



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL SUIT NO. 136 OF 2003

COPANA LIMITED PLAINTIFF

VERSUS

PANAFRICA INSURANCE CO. LTD.DEFENDANT

RULING

The parties herein started litigating in the year 2003 and more specifically 11th September 2003 when this suit was filed. The same arises from an insurance policy. What is before me is the Defendant's Chamber Summons dated 9th December 2008 which seeks an order to strike out this suit with costs to the Defendant and a preliminary objection thereto by the Plaintiff. The notice of preliminary objection is dated 13th November 2014 and was filed on even date.

The application is premised on grounds that the Plaintiff herein did not have any insurable interest on the property which is the subject matter of the insurance policy in dispute and that therefore the Plaintiff is frivolous and vexatious and an abuse of the Court process.

The application is supported by the affidavit of Fredrick Otieno Mege, an Advocate of the High Court practicing in the firm of Ms Muchiri & Co. Advocates who have conduct of this matter. This supporting affidavit is the subject of the preliminary objection. It is the Plaintiff's contention that this affidavit is inadmissible and should be struck out.

Both the Chamber Summons and the preliminary objection were argued together by way of written submissions.

The Defendant's case is that when the Plaintiff company applied for a Fire Insurance Policy in respect of LR Kisumu Municipality/Block 6/253 from the Defendant it presented itself as the owner of the property in the proposal form. However following a report by Cunningham Lindsey Kenya Limited Chartered Loss Adjusters it turned out that the property belonged to one Jones Akelo Omboto and not the Plaintiff Company. That therefore the Plaintiff Company deliberately misrepresented itself as the owner of the property and it had no insurance interest in the property.

The above is the gist of the Chamber Summons in the affidavit and in the submissions of Counsel acting for the Defendant.

As for the preliminary objection it is the Plaintiff's contention and submission that the supporting affidavit ought to be struck out as the same was sworn by an Advocate who has deponed to matters of fact which have been seriously contested which is made all the more worse by the fact that this is not an interlocutory application but one seeking final orders.

Both the Chamber Summons and the preliminary objection were vehemently opposed.

In opposing the Chamber Summons the Plaintiff relied on a replying affidavit sworn by Johannes Akelo Omboto, its director, on 13th November 2014. He deposes inter alia that the proposal form was filled by an agent of the Defendant Company and not the Plaintiff and that the Defendant was under no obligation to issue or take premiums from the Plaintiff if it had an issue with the information provided in the impugned proposal form. Secondly that the Defendant was all along aware that the property was registered in the name of the Plaintiff's Director but not the Plaintiff. Further that the Directors of the Plaintiff being lay people they did not understand the meaning of the term "insurance interest". He also deposes that there are several triable issues and the plaint ought not to be struck out. These depositions are reiterated in the submissions of the Plaintiff's Advocate who has cited several authorities in support of his submissions both in regard to the Chamber Summons and the preliminary objection.

In the further affidavit sworn on 19th January 2015 Mr, Mege deposes that he is indeed in conduct of this matter on behalf of the Defendant. That nevertheless as an Advocate he has a legal right and capacity to depone to non-contentious matters which are relevant to the issues in dispute in this matter and that every fact deposed to is supported by documentary evidence. In the defendant's submissions it is stated that not even one contentious issue has been identified by the Plaintiff's Advocate to warrant the striking out of the affidavit. As for the Chamber Summons it is urged that since the issue of insurable interest is a matter of law this is a proper issue to be determined at this preliminary stage to avoid going through the rigours of a trial. Further that is glaringly clear that the Plaintiff had no locus to bring this suit for lack of insurable interest in the subject matter.

Whereas this Court heard the preliminary objection and the chamber summons together it is only prudent that I dispose of the preliminary objection first.

The issue whether the Plaintiff company had an insurable interest in the property insured by the Defendant is central to the dispute between the parties. This is a matter apart from learning of it in the conduct of the defendant's case was not within Mr. Mege's personal knowledge. Indeed he refers to the source of this information as the report of the Loss Adjusters. The issue of whether or not the Plaintiff Complainant misrepresented itself as the owner of the property is a matter of both fact and law and is contested and again is not a matter within the personal knowledge of Mr. Mege, Advocate. I can only echoe the words of my brothers Ringera, J as he then was and Kimaru J in **East Africa Foundry Works (K) Ltd. V. Kenya Commercial Bank Ltd. [2002]1 KLR 443 at page 446** and **Albany Taylor & Another V. Christopher Taylor & Another [2008] eKLR** respectively who strongly deprecated the swearing of such affidavits by Advocates.

In the Albany Taylor case Kimaru J held:-

"In the present application, the advocate for the Plaintiff swore to facts which are contentious. The 1st defendant contested the averments which the advocate swore in support of the said application. The advocate annexed copies of e-mails which allegedly evidenced communication between the 1st defendant and the Plaintiffs in relation to the subject matter of the suit. It is evident to this Court that, if a trial were to be held the advocate of the Plaintiffs would not be a competent witness to produce the said e-mails. Further it is clear that the advocate for the Plaintiffs descended into the arena of conflict by purporting to make averments in support of an application whose ultimate aim is the entry of judgment against the defendant. That cannot be. The role of an advocate does not include being a witness in a suit where such an advocate is representing a litigant...."

In the East African Foundry Works (K) Ltd. Case Ringera J. stated:-

"..... I have always deprecated depositions by advocates on contentious matters of fact in suits or application which they canvass before Courts..... The unseemly prospect of counsel being called upon to be cross examined in matters in which they appear as counsel must be avoided by striking out such affidavits as a matter of good practice."

I am persuaded by these two authorities. Just like Tony Waiguru Njuguna Njuguna in the Albany Taylor case Mr. Mege has made reference to and annexed documents and correspondences annexed been his client and the Plaintiff which he would not be a competent witness to produce were the matter to go for trial. The preliminary objection is well merited and the affidavit sworn by Mr. Mege on 9th December 2008 is struck out.

As for the Chamber Summons having struck out the supporting affidavit it (application) is left with no legs to stand on and as the application is one that must be supported by an affidavit the same is struck out (see Order L Rule 4 of the Civil Procedure Rules). The costs of the preliminary objection and of the chamber summons shall be in the cause.

Ruling signed, dated and delivered this 16th day of July 2015

E. N. MAINA

JUDGE

In the presence of:-

Mrs Onyango for Plaintiff/Respondent

N/A for Defendant/Applicant

CC: Moses Okumu