Geminia Insurance Co. Ltd v United Pharma (K) Limited & another (Commercial Suit E164 of 2024) [2025] KEHC 480 (KLR) (Commercial and Tax) (24 January 2025) (Ruling)

Neutral citation: [2025] KEHC 480 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL SUIT E164 OF 2024

BM MUSYOKI, J

JANUARY 24, 2025

BETWEEN

GEMINIA INSURANCE CO. LTD ..... PLAINTIFF

AND

UNITED PHARMA (K) LIMITED ..... 1ST DEFENDANT

SAID HASGI ADAM ..... 2ND DEFENDANT

RULING

1. The plaintiff filed this suit against the defendants vide plaint dated 3rd April 2020 claiming the follow orders;
    a. Kshs 206,189,750/=
    b. Interest at 15% per annum effective 1st March 2023 till payment in full.
    c. Costs of this suit.
2. The basis of the claim is that on 7th December 2022, the plaintiff and the 1st defendant entered into a debt settlement agreement in which the 1st defendant undertook to pay an acknowledged debt of 332,000,000.00 in agreed installments. The 1st defendant in performance of the contract paid a few installments and started defaulting and by 29th February 2024, it had accumulated arrears of Kshs 52,189,750.00 with outstanding balance of Kshs 206,189,750/=. The 2nd defendant is sued for having given a personal guarantee and indemnity for the payment of the debt.
3. The defendants filed defence and counterclaim in which they acknowledged that the debt settlement agreement was executed and part payment done as pleaded. They pleaded further that they later after execution of the agreement and the deed of guarantee and indemnity discovered existence of two other

similar suits vide this court's commercial suits numbers E181 of 2020 and E061 of 2020 which were over the same cause of action as in this suit. The defendants have pleaded that by filing different suits and failing to disclose the same to the defendants, the plaintiff was acting fraudulently. The defendants have also claimed that the suit is fatally defective since it did not comply with Order 4 Rule 1(1)(f) of the Civil Procedure Rules which requires the plaintiff to disclose existence of other suits pending or prosecuted in other courts between the same parties over the same subject matter. The defendants have in their counterclaim pleaded that the amount so far paid to the plaintiff pursuant to the agreement should be refunded.

4. The parties herein followed their pleadings with two applications and a preliminary objection dated 24th May 2024 filed by the defendants. One of the applications is a notice of motion filed by the plaintiff dated 10th June 2024 which prays for the following orders;

    1. This Honourable court do hereby strike out the defendant's/respondents' statement of defence dated 28th May 2024.

    2. The judgment be entered in favour of the plaintiff as prayed in the plaint dated 3rd April 2024.

3. In the alternative, judgment on admission be entered against the defendants/respondents jointly and severally for the sum of Kshs 206,189,750/= together with interest at 15% per annum effective 1st March 2023.

    4. The costs of the application be borne by the defendants/respondents.

5. The second application is by the defendant dated 12th June 2024 which seeks the following orders;

    1. The suit herein be struck out.

    2. Costs.

6. The court gave directions on disposal of the two applications on 19-06-2024 where it ordered that both applications and the defendants' preliminary objection be heard together by way of written submissions. The parties have filed their respective submissions in respect of the two applications and the preliminary objection. I will begin with the defendants' application dated 12th June 2024 whose contents is similar to their preliminary objection dated 24th May 2024.

The defendants' application and preliminary objection

7. The defendants' application is not supported by an affidavit but is based on 7 grounds appearing on the face of it. The gist of the grounds is that the plaintiff failed to disclose that there existed similar suits as mentioned hereinbefore which offends provisions of Order 4 Rule 1(1)(f) of the Civil Procedure Rules. According to the defendants, that omission is fatal and the suit should be struck out. The grounds further state that the plaintiff having sought full indemnity in Hccc E181 of 2020, has engaged in a game of wager and seeks to unjustly enrich itself by attempting to be double compensated.

8. The defendants have not exhibited in their application the pleadings in the two other suits although in the replying affidavit to the plaintiff's notice of motion, they have attached plaint and defence in Hcc number E181 of 2020. In dealing with this application, I believe I should limit myself to considering whether failure to disclose the existence of the other suits is fatal to this suit. The issue of whether the plaintiff sought to unjustly enrich himself will be considered in the plaintiff's application dated 10th June 2024.

9. Order 4 Rule 1(1)(f) of the Civil Procedure Rules provides that;

> 'The plaint shall contain the following particulars an averment that there is no other suit pending, and that there have been no previous proceedings, in any court between the plaintiff and the defendant over the same subject matter and that the cause of action relates to the plaintiff named in the plaint.'

10. The above provision is very clear that the plaint must state that there is no other suit pending or has been prosecuted before another court but does not state or give the consequences of failure to do so which means the same is left to the discretion of the court when the issue is raised depending on the circumstances of each case. It should be noted that the mischief the Rule as submitted by the defendants was meant to avoid possibility of two or more parallel suits between the same parties and on the same subject matter and to avoid conflicting decisions in respect of the same subject matter and parties which would obviously amount to abuse of the court process.

11. However, I hold the view that striking out a non-compliant pleading is not the only remedy. The court has discretion to sustain the suit if the circumstances allow. In Freder Nyaboke Ondera & Another v Clerk Ogembo Town Council & 2 Others (2008) KEHC 3160 (KLR), the Honourable Justice Musinga when faced with similar prayer held that;

> 'That was material omission on the part of the plaintiffs. All previous proceedings must be disclosed, even if they were withdrawn or disposed of, as long as they relate to the same subject matter in dispute.

12. From the foregoing, it is clear that the preliminary objection that was raised is well founded and valid in law. Mr. Soire urged this court to strike out the entire suit for reasons aforesaid. However, I am reluctant to do so. In D. T. Dobie & Company (kenya) Ltd Vs Muchina [1982] KLR 1 at Page 9, it was held as follows:

> "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."
>
> If the plaintiffs' suit is struck out, they may be time barred in their quest for justice. They should have their day in court so that the dispute is determined on its merits.'

13. In my view, a pleading is meant to give the opposing party notice of the claim or defence the pleader is intending to procure before the court in order for the opposing party to answer to the same. It means therefore, the need for disclosure required by the Rule is to enable the defendant answer to such plea. In that regard, a defendant who has been served with a plaint which complies with the Rule should answer to it as far as it knows. This gives the court the comfort of proceeding with the matter well aware that no similar litigation is going on or has been prosecuted in another court. Where the defendant pleads that there is another suit like in the instant suit, the court is therefore called upon to interrogate that issue before it proceeds with the case in order to avoid a possibility of breach of the principles of sub judice or res judicata. In my considered opinion therefore, failure to comply with the Rule is not fatal to the suit. A defendant who is aware that there is a similar pending suit or there have been other proceedings between the same parties and on the same subject matter should make an appropriate application either to stay the suit or have it struck out.

14. I therefore decline to strike out the suit with consequence that the defendants' application dated 12th June 2024 and the preliminary objection dated 24th May 2024 are dismissed with costs to the plaintiff.

Plaintiff's application

15. I now turn to the plaintiff's application dated 10th June 2024. The prayers on the face of the application are omnibus. It is always desirable that a party makes a choice on the kind of orders it desires to get from the court. Although the prayers would have the same effect of having judgment entered in favour of the plaintiff, the court should not be tasked with analysing and making determination on all the prayers which are based on different provisions of the law. Looking at the grounds on the face of the application, this court will consider the application in relation to prayers 3 and 4.

16. The application is supported by affidavit of Nelly Mwathi who describes herself as the company secretary and head of legal department of the plaintiff. In the affidavit sworn on 10th June 2024, the plaintiff avers that on 7th December 2022, the 1st defendant and the plaintiff entered into an agreement in which the defendant undertook to pay the plaintiff a debt of Kshs 332,000,000.00 in installments of Kshs 8,000,000.00 with effect from 31-10-2022. In addition, the 1st defendant was to pay four installments of Kshs 25,000,000.00 each in the months of April 2023, October 2023, April 2024 and October 2024. The agreement is exhibited as annexure 'NM-1'. The 2nd defendant executed a deed of guarantee and indemnity for the payment of the said debt on the same date of 7th December 2022.

17. The 1st defendant paid in accordance with the agreement but started falling in arrears which as at 29th February 2024 which had risen to Kshs 52,189,750/= which brought the whole balance due to Kshs 206,189,750/= which is the amount prayed in this suit. It is deponed that the defendants admitted the debt through correspondence between the parties' advocates. The plaintiff claims that the defence as filed consists of mere denials and raises no triable issue and so is the counterclaim.

18. The defendants have opposed the application through an affidavit sworn by the 2nd defendant on 14th October 2024. In the affidavit and in the defence, the defendants admit that an agreement and the deed of guarantee and indemnity were executed as pleaded. Their defence is that they realized later that civil suits numbers E181 of 2020 and E061 of 2020 had been filed which fact had not been disclosed to them. According to the defendants, the procurement of the agreement and the deed of guarantee and indemnity was through fraud, misrepresentation, undue influence, duress and based on an illegality.

19. The defendants aver that the acts of fraud and misrepresentation are evident in the fact that the plaintiff's previous suit number E181 of 2020 was against its reinsurers claiming full indemnity. The defendants add that had they known of existence of these suits, they would not have entered into the said agreement or deed and therefore the same is not enforceable. According to the defendants, the non-disclosure of these suits in the instance case which I have dealt with on the foregoing paragraphs was material and justification of vitiating the contract between them and the plaintiff.

20. In further defence, the defendants state that the crystallization of the insured event discharges the insured from liability and as such, since the insured event which is non payment of the loan crystallized, the defendants were discharged from liability arising from the loan. Further, according to the defendant, the reinsurance contract was illegal and as such, it could not be a basis for another agreement which the plaintiff seeks to enforce. In a nutshell, the defendants are stating that the contract was illegal and although they benefited from the loan, the same is not enforceable.

21. I have carefully gone through the application, the supporting affidavit and annexures thereto, the replying affidavit together with its annexures and the parties' submissions. The plaintiff seeks a summary judgment under Order 36 Rule 1 of the Civil Procedure Rules. For a party to succeed in such

an application, it must be shown that the debt is rightly due and the defence put forth by the defendant is not sustainable or in other words, raises no triable issues.

22. I note that the agreement and the deed of guarantee and indemnity which are the basis of this suit are admitted as well as the fact that the amount claimed is outstanding. The only departure is when the defendants claim that the same is attended by vitiating factors and therefore not enforceable. An agreement between the parties is enforceable unless the court is satisfied that there are factors that would justify its nullification or voiding. The court should be careful while dealing with disputes over a contract so that its decision does not amount to re-writing a contract for the parties. This is a legal principle which has been soundly established over a long period in many judicial authorities. In Joe Kathungu t/a Joe Kathungu & Co. Advocates v Wilson Kaburi Macharia & Christine Wangu Macharia (2020) KEHC 3555 (KLR), it was held that;

> 'However, the court cannot rewrite contracts for parties. The court's duty is to give effect to the intentions of parties as expressed in their agreements. The parties to a contract are masters of their contractual destiny as the Court of Appeal observed in the Adopt – A Light case.'

23. In my considered view, the issues the court needs to consider is whether the agreement was entered into through misrepresentation, duress, undue influence, fraud or illegality or whether the suit is res judicata this courts Hcc E016 of 2020.

24. The defendants have pleaded four particulars of misrepresentation which can be collapsed to the plaintiff's failure to disclose that there existed Hccc number E181 of 2022 which the defendants claimed to not to have been aware of. What one needs to ask here is whether the defendants were influenced in executing the instruments by the belief that the plaintiff had no other cause of action against another party.

25. It is clear to me that the defendants were aware of the circumstances surrounding the dispute in question. They were obviously aware that they had not paid the loan obtained from Gulf Africa Bank Limited and that the loan had been settled by freezing of the plaintiff's account with the bank. Letter dated 28-08-2024 which is annexure NM-5 of the plaintiff's supporting affidavit was authored by the defendant's advocates. In the said letter, it is stated at paragraph 6 that;

> 'We have advised against belligerent stances and have worked closely with your client's previous advocates in dealing with the GulfAfrican Bank litigation and related issues which originated this current impasse. Our client could have deployed poison-pill-like defences and strategies, but we advised against such tactics'.

26. This in my view is an indication that the defendants were aware and active in dealing with the issues surrounding the disputes between the plaintiff and the said bank. I do not see how the non-disclosure of the suit if at all induced the defendants into signing the agreement and the deed of guarantee and indemnity.

27. Where a party is involved in transactions or engagements which are part of events leading to their execution of a contract in question, they should be expected to have knowledge of the circumstances surrounding the execution of the contract. A party who enters into a contract owes a duty unto itself to conduct due diligence and appraise itself of all facts relating to the contract. Not every small detail should be disclosed by the contracting parties. For non-disclosure to vitiate a contract, the undisclosed facts must be material to the contract and the onus of proving that is on the party claiming

misrepresentation. Lincoln Kivuti Njeru v Insurance Company of East Africa (2017) KEHC 3062 (KLR), it was held that;

> 'In addition, the Defendant claims that the silence or non-disclosure by the Plaintiff as to the misappropriation of more money when entering into the said agreement amounted to fraudulent misrepresentation. G.H. Treitel in his text on The Law of Contract, Sixth Edition at page 252 states that misrepresentation allows a person to claim relief if he or she is induced to enter into a contract by a misleading statement, and summarized the applicable rules as follows:

28. In the first place the representation must be of a kind which the law recognizes as giving rise to liability: this excludes "mere puffs" and certain statements of law or of opinion, or as to the future. A number of general conditions of liability must next be satisfied: the representation must be unambiguous and material, and must have been relied on by the representee. If these requirements are satisfied the representee may be able to claim damages or to rescind the contract or to do both these things"

29. It is in this respect noted that a representation must therefore essentially be a statement of an existing fact. Therefore any misrepresentations alleged to have occurred by the Plaintiff must be with respect to existing facts at the time of making of the agreement. The subject of the agreement dated 2nd June 2006 as shown in clause 1 of the said agreement was the debt of the sum of Kshs, 10,352, 953/=, which both parties testified was the debt established to have been owed by the Plaintiff as at the time of making of the agreement.'

30. The defendants have also pleaded that they signed the agreement and the deed under duress and undue influence. To succeed in their plea that they signed the agreement and the deed through undue influence, it is important for the defendants to establish that some propositions were made to them which made them believe in a certain state of affairs which influenced them into making decision to execute the disputed instruments.

31. The defendants claim that they were compelled to sign the agreement and the deed through blackmail by the plaintiff who knew that Gulf Africa Bank Limkted had by misrepresentation compromised the 1st defendant's business. According to the defendants, with this knowledge, the plaintiff blackmailed them into dropping its claim against the said Gulf African Bank Limited as a condition precedent to releasing the defendants' securities which it disparately needed to conduct its business. These averments are in the defence and counterclaim but nowhere in the replying affidavit.

32. The defendants have not explained how the alleged duress and undue influence was done. They have not even attempted to show the correlation between the securities held by the two banks mentioned in the defence and the debt mentioned in the agreement and the deed of guarantee and indemnity. Where in an application for summary judgment propositions are made in proof of the claim, the respondent is under an obligation to counter the averments in a replying affidavit. A general statement in the defence will not suffice in the circumstances. It was so held in Zola & Another (As Executors or Legal Representatives of Bronislaw Sirley- Deceased) v Ralli Brothers Limited & Another (1969) COAEA 1 (KLR) where the then apex court stated;

> 'Normally a defendant who wishes to resist the entry of summary judgment should place evidence by way of affidavit before the judge showing some reasonable ground of defence. This is clear from the words of Order XXXV, rule 2, which states:-

33. The court may thereupon unless the defendant by affidavit, or by his own viva voce evidence or otherwise, shall satisfy that he has a good defence on the merits, or discloses such facts as may be deemed sufficient entitle him to defend, pronounce judgment accordingly."

34. The chronology of events leading to the alleged undue influence or duress have not been explained and this court is not inclined to accept that there was undue influence or duress exerted on the defendants in executing the agreement and the deed of indemnity.

35. The principle of duress as a vitiating factor is applicable where the party seeking to rely on it is able to show that the other party applied compulsion or some threat and the pleading party acted in fear of the possible outcome of his lack of cooperation. On the other hand, undue influence will apply where the party pleading the same establishes that the other party was in a more advantageous or powerful position than him and it is proved that he was driven to enter into the agreement by the disadvantageous position, he found himself in. Undue influence would be exerted where one party is in a superior bargaining power than the party who seeks to have the court find in its favour. In the case before me, the defendants have not shown what bargaining power the plaintiff enjoyed against them which influenced them to unwillingly execute the agreement. The defendants' allegations that the 1st defendant's business was down and could only be saved by the signing the agreement and the deed of guarantee and indemnity have not been proved.

36. The pleaded particulars of fraud revolve around existence of civil suit number E181 of 2020. In further defence, the defendant claim that the suit is res judicata Hcc number E061 of 2020. The onus of proving that the suit is res judicata was on the defendants. The defendants did not exhibit the pleadings and determination of the court in the said suit despite the fact that the 1st defendant was a party to the said suit.

37. I have looked at the record of the two suits in this court's case tracking system. I note that the Hcc number E181 of 2020 is still active before Honurable Justice Peter Mulwa while Hcc E061 of 2020 was closed on 20-09-2024. It is clear to me that Hcc E181 of 2020 is not against the defendants in this suit neither is the defendant in that suit sued under the same title as the defendants in this suit. In the suit, the plaintiff seeks full indemnity in relation to the loan the 1st defendant in this suit failed to pay while in this suit, the defendant is sued for failing to honour terms of the agreement dated 7th December 2022.

38. Parties in Hcc number E061 of 2020 are the plaintiff herein and Gulf African Bank Limited and the 1st defendant herein. I was unable to ascertain the cause of action but some applications indicate that the plaintiff herein was seeking the bank to provide statement of the 1st defendant's loan account. However, this does not in my view exonerate the plaintiff herein from liability. The defendants were the ones who took the loan and can be said to be the primary debtors. It is therefore my view that the suits do not involve the same parties although the same may have the 1st defendant as a common denominator.

39. The suits were filed two years before the agreement and the deed of guarantee and indemnity were executed. As I have held elsewhere above, the defendants were aware of existence of these suits as at the time they appended their signatures in the agreement and the deed of guarantee and indemnity. In view of this, I do not see any element of fraud as held in Gichinga Kibutha v Caroline Nduku (2018) KEELC 3981 (KLR) where the court stated that;

> 'With respect to a contract, fraud means and includes any of the acts set out below committed by a party to a contract, or with his connivance or by his agent with the intent to deceive another party thereto or his agent or to induce him to contract: -

a. the suggestion as a fact, of that which is not true by one who does not believe it to be true;

b. the active concealment of a fact by one having knowledge or belief of the fact;

c. a promise made without intention of performing it;

d. any other act fitted to deceive; and

e. any such act or omission or the law declares to be fraudulent.

40. Equity has exercised a general jurisdiction in case of fraud, sometimes concurrent with and sometimes exclusive of common law courts. Fraud would, therefore, consist of deceitful actions which may be made through either positive assertions or concealment of facts.'

41. The defendants have not in their replying affidavit made convincing narration of events or actions by the plaintiff which qualify to be or can be classified as fraudulent.

42. Having found that the agreement entered into and the guarantee of indemnity were not executed through fraud, misrepresentation, duress or undue influence, the last issue of consideration is whether in the circumstances, the defendant's defence raises any triable issue and counterclaim. As observed earlier, the defendant's defence and counterclaim are hinged solely on the claims of the above vitiating factors. I have seen the letters dated 13-02-2024, 28-02-2024, 5-03-2024 and 11-03-2024 attached to the plaintiff's supporting affidavit as annexures NM4 to NM7.

43. Of the above letters, only the one dated 5-03-2024 is drawn on a without prejudice basis and therefore not admissible in evidence. The other letters bespeak of the debt especially the one by the defendant's advocates dated 28-02-2024 which in all aspects admits the outstanding debt but pleads for understanding due to the defendant's financial instability and further proposes restructuring of installments so that the debt is cleared in December 2025. The letters have not been challenged or denied and are clear that the defendants were acknowledging existence of the debt. The defendants have also acknowledged as much in their defence and the replying affidavit safe for their attempt to nullify the contract. In view of these circumstances, I do not see any triable issue in the defence.

44. With the same narrative, the defendants counterclaimed for several declarations which incorporates Klapton Insurance Company Limited and Gulf Africa Bank Limited whose final effect would be to have loan granted by the bank deemed completely paid and some damages of Kshs 125,810,250/= and Kshs 90,585,615/=, general damages and costs of the suit. The defendants have not sought to join the bank and Klapton Insurance Company Limited as defendants or third parties in this matter.

45. In effect, if the counterclaim were to succeed, the defendants would have taken a loan of Kshs 332,000,000.00 from the bank, then instead of paying back they would have the same declared compromised and in addition get some special and general damages. That is the gist of the defendants' argument that once an insured event crystalises, the insured becomes discharged from liability. It would be fraudulent on the part of borrowers and a recipe for destabilising the insurance and lending markets if the courts were to countenance scenarios where a party would borrow a loan, insure the same, then deliberately default and expect to go scot free since the insurance company is available to pay the loan. In my view such would amount to the defendants unjustly enriching themselves and not the plaintiff as the defendants want this court to believe. Similarly, with the collapse of the claim of fraud, misrepresentation, undue influence and duress, counterclaim as well has no legs to stand on.

46. Clause 6 of the agreement provided that upon default, the debt shall attract interest at 15% per annum from the date of default. The supporting affidavit is not explicit on the date the default occurred safe

to state that as at 29th February 2024, the 1st defendant had accumulated arrears of Kshs 52,189,750.00. The agreement is also not clear whether the interest was to be applied on the arrears only or the entire outstanding sum. The statement of account exhibited as annexure NM-3 of the plaintiff's supporting affidavit does not appear to have charged interest even with intermitted defaults. In my discretion, I hold that with the unclarity, the interest of the sum awarded in this matter should apply from the date of filing the suit.

47. The upshot of the above is that the only orders that commend themselves to me are orders for summary judgment as there is nothing to go for trial. Consequently, the plaintiff's application dated 10th June 2024 is allowed in the following terms;

    a. Judgement is entered for the plaintiff against the defendants jointly and severally for a sum of Kshs 206,189,750.00.

    b. The above amount shall attract interest at the rate of 15% per annum with effect from the date of filing this suit until payment in full.

    c. The defendants shall pay the costs of this suit.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JANUARY 2025.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Ruling delivered in presence of Mr. Omagwa holding brief for Mr. Kibanga for the plaintiff and Mr. Omondi holding brief for Dr. Kiplagat for the defendants.