

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

HC COMM. CASE NO. E209 OF 2025

1997

BETWEEN

NIRMALLA KUMARI INDERJIT TAWLAR

**(the Administrator of the Estate of the late
Inderjit Amarnath Gianchand Tawlar)**

.....**1ST PLAINTIFF**

**VISHIT INDERJIT TAWLAR.....2ND
PLAINTIFF**

AND

**CANNON GENERAL INSURANCE(K) LIMITED.....
1ST DEFENDANT**

**CANNON LIFE ASSURANCE(K) LIMITED2ND
DEFENDANT**

**GOODISON TWENTY FIVE LIMITED.....3RD
DEFENDANT**

**GARETO INVESTMENT TRUST LIMITED.....4TH
DEFENDANT**

**METROPOLITAN INTERNATIONAL
HOLDINGS (PTY) LIMITED.....5TH
DEFENDANT**

DESTERIO OYATSI.....6TH

DEFENDANT

GOLUM INVESTMENTS LIMITED.....7TH

DEFENDANT

AND

THE REGISTRAR OF

COMPANIES.....INTERESTED PARTY

RULING

1. Before this this Honourable Court is the Defendants' (except the 5th Defendant) notice of motion application dated 9th April 2025 and it seeks the following relief:-

- 1. THAT the suit be dismissed.**
- 2. Alternatively, the suit be struck out.**
- 3. THAT costs of the suit be paid by the Plaintiffs/Respondents jointly and severally to the 1st, 2nd, 3rd, 4th, 6th, and 7th Defendants. As prayed in the respective defences together with the costs of this application.**

2. The application was supported by the grounds set out in the application and the affidavits of BETTY KANYAGIA sworn on 9th April 2025 and a further affidavit sworn by BETTY KANYAGIA on

29th April 2025 as well as a supplementary affidavit sworn by the same deponent on 28th May 2025. The 5th Defendant indicated that it is not participating in the application.

3. On their part, the Plaintiffs have opposed the application vide the replying affidavit of VISHISHT TALWAR, the 2nd Plaintiff sworn on 20th May 2025. Both parties have filed written submissions which I have carefully considered.

Analysis and Determination

4. Upon careful consideration of the pleadings, I note that the Amended Plaint dated 23rd June, 2025 reveals a complex dispute between the parties arising from the shareholding in 2 entities - Cannon General Insurance (K) Limited, the 1st Defendant and Cannon Life Assurance (K) Limited. I note that one of the allegations in the Amended Plaint surrounds the exit of the 5th Defendant as a shareholder in the 1st and 2nd Defendants. The Plaintiffs allege that the 5th Defendant's exit violated the 1st Plaintiff's pre-emption rights in the company and further violated provisions of the shareholders agreements in place. I also note that the Plaintiffs averments that the 1st Plaintiff's shareholding in the 2nd Defendant was

unlawfully transferred without her knowledge or consent and that there was an unlawful attempt to transfer the 1st Plaintiff's shareholding in the 1st Defendant but that transfer was not completed at the Registrar of Companies.

5. In summary, I note that the Plaintiffs seek orders either to restore the shareholding to what it was before the unlawful actions cited or for compensation to the Plaintiffs for their shareholding in the 1st and 2nd Defendants in accordance with certain share purchase agreements that were signed in 2021.
6. I have equally considered the defences filed by the Defendants. It is the position taken by the 5th Defendant that there was no wrongdoing on its part while the rest of the Defendants allege wrongdoing on the part of the Plaintiff and make several allegations including an investigation by the Insurance Regulatory Authority which they allege authored a report which established fraud and criminal wrongdoing on the part of the Plaintiffs.
7. The present application before this Court seeks the dismissal or strike out of the Suit based on the doctrine of *ex turpi causa*. The Defendants argue that the Plaintiffs' causes of action arise on several transgressions of statute and proceeds to list some of them as:

- (a) Subversion of the Constitution by exercising state authority and imposing illegal tax on the 1st Defendant's products and collecting the said illegal tax from the 1st Defendant's policyholders.**
- (b) Misappropriating the 1st and 2nd Defendants' assets as well as policyholders' assets held under trust.**
- (c) Disobeying lawful orders of the IRA to protect the 1st and 2nd Defendants' assets and those of their policyholders.**
- (d) Violation of anti-money laundering legislation by collecting the said illegal tax from policyholders and cleaning it up as legitimate income.**

8. The Defendants argue that by virtue of these transgressions by the Plaintiffs, they ceased to be shareholders of the 1st and 2nd Defendants and by dint of these transgressions, the Plaintiffs do not have a valid cause of action against the Defendants. In her supporting affidavit sworn on 9th April 2025, BETTY KANYAGIA reiterates those averments and provides some more colour to the grounds in the application. In support of their allegations of wrongdoing, the Defendants have relied on a report marked as BK2 authored by an entity by the name **Actserve Actuarial Consultants**.

9. In addition, the Defendants have also produced a letter dated 6th September 2021 from the Kenya Revenue Authority which appears to have made preliminary findings of corporation tax, PAYE and withholding tax against Metropolitan Cannon General Insurance Ltd.
10. There are also several letters from the Insurance Regulatory Authority addressed to Metropolitan Cannon Life Assurance Limited regarding an investigation, referring to settlement discussions with the 1st Plaintiff in respect of a restitution amount of KES172 million. A further letter from the Insurance Regulatory Authority marked BK5 addressed to Metropolitan Cannon Life Assurance Limited was in relation to an investigation into Cannon Assurance Life business and directed the entity named to retribute affected policyholders to the tune of the recommended amount of KES 172 million.
11. In response, the 2nd Plaintiff swore a replying affidavit denying the allegations of wrongdoing. The Plaintiffs state that the Defendants' application is not grounded on any of the grounds under Order 2 Rule 15 of the Civil Procedure Rules and that the Defendants have failed to meet the requisite threshold upon which a suit may be struck out and that all the

issues in dispute are factual which can only be properly resolved through a full hearing on the merits and not by way of summary dismissal.

1. I have read the pleadings, the various affidavit and submissions of both parties and gone through the evidence on record. The application seeks two distinct prayers, one (1) to dismiss this Suit and two (2) in the alternative to strike out the suit in its entirety. The present application is grounded under **Order 2 rule 15 (b), (c) & (d)** of the **Rules** as follows:

15. Striking out pleadings [Order 2, rule 15.]

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

—

(a)

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court,

and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

2. Madan JA. (as he then was), in **D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another**

[1980] KECA 3 (KLR) held that “No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.” In addition, Order **13 Rule 2** of the **Rules**, which states as follows:

Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the Court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the Court may upon such application make such order, or give such judgment, as the Court may think just.

12. Dismissal connotes that a merit hearing took place where parties were heard. No hearing has taken place here and accordingly; a court cannot dismiss a suit through an application without the matter having gone to trial. This prayer cannot be granted in the circumstances.

13. To paraphrase the holding in the **D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another** (supra), can it be said that the instant suit is hopeless? That it plainly discloses no cause of action? And that it is so weak beyond redemption? I disagree. In my view, the Suit discloses a reasonable cause of action which all of the defendants have responded to. In the application, the Defendants have not pointed out how the Plaintiffs' suit is hopeless. In fact, the Defendants do not allege that it does not disclose a reasonable cause of action. In fact, the Plaintiffs have not anchored their application on any of the grounds set out in Order 2 Rule 15 which governs the striking out of suits.
14. Instead, the entire weight of the application is placed on the doctrine of *ex turpi causa* which is essentially a Latin maxim which is deployed in circumstances where a plaintiff is attempting to pursue a cause of action that is anchored on his own wrongdoing. However, the important question to ask is whether there has been any determination by any court of competent jurisdiction finding any wrongdoing on the part of the Plaintiffs which would preclude them from pursuing the remedies sought in this Suit. None has been pointed out to this court.

15. It appears that it is the Defendants' own position, which has not been interrogated by any court, that the Plaintiffs are guilty of material breaches of the law. The Defendants have made serious accusations against the Plaintiffs including accusing them of constitutional breaches by imposing illegal taxes on policyholders as well as allegations of violation of the Proceeds of Crime and Anti-Money Laundering Act. These violations are criminal in nature.
16. My view is that allegations of criminality cannot be determined in a civil court and certainly not by way of contested affidavit evidence. In **Westmont Power Kenya Ltd v Bosley Frederick & another t/a Continental Traders & Marketing [2003] KECA 169 (KLR)** the Court of Appeal held that it was quite unusual to enter summary judgment when serious allegations of fraud and other wrong doings are made.
17. In **Fanikiwa Limited & 3 others v Sirikwa Squatters Group & 17 others [2023] KESC 105 (KLR)** the Supreme Court held that:

“In the circumstances of this case therefore, we are not convinced that it was prudent and judicious, considering the

highly contentious nature of the claims and circumstances of each of the numerous parties involved to determine this matter by affidavit evidence only. The authors of the said affidavits ought to have been called and cross-examined to test the veracity of the affidavits and documentary evidence. To our minds, this would have presented the best available evidence for the learned trial judge to make his decision fairly.”

18. From the record before me, this appears to be a highly contentious matter where both sides have alleged fraud against each other in respect of their separate positions. It is only fair that this Court should let all the parties have their day in court and prove their respective cases by giving evidence and having that evidence tested by way of cross-examination.
19. I find that the Defendants’ application seeking to have this case struck out in a summary manner without subjecting it to trial cannot be allowed at this stage of the proceedings. To do so would be driving the Plaintiffs away from the seat of justice contrary to Article 48 and 50 (1) of the Constitution of Kenya.

20. Accordingly, I find that this is not a fit case for striking out and I proceed to dismiss the application. Let the matter proceed to trial in the normal manner. Costs of the application are awarded to the Plaintiffs. It is so ordered.

DATED SIGNED and DELIVERED virtually at NAIROBI this 1st DAY of DECEMBER 2025

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J.W.W. MONGARE
JUDGE

IN THE PRESENCE OF

1. Mr. Denzel and Ms. Salim for the 1st & 2nd Plaintiff/Respondents.
2. Ms. Gathimba & Ms. Mwango for the 5th Defendant/ Respondents.
3. Mr. Otieno holding brief for Mr. Oyatsi for the 6th Defendant/Applicant.
4. Ivan - Court Assistant

ORIGINAL