



REPUBLIC OF KENYA

High Court at Machakos

Civil Case 352 of 2011

COSMUS MUTUA SILA PLAINTIFF

VERSUS

INSURANCE COMPANY OF EAST AFRICA LTD. DEFENDANTS/RESPONDENTS

RULING

The plaintiff brought the suit herein by way of plaint dated 24th November 2011 seeking declarations, specific performance of terms of an insurance contract, interest and costs. The plaint was filed on the same 24th November 2011.

A memorandum of appearance was filed on 30th November 2011. A defence was filed on 14th December 2011. On 10th January 2012, the plaintiff filed an application by way of Notice of Motion under Order 2 Rule 15, Order 6 Rule 5 and Order 1 Rule 3 and 4 of the Civil Procedure rules, and Section 1A, 1B, 3A and 25 of the Civil Procedure Act (Cap 21 Laws of Kenya). The prayers in the application are:-

- 1. That the application be certified as urgent and be heard ex parte in the first instance.**
- 2. That the defendant's defence dated 14th December 2011 and filed in court on the same date be struck out and/or expunged from the court record.**
- 3. Judgment be entered for the plaintiff against the defendant as prayed for in the plaint under prayers (a) to (g).**
- 4. That there be judgment against defendant for specific performance and/or compliance with the insurance contract by payment to the plaintiff of the insured value of Kshs.4.8 million, cost of towing of Kshs.70,000/= and loss of user at Kshs.25,000/= per day from the date of accident of 19th May 2011.**
- 5. That the costs of this suit and this application be paid by the defendant.**

The main grounds of the application are that the defence and appearance were not filed and served on time as required by law, and that the defence contained only general denials, and was a sham.

The application is opposed. Grounds of opposition were filed on 09th February 2012. Parties' counsel also filed written submissions, which I have perused. Counsel relied upon the said submissions.

This is an application for striking out a defence. As was stated by the Court of Appeal in **Fremar**

Construction Co. Ltd. –vs- Minakshi Navin Shah - Nbi Civil Appeal No. 85 of 2002:-

“This court has stated many times before, and the learned Judge of the superior court was conscious of it, that striking out of a pleading is a drastic remedy and the powers of the court are to be exercised with great caution and only in clear cases. But the power is clearly donated in the rules and exists inherently, for the court in the interests of justice, to reject manifestly frivolous and vexatious pleadings and suits and to protect itself from abuse of its process.”

It follows therefore that before striking out a pleading a court has to exercise great caution.

The complaint of the plaintiff that the memorandum of appearance and defence were filed and served outside the time allowed by law is not sustainable. Firstly, I am not aware of any law or rule that states mandatorily and categorically that a memorandum of appearance or defence filed or served outside the time prescribed by law is fatally defective, or that it must be struck out. In addition, the overriding objective in civil proceedings under Section 1A and 1B of the Civil Procedure Act (Cap 21) enjoins courts to administer substantive justice, rather than procedural justice. More importantly, Article 159 (2) (d) of the Constitution specifically requires courts to administer substantive justice. It states:-

159(2) (d)

Justice shall be administered without undue regard to procedural technicalities; and

In my view, a little delay in filing or serving documents, is strictly a procedural or technical matter. It does not go to the substance of a case. The fact is that the memorandum of appearance and defence herein have already been filed and served, though probably late. The plaintiff has in my view not suffered any prejudice occasioned by the alleged delay. Therefore, there is no justification for disturbing the defence on this ground. I dismiss that objection.

I now turn to the issue of the allegation that the defence is a mere general denial. One will quickly observe that the prayers sought by the plaintiff in the application for striking out the defence have far reaching consequences. They will if allowed, shut out the defendant from ventilating his case. They also appear, in my view, to be different from the prayers in the plaint. There was an attempt in prayer 4 of the application to add to the reliefs sought in the plaint.

The defendant in paragraph 5 of the defence claimed that the plaintiff was in breach of clause 3 of the insurance policy in respect of the motor vehicle. In paragraph 6 they stated that the plaintiff was guilty of non disclosure of material facts. Both these are matters of utmost importance in insurance contracts. They can only be proved or disproved through evidence to be tendered. It cannot therefore be said that there is no arguable issue in the defence. The defence is not a sham. There is therefore no basis for this court to exercise the powers of granting the drastic remedy of striking out pleadings. Justice requires that both parties be heard in support of their pleadings. I find no basis to justify the striking out of the defence, as in my view it raises arguable issues.

Consequently, and for the above reasons, I find no merits in the application. It is dismissed. Costs will however be in the cause, as the main proceedings are yet to be heard and determined. It is so ordered.

Dated and delivered this 2nd day of **October** 2012.

.....

George Dulu
Judge

In the presence of:

Mr Ngala for Plaintiff

Mrs Isika h/b for PM Mulwa for Defendant

Court Clerk: Nyalo