



REPUBLIC OF KENYA
HIGH COURT AT NAKURU
CIVIL SUIT NO. 254 OF 2012

JOSEPH MACHARIA NDERITU PLAINTIFF

VERSUS

REAL INSURANCE CO. LTD. DEFENDANT

RULING

By a Notice of Motion dated 27/08/2012 pursuant to provisions of **Order 2 Rule 15(1) (a) (b) and (c)** of the **Civil Procedure Rules**, the applicant, the plaintiff seeks that the Defendant's statement of defence dated and filed in court on 13th August 2012 be struck out and judgment be entered for the plaintiff as prayed in the plaint. He also seeks costs for the application and the suit.

The same is based on grounds that:

- (1) The defence is a sham, hollow, evasive and does not raise any triable issues.
- (2) The defence is scandalous, frivolous and vexatious.
- (3) The defence is aimed at delaying expeditious and immediate disposal of the suit.
- (4) The defence statement is not supported by any of the witnesses' statement and amounts to nothing beyond are denials.
- (5) The defence has been filed and served in total violation of order 7 Rule 5(c) Civil Procedure Rules which is couched in clear mandatory terms.

In the supporting affidavit sworn by the plaintiff, he deposes that the defence does not reflect any seriousness and the defendant is not candid and truthful when it denies “..... **in toto**” yet its own list of documents exhibits the same policy which is attached as **JMN 1** in applicant's documents.

Further, that the defence is evasive and hollow by denying what is clearly contained in a document dated 22/07/2011 duly signed and stamped by defendant and which demonstrates that:

- (a) The value of the subject motor vehicle was filed by the defendant at Kshs.4,328,000/=.
- (b) The motor vehicle was insured by the defendant against such risk as damage and theft.

(c) The subject motor vehicle was insured as from 25/07/2011 to 24/07/2012 under Policy No.NKU/MCOM/2046576.

The applicant questions the defendant's assertion that it is a stranger to the claims yet there exists the policy document – which it has offered in its list of documents.

The defendant's denial regarding theft of the motor vehicle on 7th January 2012 at 2.30 a.m. is described as frivolous as a report was made to Muthangari Police Station vide OB 10/09/1/2012 and defendant issued and filled the claim form.

Furthermore the defendant had made offers to the plaintiff on **12th April, 2012** and **30th May 2012** to settle the claim. The applicant laments that he has been subjected to enormous expenses levied against him by his financier (i.e. NIC Bank Ltd) – a statement from the bank is annexed. He points out that if the defendant had settled his claim promptly; all the penalties and interest from the Bank would not have accrued.

As regards the arbitration clause which the defendant now seeks to rely on, the same is faulted on grounds that once a defence was filed, then it means the defendant wanted its right to arbitration, and opted to actively participate in these proceedings, and in any event, the defendant is yet to comply with the mandatory legal and procedural requirement of filing its statement.

The matter proceeded *ex parte*, the defendant having failed to file any document in response to the application and the applicant's counsel pointed out that despite the defendant's pleading that the applicant did not have a commercial policy with them, they have annexed in their list of documents the very policy document which the applicant relies on. Further although the defendants dispute the value of the motor vehicle given as **4,383,000/=**, their own documents (issued and signed by them) confirms that value.

Applicant's counsel further submits that the insurance cover was that in case of loss or theft, the defendant would pay. The motor vehicle was stolen and the defendant was duly notified and even issued claim forms which the applicant filled and delivered to them. When the defendants started corresponding with the applicant, they now came up with a pre-theft value of **Kshs.3.8 million** yet it is not clear how they got to assess the motor vehicle before the theft, unless they were party to the theft. Further despite denying existence of any policy, at the end of their statement of defence, it is pleaded that the matter ought to go for arbitration and counsel wonders how one can refer to a non-existent relationship for arbitration.

The statement of defence denies a comprehensive cover for motor vehicle KBP 192V, or that defendant had agreed to indemnify applicant for loss, theft or damage. From the defendant's own list of documents, the insurance policy was a comprehensive cover for loss or damage and indemnity is limited to the reasonable market value at the time of loss. Whereas the applicant seeks the value of the motor vehicle as at the time it was insured, it is apparent that what is to be indemnified is the market value at the time of loss. This would require that evidence be adduced to demonstrate whether the motor vehicle market value had remained constant one year after its purchase, or whether there were interceding events prior to the theft which may have affected its market value. Indeed it would be necessary to determine whether there is a distinction between the term **“estimate of the value of vehicle including accessories and spare parts”** and **“reasonable prevailing market value.”** In my view, that is a triable issue. This is clearly derived from paragraph 7 of the statement of defence, it would be necessary to determine the meaning of pre-theft value referred to in the pleadings and whether that is the same as prevailing market value.

Therefore if the defence were to be struck off, it certainly cannot be on the grounds that it doesn't raise any triable issue. Under **Order 2 rule 15(a) and (b)**, pleadings may be struck out on grounds that there is no reasonable defence in law and that it is vexatious – that is not the situation prevailing here. Whereas it is true that the applicant was insured and indeed the same policy document forms part of both parties list of documents, and that there is no way in which the applicants can be referred to as a total stranger. Para 7 of the statement of defence *vis a viz* the conditions set in the policy document raises an issue that cannot be wished away without an interpartes hearing of arguments.

It would of course have been different if the defendant was pleading that upon failing to agree with the applicant, it suggested that the matter be referred to arbitration and the same was grounded or turned down. If the defendant wished to take a benefit of the arbitration clause, then, it was obliged to apply for a stay after entering appearance and before delivery of any pleadings. By filing a defence the defendant lost its right rely on the clause.

I refer to **“The Law and Practice of Commercial Arbitration in England”** by Mustill and Boyd (2nd Edition) regarding procedure where a party seeks to rely on an arbitration clause at pg 165.

“..... First it creates an obligation to arbitrate and as such gives the defendant in High Court action, the right to apply for a stay of proceedings.....”

I am also guided by the Court of Appeal decision in **Corporate Insurance Company V Loice Wanjiru** CA 151 of 1995.

Once the statement of defence was filed then it means the defendants offered to subject itself to the court’s system of determining dispute rather than seek arbitration, but the bottom line is that even if just the triable issue is raised, then that warrants a matter being heard.

Consequently I decline to grant the orders sought and the application is dismissed. Since respondents did not file any documents in response to the application, nor did they attend court for hearing of the application there would be no basis for condemning them to costs.

Delivered and dated this 2nd day of November, 2012 at Nakuru.

**H.A. OMONDI
JUDGE**