REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 243 OF 2009

CANNON ASSURANCE KENYA LTD…………………….....………….APPELLANT

VERUS

PETER OMONYWA……………………………..........……….……RESPONDENT

(Being an appeal from the ruling and judgment of the Lower court, Kimutai SRM) delivered on the 11th November, 2009 in the ORIGINAL Kisii CMCC.NO. 388 OF 2009)

JUDGMENT

1. This is an appeal against the ruling and order of hon. Kimutai in Kisii CMCC.No. 388 of 2009 delivered on 11.11.2009. The ruling arose from a application dated 11.08.2009 taken out by the respondent. In that application the respondent sought the following orders:-

a) The defendant/respondents(now appellant) defence herein be struck out for being scandalous, frivolous, vexatious and otherwise an abuse of the court process.

b) Judgment be entered for the plaintiff(now respondent) as prayed in the plaint herein.

c) Costs of the application be provided for.

2. The grounds upon which the respondent(then plaintiff/Applicant) premised the application were that the defence filed was frivolous, vexatious, scandalous and otherwise an abuse of the court process, it was a mere denial of facts which have been heard and determined by the court in Kisii Chief Magistrate Civil suit No. 487 of 2008, the defendants were duly served with a statutory notice of institution of suit to wit Kisii CMCC. No. 487 of 2008, no appeal has been preferred against the judgment in Kisii CMCC. No. 487 of 2008, the defendant did not repudiate liability and lastly that judgment was entered for the plaintiff in the primary suit, Kisii CMCC. No. 487 of 2008. Apparently, the respondent was pedestrian when a motor vehicle KAR 432L insured by the appellant vide policy No. 01108/01216/07/COMP.hit the respondent and he got injured.

3. The respondent also filed an affidavit in support of the above application. The affidavit in a nutshell gave the history of the dispute leading to the application and it was thus that sometimes in the year, 2008, he instituted a suit in Kisii Chief Magistrate’s court Civil suit Number 487 of 2008 as against Timothy Marete and the Board of governors Kanyakine High School seeking damages resulting from the injuries he sustained from a road traffic accident that judgment was entered in his favour as against the defendants on the 19th May, 2009 to the tune of Kshs. 246,897. He further stated that it was a term of the contract

between the defendant herein and the said Board of Governors, Kanyakine High School vide policy number 01108/01216/07/COMP. that the defendant/respondent herein would indemnify the insured of any liability caused by Motor vehicle registration Number KAR 432L, and that no appeal has been preferred by the respondent in respect of Kisii CMCC. No. 487 of 2008. The respondent/appellant having failed to satisfy the decree, the plaintiff/respondent then filed a declaration suit against the respondent/appellant pursuant to which the plaintiff/respondent subsequently filed an application to strike out the defendant/appellants defence, the subject of this appeal,. The plaintiff/respondent took the view that since Notice under section 10(2) of Cap 405 was served on the appellant before the institution of the parent suit and upon institution there was evidence that the appellant had insured the subject motor vehicle and the absence of declaratory order absolving and or discharging the appellant from satisfying the decree in the parent suit, the defence filed in 6th July 2009 was clearly a frivolous, vexatious, scandalous and otherwise an abuse of the court process.

4. The above application was opposed by the appellant through grounds of opposition dated 3rd October, 2009 in which the appellant maintained that the respondent's application was frivolous, misconceived, misdirected and amounts to an abuse of court. That the application is premature, not been brought at the wrong time, the appellant defence raises triable issues which can only be canvassed at the full hearing and not at this stage and that judgment in Kisii CMCC.NO. 487 OF 2008 has been stayed.

5. What defence did appellant advance against respondent in the suit? It contended that at anytime. It never insured the alleged Board of Governors, Kanyakine High School, or that it ever issued policy number 01108/02136/07/COMP. or that the said policy covered passengers using the motor vehicle registration number KAR 432L or at all and further that the policy was issued pursuant and in accordance with section 5(b) of Cap 405 Laws of Kenya. That even if it ever issued the policy as pleaded, the plaintiff(now respondent) totally failed to comply with section 10 of Cap 405 in that no notice has ever been brought to its attention to institute the Kisii CMCC. No. 487 of 2008 and thus pleaded that its liability under the Act has not arisen therefore its under no obligation to satisfy the decree. Further the appellant in its defence stated that if indeed any policy was issued as pleaded in its name then the same is enforceable, in that it was procured by fraud perpetrated by the said Board of Governors, Kanyakine High School who then furnished no consideration by payment of premiums and the appellant then pleaded that to enforce the said policy against it would be to bless and perpetuate fraud.

6. The appellant also particularized the particulars of fraud as:-

> *1) Stealing cover note so as to defraud the defendant.*
>
> *2) Conspiring with an agent to take a cover note without paying the premiums*.

7. Lastly, appellant in his defence contended that no demand was ever made nor was notice of intention to sue served and that the suit was thus incompetent for being premature.

8. The application was canvassed inter partes and in a ruling delivered on 11th November, 2009, the learned magistrate allowed the application i.e the trial court struck out the defence filed by the appellant.

9. That action triggered this appeal. The grounds of appeal set out in the memorandum of appeal are as follows:-

> *1) The learned trial court erred in law in finding that the statement of defence filed was a bare denial disclosing no trial issues.*
>
> *2) The learned trial magistrate erred in law on striking out the defence, when the pleadings in totality demanded that evidence be led to establish the pre-requisite of Cap 405.*
>
> *3) The learned trial magistrate erred in law and fact in failing to find that the mere fact that the primary suit having been challenged the declaratory suit was premature.*

4) There having been a pleading denying issuance of the policy in issue, it was incumbent upon the trial court to investigate the existence or otherwise of the policy and the court was thus plainly wrong in entering judgment without proof of the policy.

5) The ruling and ensuing judgment was thus contrary to the law and the evidence unread.

10. When the appeal came before Sitati, J on 9th June, 2014, it was agreed amongst other directions that the appeal be canvassed by way of written submissions. Subsequently, parties filed and exchanged written submissions which I have carefully read and considered alongside cited authorities.

11. It is trite law that striking out pleadings is such a drastic remedy which can only be resorted to sparingly and in the clearest of cases. This was demonstrated by the Court of Appeal in the case of **Ramji Megji Gudka Ltd v. Alfred Morfat Omudni Michira & 2 others (2005) eKLR** as follows:-

> *'In our view, the power to strike out pleadings must be sparingly exercised. It can only be exercised in the clearest of cases. The issue of summary procedure and striking out of pleadings was given very careful consideration by this court in DT Dobie & Company (Kenya) ltd. V. Muchira (1982) KLR in which Madan J A at p.9 said:-*
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> *"the court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court at this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the curt itself is not usually fully informed so as to deal with the merits 'without discovery; without oral evidence tested by cross examination in the ordinary way. (Sellers LJ(supra). As far as possible indeed, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he things right".*

12. In dealing with the issue of triable issues, we must point out that even one triable issue would be sufficient. A court would be entitled to strike out a defence when satisfied that the defence filed has no merit and is indeed a sham.

13. Similar sentiment were observed in the case of **Blue Shield Insurance Company Limited v. Joseph Mboya Oguttu(2009) eKLR** where the Court of Appeal stated that the right of a hearing should only be taken away by striking out pleadings sparingly in the most clear of cases and that the right to decide cases on went after allowing the parties at hearing to adduce proper evidence and test it in cross-examination should be the desire of a court of justice Again in the case of Wachira Waruru and the Standard Limited V. Francis Oyabsi C.A. No. 111 of 2000(UR) the Court of Appeal observed.

> *"…..striking out a defence is so drastic a remedy and it is incumbent upon judge to give good reasons for doing so…..".*

14. What were the reasons advanced by the learned magistrate in striking out the defence? Firstly, the fact that the notice of institution of suit (PO4) was duly given and that there was no proof of stay? Indeed there is proof through an exhibit PO4 from the respondent that the appellant firm was served with a notice of institution of suit dated 22nd July, 2008. The same has been stamped with a receiver stamp from the appellant insurance stamp stating clearly that the said notice was received on 24th July, 2008 thus the appellants cannot succeed in this ground of appeal as there is prove that they were aware that the respondent had filed civil proceedings against a vehicle they had insured.

15. On looking at the defence, even though I have stated above that indeed there is evidence that the appellant had been served with the Notice to Institute Kisii CMCC.NO. 487 OF 2008, the appellant also raised the issue of fraud at paragraph 6 of its written statement of defence where it contended.

> *'the defendant further pleads that if indeed any policy was issued as pleaded in its name the same*

is unforceable in that it was procured by fraud perpetrated by the said Board of Governors, Kanyakine High School, who then furnished no consideration by payment of premiums and the Defendant thus pleading that to enforce the said policy against it would be to bless and perpetuate fraud.

PARTICULARS OF FRAUD WERE ALSO PARTICULARIZED AS:

1) Stealing cover note so as to defraud the defendant.

2) Conspiring with an agent to take a cover note without paying the premiums.

16. In my humble view, allegations of fraud once raised cannot be decided in an interlocutory application and have to wait till trial so that evidence can be adduced to demonstrate how the alleged fraud may have taken place. Once the appellant raised the issue of fraud this in itself forms a valid defence which ought to have been ventilated at the trial. As, held in DT Dobie(supra), that even one triable issue would be sufficient and in this case the fact that the appellant contends that there was fraud in the manner in which the insurance policy was acquired that in itself is sufficient to be a viable defence.

17. In addition to this, the appellant has contended that no policy cover was adduced to show that it had indeed covered the defendant in the parent suit and the fact that the defendant did not remit any premiums to it thus defendant was not entitled to any kind of compensation. This to me again are all valid grounds of defence which cannot be dismissed at the interlocutory stage but instead must be ventilated during full trial.

18. Furthermore, considering the parent suit had proceeded exparte since the appellant's insured for reasons not apparent on the record never defended the suit, it is possible that there was indeed fraud in the manner in which the insurance policy was acquired.

19. To my mind therefore, there are outstanding issues in the suit which could only have been resolved at a full trial and in evidence. Accordingly, the suit ought to have been allowed to proceed to full trial.

20. For the foregoing reasons, the appeal is allowed, the order by the trial court striking out the defence filed by the appellant is set aside and substituted with an order dismissing the application with costs. The appellant shall have the costs of this appeal.

Judgment dated and delivered at KISII this 4th day of December, 2014

C.B. NAGILLAH,

JUDGE.

In the presence of:-

Nyachoti holdingbrief for Ochuro for the appellant.

Ochoki holding brief for Ntabo for the respondent.

Edwin Mongare Court Clerk.