



**THE REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**CIVIL SUIT NO 53 OF 2014**

**F O.....1<sup>ST</sup> PLAINTIFF**

**S O.....2<sup>ND</sup> PLAINTIFF**

**(Suing as next friend to minor S K)**

**VERSUS**

**APA INSURANCE COMPANY LIMITED.....DEFENDANT**

**RULING**

Vide a plaint dated 10<sup>th</sup> March 2014; the plaintiffs herein **F O and S O** seek a declaration that the defendant **APA INSURANCE COMPANY LIMITED** is under the statutory obligation to indemnify the plaintiffs in respect of the two judgments in CMCC 11889 of 2004 and CMCC 2401 of 2005. The plaintiffs also seek an order against the defendant to pay the decretal amount of Ksh 808,510 and Ksh 259,632 awarded to them in the aforementioned suits.

The plaintiffs' claim is denied by the defendant through its statement of defence dated 9<sup>th</sup> April 2014. The defendant avers that it was not established as a result of any merger or consolidation of Pan Africa General Insurance Limited and Apollo Insurance therefore the suit by the plaintiff does not disclose any cause of action against them. The also defendant deny that it is as a successor in title to Pan Africa Insurance Company Limited.

By a Notice of motion dated 17<sup>th</sup> July 2014, brought under **section 3A of the Civil Procedure Act, Order 2 rule 15(1) (a)(b) and (c) and Order 51 rule 1, Order 35 (1) of the Civil Procedure Rules** the plaintiffs seek to strike out the defendant's defence for not disclosing any or reasonable cause of defense; it is scandalous; frivolous and vexatious and may prejudice or embarrass or delay the fair trial of the suit and that it is otherwise an abuse of the court process. The application is premised on the ground that the defence constitutes mere denial, it is a sham and spurious and it discloses no triable issues. That the merger of Pan African Insurance Company Limited and Apollo Insurance Company Limited is admitted in spite of the denial. The plaintiffs also claim that the defence is verbose, vague and incoherent and repetitive.

The application is opposed through the replying affidavit of Paul Kariba, the Legal Officer of the defendant, dated 9<sup>th</sup> May 2015. Mr Kariba avers that the alleged insurer of the motor vehicle KAM 982C is a company that is still in active business and that the defendant ought to have sued Pan Africa Insurance Company Limited who is the insurance within the meaning of section 10(2)(a) of Motor

Vehicle Third Party Risks Act, Cap 405 Laws of Kenya. In addition, it is deposed that that is the reason that the provisions of Order 1 rule 15 of the Civil Procedure Rules relating to Notice to Third and subsequent parties was enacted. That the defendant could only be brought to the present proceedings by the said Pan Africa Insurance Company Limited in a claim for indemnity. Further, that the plaintiff's statutory Notice was indeed directed to the said Pan Africa Insurance Company Limited not the defendant.

The defendant contends that it has raised issues that warrant a full trial before it can be condemned in a summary manner as sought by the plaintiff, and that the plaintiff's claim must be proved within the legally set law and requirements and not reliance on misconceived and misdirected correspondences as the plaintiffs purports in this suit.

The application was canvassed by way of written submissions which were duly filed and exchanged between the parties respective advocates.

The plaintiffs submitted that they were invoking Order 2 rule 15 of the Civil Procedure Rules that grants this court jurisdiction to strike out any pleading. The jurisdiction is limited to pleadings that fail to disclose any defence in law or are scandalous, frivolous or vexatious or may prejudice, embarrass, delay the fair trial. The plaintiffs also submitted that a statement of defense is liable to be struck out where it fails to raise reasonable defense at law or otherwise fails to raise a bona fide triable issue. The plaintiffs stated that the defense consisted of mere denials without addressing the substantive legal and factual issues of the claim. The plaintiffs relied on the case of **Ragbir Singh Chatte vs National Bank of Kenya Limited (1996) eKLR**. The plaintiffs submitted that the defence here does not give a fair and substantial answer to the plaintiffs' claim.

The plaintiffs also submitted that by dint of section 60 of the Evidence Act, Cap 80 the court should take judicial notice of matters published in the Kenya Gazette and by virtue of section 59 of the same Act, such matters need not to be proven and thus cannot be said to be in issue. The plaintiffs relied on the case of **Rose of Sharon Academy Limited & Another vs National Land Commission & Another (2014) eKLR**.

The plaintiffs invited the court's attention to the decision of **APA Insurance Limited vs Benadah Irusa & Another (2012) eKLR** which is similar to the plaintiffs' case since the plaintiff in that suit was also a passenger in Motor vehicle KAM 982 in which the plaintiffs herein were travelling in. that in the said matter, the defendants herein raised the same defense and issues herein and the court held that pursuant to the merger between Pan Africa Insurance Company Limited and Apollo Insurance Company Limited the defendant took over the liabilities of Pan Africa Insurance Company limited.

The plaintiffs also submitted that the defense is frivolous as it lacks seriousness and is a spurious pleading, is vexatious as it annoys for lacking any significant issue.

The defendants on the other hand submitted that the facts disclosed by the documents availed to court cannot be wished away as the alleged merger between companies has not been proved at all. That according to Order 1 rule 15 of the Civil Procedure Rules, the plaintiff ought to have sued the insurer of the alleged motor vehicle who could in turn have invoked Order 1 rule 15 of the Civil Procedure Rules, and that the defendant could only bring the present proceedings by the said Pan Africa Insurance Company Limited in the claim for indemnity. The defendant submitted that it is not privy to any insurance contract or policy between any third party or Kenya Bus Service Limited and is therefore under no obligations arising from such contract with any third parties and as such the defendant cannot be summarily found to be answerable for liability arising from such contracts.

The defendant also argued that the authorities cited by the plaintiff in support of the application are distinguishable and those from the High Court of concurrent jurisdiction do not bar the court herein from arriving at its own independent and reasoned finding. The defendant also submitted that it has never been and cannot under any circumstances be construed to be the insurer within the meaning of section 10 of the said Insurance Motor vehicle Third Party Risk Act, Cap 405 so far as the facts disclosed in the plaintiffs'

plaint are concerned or at all. That the plaintiffs have not provided evidence of their allegations to the contrary. In conclusion the defendant submitted that the matter deserves a full trial.

Having set out the respective parties' positions as above, I am of the view that the only issue for determination is ***whether on the facts and circumstances of this case the court should strike out the defence and grant Summary judgment.***

The courts have held on several occasions that the power to strike out pleadings, and in the process deprive a party of the opportunity to present his case is a draconian measure which ought to be employed only as a last resort and even then only in the clearest of cases. That power should only be exercised after the court has considered all facts and not the merits of the case. See **DT DOBIE & COMPANY (KENYA) LTD VS MUCHINA (SUPRA)**. The power is also discretionary which should be exercised judiciously and not capriciously, and with a lot of caution. The court of Appeal in the case of **CRESCENT CONSTRUCTION CO. LTD v DELPHIS BANK LTD CIVIL APPEAL 146 OF 2001 [2007] eKLR** observed that:

***“However, one thing remains clear, and that is that the power to strike out a pleading is a discretionary one. It is to be exercised with the greatest care and caution. This comes from the realization that the rules of natural justice require that the courts must not drive away any litigant however weak his case may be from the seat of justice. This is a time-honoured legal principle. At the same time, it is unfair to drug a person to the seat of justice when the case purportedly brought against him is a non-starter. (emphasis added).***

The plaintiffs' application is premised on **Order 2 Rule 15 of the Civil Procedure Rules, 2010** which provides:-

**(1) At any stage of the proceedings the Court may order to be struck out or amended any pleading on the ground that:-**

- a. **It discloses no reasonable cause of action or defence in law.**
- b. **Its scandalous, frivolous or vexatious; or**
- c. **It may prejudice, embarrass or delay the fair trial of the action; or**
- d. **It's otherwise an abuse of the Court process and may order the suit be stayed or dismissed or judgment to be entered accordingly as the case may be.**

From the above provision a court's power to strike out pleadings is on the basis that discloses no reasonable cause of action or defence in law, its scandalous, frivolous or vexatious or it may prejudice, embarrass or delay the fair trial of the action or It's otherwise an abuse of the Court process it. At this stage no evidence is admissible and the court will therefore only make a decision based on the Plaintiff and the Defence as filed. Under the aforementioned provision, the Court has the discretion to either dismiss, stay or enter judgment as it may deem fit for the ends of justice, once it has been established that the grounds as set out in the said application warrant such relief.

In the instant case, the plaintiff's contention is that the defense contains mere denials of the plaintiffs' claim. The plaintiffs argue that the defence as filed does not give substantial answer to their claim. I agree with the plaintiffs that there must be substantial answers given to the plaintiffs claim. See **Raghibir Singh Chatte vs National Bank of Kenya Limited (supra)**. To my understanding the plaintiffs seek a declaratory Judgment against the defendant to realize the decretal sum in CMCC 11889 of 2004 and CMCC 2401 of 2005 which was obtained against Kenya Bus Service Limited, a public transport Company which has since been wound up. The plaintiffs' claim was made with the understanding that the defendant took over liability and obligations of Pan African Insurance Company Limited following Gazette Notice 8126 which stated ***“.....the Companies have applied jointly to the Minister for Finance, through the Commissioner of Insurance, pursuant to section 113(1) of the Insurance Act for approval for transfer of the property, undertaking, assets and liabilities of their respective general insurance business to a new limited liability company....”***

The plaintiffs served the defendant on 26<sup>th</sup> March 2004 with the Statutory Notice as required by the law which fact is not challenged by the defendant. The defendant having accepted the said notice was clear admission that it was required to pay and settle the judgment sum.

In their submissions the defendant has admitted the existence of a merger but stated that the same has not been approved therefore averments by the defendant that the merger between Pan African Insurance Co Ltd and Apollo Insurance Co. Ltd to form APA Insurance Company does not exist cannot be true. The defendant herein took the liabilities of Pan African Insurance Co Ltd and therefore liable to compensate the plaintiffs. I have no good reasons to differ with the holding in the case of **APA insurance Limited vs Benadah Irusa & Another (supra), APA Insurance Ltd vs Japhy Elliot Ogundoh Okuwa (2012)eKLR**. Wherein the facts were the same as the case before me herein and where the court held that APA Insurance Company Limited took over the liabilities of Pan Africa Insurance Co. Ltd. The defense as filed is in my view therefore an abuse of the court process and is intended to delay the fair trial of this case which is also meant to delay justice in this case and it should be struck out.

Having found that the defence should be struck out, I also find that the plaintiffs are entitled to summary judgment. The court of Appeal in the case of **HARIT SHETH T/A HARIT SHETH ADVOCATES V SHAMAS CHARANIA CIVIL APPEAL NO. 252 OF 2008 [2014] eKLR** held:

***“The principles which guide our courts in determining applications for summary judgment are not in dispute. In INDUSTRIAL & COMMERCIAL DEVELOPMENT CORPORATION V DABER ENTERPRISES LTD, (2000) 1 EA 75 this Court stated that the purpose of the proceedings in an application for summary judgment is to enable a plaintiff to obtain a quick judgment where there is plainly no defence to the claims. To justify summary judgment, the matter must be plain and obvious and where it is not plain and obvious, a party to a civil litigation is not to be deprived of his right to have his case tried by a proper trial where, if necessary, there has been discovery and oral evidence subject to cross-examination.” (emphasis added).***

In the instant case, I find that the matter here is plain and obvious in the sense that the defendant is obligated under section 10(1) of the Insurance Motor Vehicle Third Party Risks Act to settle the claim herein. Section 10 thereof provides:

***“10.(1) If after a policy of insurance has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of Section 5 (being liability covered by the terms of the policy) is obtained against any person insured by the policy then notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy, the insurer shall subject to the provisions of this section pay to the persons entitled to the benefit of the judgment any sum payable there under in respect of interest on that sum by virtue of any enactment relating to interest of judgments.”***

By dint of Gazette Notice 8126 and other reasons stated herein, the defendant is liable and obliged by law to settle the judgments and decrees in favour of the plaintiffs. It is for those reasons that this court should enter summary judgment in favour of the plaintiffs, as I am satisfied that there are no triable issues which need to be determined by the court at a full trial. I am also satisfied that the defendant will in no way be prejudiced by the summary judgment and neither will they be ousted from the judgment seat since there is absolutely no issue capable of going for trial.

In the end I find the plaintiffs’ application meritorious, I strike out the defence filed by the defendant and enter judgment in favour of the plaintiffs as prayed in the plaint with costs and interest at court rates.

Dated, signed and delivered at Nairobi this 15<sup>th</sup> day of July 2015

**R.E.ABURILI**

**JUDGE**

