IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, OKWENGU & G.B.M. KARIUKI JJ.A.)

CIVIL APPEAL NO. 197 OF 2008

BETWEEN

KENYA POWER & LIGHTING COMPANY LIMITED..…….APPELLANT

AND

AMERICAN LIFE INSURANCE

COMPANY (K) LIMITED…...……..…...RESPONDENT

(Being an appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Milimani Commercial Courts), (Ochieng J.) dated 15th July, 2005

in

H.C.C.C. No. 247 of 2004 (Milimani))

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JUDGMENT OF THE COURT

[1] The genesis of this appeal is a suit which was filed by the appellant, Kenya Power and Lighting Company Limited, against the respondent, American Life Insurance Company Limited. In the suit, the appellant sought judgment against the respondent for Kshs.55 million, being outstanding claims it alleged the respondent wrongfully repudiated. The claims arose from a group personal accident insurance policy that the appellant had taken out with the respondent. The respondent filed a defence to the appellant's claim maintaining that it properly repudiated the claims as the claims were not commenced within 12 months from the date of disclaimer of liability under the policy. By a chamber summons dated 23rd

June, 2004, the respondent sought to have the appellant's suit struck out under ***Order 6 Rules 13 (1) (b)*** and ***(d)*** & ***16*** of the ***Civil Procedure Rules,*** and ***Section 3A*** of the ***Civil Procedure Act***. It was the respondent's contention that the appellant's suit was frivolous, vexatious and an abuse of the court process as the claim was barred by contractual limitation, not having been filed within the period provided under the contract.

[2] Upon hearing the application, the learned Judge of the High Court (Ochieng J), delivered a ruling in which he found: that both parties were in agreement that the contract was repudiated; that the appellant had to commence a suit within 12 months if the repudiation was wrongful; that the appellant failed to file

the suit within that period; and therefore, the claims were forfeited. Accordingly, the learned Judge granted the application and struck out the appellant's suit with costs.

[3] Being aggrieved by the ruling of the High Court, the appellant lodged an appeal urging us to set aside the orders made by the High Court. In the memorandum of appeal, dated 30th July, 2008, the appellant has raised nine grounds. In short, the appellant is aggrieved that the trial Judge wrongly exercised his discretion and arrived at an erroneous decision; that the issue of limitation could only be determined at full trial; that the learned Judge prematurely accepted that there was repudiation without the respondent discharging the burden of proof or the appellant having the opportunity to demonstrate that the repudiation was wrongful; that the learned Judge misunderstood and misapprehended the law relating to striking out pleadings at interlocutory stage; and that the Judge failed to apply the well-established principles of law for striking out pleadings.

[4] In arguing the appeal, Mr. Kipkorir, learned counsel for the appellant, reiterated the submissions he had made in the High Court that the respondent's application for striking out of the appellant's suit at the interlocutory stage contravened ***Order 6 Rule 13*** of the ***Civil Procedure Rules***, as the appellant brought the application under both ***sub-rules (b) and (d)*** of that ***rule***. Counsel maintained that the appellant could not extract and rely on parts of the contract in isolation from the whole contract. He referred the court to the authorities he had relied on in the High Court which included ***Atlantic Shipping and Trading Company v Louis Dreyfus and Co [1992] All ER 559***; ***Austin v Zurich General Accident and Liability Insurance Co Ltd [1945] 1 All ER 316; and D.T. Dobie v Muchina.***

[5] In regard to the clause in the contract on disclaiming liability, Mr. Kipkorir argued that the respondent never disclaimed liability but only intimated to the appellant that it was closing its file; that "disclaiming liability" is a legal term which can only arise in certain conditions; that there was no timeline provided for the appellant to avail documents; and that the learned Judge having accepted the appellant's submissions erred in striking out the suit on grounds of limitation.

[6] On his part, Mr. Imende, learned counsel for the respondent, opposed the appeal submitting that the main issue before the learned Judge was the effect of the clause limiting the time within which the claims were to be filed; that the appellant having pleaded in its plaint that the respondent wrongfully repudiated the claim, what was in issue was the reason for repudiation and not the fact of repudiation; that the contract clause in issue was clear that a claim that was not made within 12 months could be repudiated. Therefore, the justification for the disclaimer was not in issue as the suit was filed more than 12 months after the disclaimer. Mr. Imende maintained that there was justification for a time frame as the period taken before filing the suit ought to be reasonable to enable the insurance company verify the claim; that repudiation and disclaimer mean the same thing; and that the learned Judge properly exercised his discretion in striking out the appellant's suit. In this regard, counsel relied on ***Mbogo & Anor. vs Shah, [1968] EA 93.***

[7] The application before the learned Judge was one for striking out pleadings. Therefore, we bear in mind the caution by Madan, J.A. (as he then was) in ***D T Dobie & Company (K) Ltd. v. Muchina, [1982] KLR 1***, that the power of the court to strike out pleadings should be exercised very cautiously and considering all facts of the case, before dismissing a case for not disclosing a reasonable cause of action or being an abuse of the process of the court. The following extract from ***Moore v. Lawson & Another, [1915] 31TLR 418*** which was applied in ***D T Dobie v. Muchina*** (supra) is also instructive:

"It cannot be doubted that the court has an inherent jurisdiction to dismiss an action which is an abuse of the process of the court. It is a jurisdiction which ought to be very sparingly exercised and only in exceptional cases. I do not think its exercise would be justified merely because the story told in the pleadings was highly improbable and one which it was difficult to believe could be proved".

0. The main issue in this appeal is whether the learned Judge was right in striking out the appellant's suit. The grounds upon which the respondent sought to strike out the appellant's suit were specific. That is, that the suit was frivolous and/ or vexatious, and/or an abuse of the court process. In this regard, the learned Judge rendered himself as follows:

"I have looked closely at the eleven paragraphs in the plaint herein. I find nothing in it which is either scandalous, frivolous or vexatious. I also fail to find any pleading which could be said to be an abuse of the court process. By suing for Kshs. 55 Million, which the plaintiff avers to be payable in respect of outstanding claims under a Group Personal Accident Insurance Policy, the plaintiff cannot be said to have done anything which would be tantamount to abusing the process of the court. I think it is important to emphasis that even if a party had a weak case he would be entitled to have his day in court, and his case should then not be seen as being an abuse of the process of the court simply on the ground of his weakness as may be perceived by the opposite party".

0. It is evident from the above extract that the learned Judge made a clear finding that there was nothing scandalous, frivolous or vexatious, in the appellant's plaint nor was the plaint an abuse of the court process. That finding ought to have resolved the matter. However, the learned Judge did not end there but proceeded to consider the provisions of the contract, in particular the provisions concerning the claim notification, repudiation and/or disclaimer, and finally concluded as follows:

"In my understanding of that provision, once the plaintiff failed to institute action within 12 months from the date when, by his own admission the contract was repudiated, the contract was forfeited. For that reason, I hold that this is a fit and proper case for striking out the plaint…"

0. The findings of the learned Judge raise concern in three pertinent areas. First, is the contradiction in the findings of the learned Judge. If the plaint was neither frivolous nor vexatious nor an abuse of the court process as per the earlier findings, then the striking out of the plaint could not be justified under ***Order 6 Rule 13(1) (b)*** and ***(c)*** of the ***Civil Procedure Rules***. Secondly, it is not clear from the judgment under which provision the learned Judge struck out the plaint. Was the plaint after all frivolous or vexatious as to fall under ***Order 6 Rule 13(1) (b),*** or was it an abuse of the court process as to fall under ***Rule 13(1) (c)***?

0. Thirdly, the learned Judge appears to have misapprehended the facts. From the pleadings, the application dated 23rd June, 2004, and the affidavit filed in support and in response thereto, it was common ground that there was a contract of insurance between the appellant and the respondent pursuant to which the appellant lodged some claims with the respondent. In its plaint the appellant claimed that the respondent wrongfully repudiated claims lodged by the appellant under the policy of insurance. In the appellant's view, this raised an issue whether the respondent's purported repudiation of the claims was proper. In this regard, the learned Judge rendered himself thus:

"In paragraph 7 of the plaint, it is expressly pleaded that the defendant repudiated its obligations on 24th September, 1999. That is an averment by the plaintiff itself, therefore, the plaintiff is bound by it. It cannot now be permitted to say that the action of the defendant did not amount to repudiation when the defendant had admitted that fact in its defence. In effect, it is not in issue as to whether or not the contract was repudiated. Both parties are in agreement that the contract was repudiated". (Emphasis added)

[12] It is pertinent at this stage to reproduce herein paragraphs 5, 6 and 7 of the plaint which are the relevant parts relating to repudiation. These paragraphs state as follows:

5. **By two letters dated 2nd February, 1999, to the plaintiff, and in total disregard of the terms of the policy, the defendant threatened to close all pending files on claims for compensation properly lodged by the plaintiff within fourteen days of the said letter.**

6. **The defendant further purported to unilaterally vary the terms of the contract by imposing a Thirty (30) Day period for reporting new claims and a Ninety**

90. **Day period for furnishing documentation in support of the claim. The plaintiff rejected the variation of the terms of the contract of insurance between it and the defendant.**

7. **In breach of the contract, the defendant by its letter dated 24th September, 1999, wrongfully repudiated its obligations under the policy of insurance and confirmed that it was closing its files.**

[13] The respondent's reply to the appellant's pleadings are contained at paragraph 2 and 3 of the defence that stated as follows:

2. **Paragraphs 3, 4, 5, 6 and 7 are admitted save that the plaintiff avers that there was no variation of the terms of the policy and that the defendant properly repudiated the claim under it.**

3. **The defendant further avers that the plaintiff's claim does not lie as it is not commenced within 12 months after the disclaimer of liability under the policy.**

0. In our view, the pleadings revealed that there was joinder of issue regarding the purported repudiation of some claims arising from the contract, the issue being whether the repudiation of the claims by the respondent was proper and lawful; and secondly, whether the appellant's claims were contractually barred. The issue therefore, was not repudiation of the contract per se.

0. It is evident from the afore quoted extract of the ruling that the learned Judge misapprehended the facts and misdirected himself, as there was no admission by the parties on the repudiation of the contract. The pleadings related to the repudiation of the claims and not the contract. The learned Judge appeared to have addressed the defence and come to the conclusion that the appellant's suit does not lie in light of the limitation clause agreed upon by the parties.

[16] Worthy of note is that the respondent's application for striking out the appellant's suit was grounded on its defence that the appellant's claims were barred by contractual limitation as the suit was not filed within 12 months after disclaimer of liability. The applicant maintained that its claim was not statute barred as the respondent never disclaimed liability. The question is whether this contention was frivolous or vexatious such that it can be concluded that the appellant's suit was frivolous, vexatious or an abuse of the court process.

[17] The following statement by Ringera, J (as he then was) in ***Mpaka Road Development Ltd. v Kana [2004]1EA 161***, adopted from the UK Supreme Court Rules, is useful in answering the above question:

"A matter would only be scandalous if it would not be admissible in evidence to show the truth of any allegation in the pleadings which is sought to be impugned. Such would be the case where an imputation is made on the character of a party when the character is not in issue. And I would say a pleading is frivolous if it lacks seriousness. If it is not serious then it would be unsustainable in court. A pleading would be vexatious if it annoys or tends to annoy. Obviously, it would annoy or tend to annoy if it was not serious or it contained scandalous matter which was irrelevant to the action or defence. In short, it is my discernment that a scandalous and/or frivolous pleading is ipso facto vexatious".

[18] In regard to abuse of process, the Supreme Court recently stated in Civil Application No. 14 of 2014 ***Charo Hassan Nyange vs Mwashetani Hatibu & 3 Others***, as follows:

"The Black's Law Dictionary defines abuse of process at page 11 as:

'The improper and tortious use of a legitimately issued court process to obtain a result that is either unlawful or beyond the process's scope'.

It includes the deliberate use of the court and court process to settle vendetta, to intimidate, to inflict fear and involves the bringing of matters to Court that have no justiciable cause of action".

[19] We have examined the relevant parts of the appellant's claim and find nothing that can be said to be

inadmissible, or evidence of lack of seriousness. It is apparent that the appellant had a justiciable cause of action arising from the claims made under the contract. Indeed, discussions concerning the claims had been ongoing. It cannot, therefore, be said that the appellant's suit was intended to annoy.

Nor was the appellant's claim frivolous, vexatious or an abuse of the court process. The defence relating to limitation was one anchored on the contract and the facts. It was for the court to interpret the contract including the limitation clause and apply the same to the facts to be established at the hearing. In concluding that the appellant had no proper cause of action, the learned Judge prematurely determined the issue without giving the appellant the opportunity to challenge the defence raised by the respondent. Moreover, the learned Judge misdirected himself as the application was not one under ***Order 6 Rule 13 (1) (a)*** of the ***Civil Procedure Rules***.

[20] In ***Ramji Megji Gudka Limited v Muchira & Others***, ***[2005] eKLR,*** the Court of Appeal stated:

"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 easy merits of the case for that is a function solely reserved for the Judge at the trial as the court 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".

[21] We come to the conclusion that the learned Judge failed to exercise the required caution and erred in striking out the appellant's plaint. His ruling cannot be upheld. Consequently, we set aside the ruling delivered on 15th July, 2005 and the order for striking out the plaint, and substitute thereof an order dismissing the respondent's application dated 23rd June, 2004 with costs. We award the appellant the costs of this appeal.

Those shall be the orders of this Court.

Dated and Delivered at Nairobi this 3rd day of July, 2015.

W. KARANJA

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JUDGE OF APPEAL

H. M. OKWENGU

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JUDGE OF APPEAL

G. B. M. KARIUKI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR