivolous and vexatious and amounts to mere denials of an obvious legal obligation.

3. Mr. Mutiso learned counsel for the Applicant reiterated the averments of his client and submitted however stated that the Defendant's gravamen is the quantum awarded which issue is not the concern in this suit. He argued that that the issue is the preserve of and that the existing appeal is no stay. Counsel on this point cited the case of **Nathan Gitonga Mungania v. Intra Africa Assurance Co. Ltd (2008) eKLR**.

4. The Defendant filed grounds of opposition dated 20th January, 2015 in opposition to the application. It contended that the defence raises bonafide triable issues that need to be ventilated through a full hearing; that there also exists an appeal against the lower court's judgment in the suit being Nairobi HCCA No. 150 of 2014, which appeal is yet to be determined and has good chances of success and will definitely impact on this declaratory suit and the rights between the parties and that the Defendant's defence herein can be further strengthened by way of amendment to include vital facts that raise further issues which were inadvertently left out during drafting. Mr. Gachugi learned counsel for the Respondent submitted

that the appeal pending against the judgment sought to be enforced was both on liability and Advocates did not bring out the actual issues between the parties and that this could be remedied by an amendment. He however admitted that the Respondent had paid Kshs.400,000/- in partial settlement of the decree.

5. I have considered the depositions of the parties herein. The question that is to be answered answer is whether the defence is scandalous, frivolous vexatious and an abuse of court process and or raises no triable issues. In order to succeed in this application, the Plaintiff ought to demonstrate that the defence is scandalous, frivolous or vexatious, or that it is otherwise an abuse of the process of the court. In **D. T. Dobie & Co. (Kenya) Limited v. Muchina [1982] KLR 1 at page the court of appeal held**:-

> ***"No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a Court of justice ought not to act in darkness without the full facts of a case before it."***

6. What constitutes a frivolous, vexatious or scandalous pleading was considered by **Ringera, J (**as he then was) in **Mpaka Road Development Limited vs. Kana (2004) 1 E.A. 124 wherein he** stated at page 165 that: **-**

> ***"A pleading is frivolous if it lacks seriousness. If it is not serious then it would be unsustainable in court. A pleading would be vexatious if it annoys or tends to annoy. Obviously it would annoy or tend to annoy if it was not serious or it contained scandalous matters which are irrelevant to the action or defence. In short, it is my discernment that a scandalous, frivolous or vexatious pleading is ipso facto vexatious."***

The authors of ***Bullen and* Leake and *Jacob's Precedents of Pleadings, 12th Ed. by I. H. Jacob (London: Sweet & Maxwell, 1975) (at p. 144) state:-***

> ***"Any scandalous matter in any pleading or endorsement of the writ may be ordered to be struck out or amended. For this purpose, allegations in any pleading are scandalous if they state matters which are indecent, offensive or are made for the mere purpose of prejudicing the other party..."***

7. Elsewhere in **Diamond Trust Bank (K) Ltd v. Martin Ngombo& 8 Others (2005) eKLR** Ouko J, (as he then was) held:-

> ***"This summary procedure is intended to give quick remedy to the plaintiff which is being delayed in realizing his claim against the defendant by what is generally described as sham defence…The jurisprudence that passes through the above cases is that a mere denial or general traverse is not sufficient defence and that a defence that has no merit is for striking out."***

8. I have considered the entire record. It is not in dispute that the primary suit was concluded with a judgment in favour of the Plaintiff in this suit. It is also not disputed that that judgment has been appealed to this court in H.C. Civil Appeal No. 150 of 2014 on both liability and quantum. It has also been admitted that the Defendant had paid Kshs.400,000/- in partial satisfaction for the decree. It is also not disputed that there is no stay of execution in force nor are there any stay proceedings against the decree in the primary suit.

9. I have looked at the Defence. The Respondent contended that the Applicant herein lacked locus standi to bring the current suit; that the Respondent was not the insurer of the motor cycle that was the subject of the accident in the primary suit; that the Applicant was not involved in any accident as pleaded in the primary suit and that the Respondent had not been served with either the judgment in the primary suit or with a notice pursuant to Section 10(2) of the Insurance (Motor Vehicle Third Party Risk) Act

(hereinafter "the Act") For the foregoing reasons, the Respondent contended that it was not liable to satisfy the judgment in the primary suit.

10. There was no Replying Affidavit that was filed by the Defendant to controvert the statements made on oath by the Applicant. Some of these statements were in answer to the defences set up in the Respondents defence. These I propose to consider seriatim. The first issue was that the applicant lacked locus standi to bring the current suit. I have seen the judgment dated 28th March, 2014. The Applicant is named therein as the Plaintiff and is the one in whose favour the primary suit was decided upon. Surely, the locus standi of the Applicant is a non-issue.

11. The second issue is that Respondent was not the insurer of the Motor cycle that was involved in the accident the subject matter of the primary suit. The Applicant swore that the defendants in the primary suit were insured by the Respondent. He produced Police Abstract No. 0244762 dated 12th October, 2010 which showed that Motor Cycle no. KMCB 041B was covered by insurance Police No. HQS/708/037868/2009 (Comp) under Certificate No. 1435527 issued by Madison Insurance Company, the Respondent. There was no Affidavit to deny this fact. To my mind, there having been no denial to that fact, the issue of the Respondent being the insurer of the subject motor cycle cannot be an issue for trial.

12. The other issue is that the applicant had not been involved in the subject accident as pleaded in the primary suit. To my mind, this is an unserious pleading. There is a judgment of a competent court of law which had determined that issue. Until and unless that finding is properly set aside as provided in the law, it cannot be a subject of a trial before this court. It does not matter that the finding is under challenge in a pending unprosecuted appeal.

13. The other issue put on defence is that the judgment in the primary suit and a notice under Section 10(2) of the Act had not been served upon the Respondent. As to the existence of the judgment, the record shows that the same was contained in the bundle of documents served with the Plaint and Summons. As regards the Notice under Section 10(2) of the Act, the Applicant produced as exhibit "JM2" a letter dated 9th November, 2010 by his Advocates addressed to Makindu Motors Limited making demands about the occurrence of the accident the subject matter of the primary suit. The letter demanded admission of liability in the occurrence of the said accident and put on notice, the recipients of that letter of the intended legal proceedings. That letter was copied to, inter alia, the Respondent and Policy No. HQS/708/037868/2009 C/N 1435527 was clearly noted therein. There was no statement on oath by the Respondent denying receipt of this notice.

14. As to the existence of NRB HCCA No. 150 of 2014, I am satisfied that that cannot be a bar to the present suit. It was not suggested that are order of stay of execution had been obtained or that there any stay proceedings pending. To that extent the pendency of that appeal is in my view not a bar to the current suit.

15. As regards the submission that the Defence as currently drafted could be strengthened by amendments, those amendments were not brought to the attention of the court. No draft amended defence was produced for the court to know and/or consider the nature of the alleged amendments that were intended to be introduced. To my mind, that was only a smokescreen intended to postpone the day of reckoning. In any event, the Respondent had admittedly paid a sum of Kshs.400,000/- vide cheque No. 101915 dated 10th April, 2014 produced as "JMS". Surely with all these, the Plaintiffs claim is unresistible.

16. From the foregoing, I am satisfied that the Defence is unarguable. The same is a sham. The same is but frivolous and vexations and abuse of court process. The same is for striking out as i hereby do.

17. Accordingly, I enter judgment for the Plaintiff as prayed for in the Plaint.

Dated, Signed and Delivered at Nairobi this 6th day of March, 2015.

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A MABEYA

JUDGE