



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**APPELLATE SIDE**

**(Coram: Odunga, J)**

**CIVIL APPEAL NO.136 OF 2017**

**THE MONARCH INSURANCE COMPANY LTD.....APPELLANT**

**-VERSUS-**

**MAGRATE MUTAVE PETER.....RESPONDENT**

**(Being an appeal from the Judgment of the Chief Magistrate's Court at Machakos by the Honourable Magistrate I.M. KAHUYA (SPM) delivered on 7<sup>th</sup> September, 2017 in Machakos Chief Magistrate's Court Civil Suit No.104 of 2017)**

**BETWEEN**

**MAGRATE MUTAVE PETER.....PLAINTIFFS**

**VERSUS**

**THE MONARCH INSURANCE COMPANY LTD.....DEFENDANT**

**JUDGEMENT**

1. On 27<sup>th</sup> February, 2017, the Respondent herein, **Magrate Mutave Peter**, filed a plaint dated 19<sup>th</sup> January, 2017 before the Chief Magistrate's Court Machakos in Machakos CMCC No. 104 of 2017 (the declaratory suit) seeking a declaration that the Appellant is bound to honour and/or satisfy the judgemental Machakos CMCC No. 953 of 2013 – **Magrate Mutave Peter vs. Laban Maina Mwangi** (the primary suit) and an order compelling the Appellant to pay the Respondent the sum of Kshs 179,246/= plus interests therein and the costs. She also sought the costs of the declaratory suit.

2. The cause of action, according to the plaint was that the Appellant was the insurer of motor vehicle registration no. KSS 593 which it allegedly insured vide policy no. HD/0800/000912/2012 TPO against any liability required to be covered under paragraph (b) of section 4 of the **Insurance (Motor Vehicle Third Party Risks) Act**, Cap 405, Laws of Kenya (the Act). According to the Respondent, on 17<sup>th</sup> February, 2013, she was travelling as a lawfully passenger in the said vehicle when due to negligence of the driver thereof the said vehicle lost control, veered off its lane and overturned occasioning the Appellant severe injuries.

3. As a result, the Respondent instructed her advocates to send a statutory notice pursuant to section 10(2) of the said Act and on 25<sup>th</sup> September, 2013 the said advocates instituted the primary suit against the owner of the said vehicle seeking damages for the injuries sustained. On 4<sup>th</sup> November, 2015, it was pleaded that judgement was entered for the Respondent against the Appellant in the said suit in the sum of Kshs 104,650/=, costs of Kshs 56,282/= and interests which the Respondent pleaded amounted to Kshs 18,314/= totalling Kshs 179,246/=. Vide a letter dated 5<sup>th</sup> November, 2016 the Appellant was notified of the said judgement and was requested to settle the same but refused, neglected and/or declined to do so.

4. In its defence dated 16<sup>th</sup> March, 2017, the Appellant denied that it insured the said vehicle under the said policy or at all hence it was not liable to settle the judgement obtained against its registered owner as there was not contract of insurance between it and the owner of the said vehicle. It was also denied that the Defendant in the primary suit was the Appellant's insured hence the Appellant was not obliged to satisfy the decree issued therein. Apart from that the Appellant denied that it was served with the statutory notice as alleged by the Respondent.

5. The Respondent filed a Notice of Motion dated 3<sup>rd</sup> March, 2017 grounded on Order 2 Rule 15, Order 51 of the **Civil Procedure Rules** and all other enabling provisions of the law, seeking that the Appellant's said defence be struck out on the ground that the same was frivolous, a

sham and otherwise an abuse of the court process. She sought that summary judgement be entered for the Respondent against the Appellant as sought in the plaint. She also sought the costs of the application. In the supporting affidavit the Respondent reiterated her averment in the plaint and annexed copies of the police abstract report, statutory notice and the letter acknowledging its receipt and averred that in those circumstances, the Appellant had no defence to the suit.

6. In its replying affidavit, the Appellant similarly reiterated the contents of its defence and averred that its defence raised serious triable issues which ought to have gone for a hearing and for determination on merit.

7. In a rejoinder, the Respondent averred that it was too late in the day for the Appellant to claim that it did not insure the vehicle in question or that the police in question was not valid without repudiating the policy.

8. In her judgement, the learned trial magistrate relied on the decision in **Co-operative Insurance Company Ltd vs. John Kabui Njiri HCCA No. 119 of 2003** and **Blue Shield Insurance Company Ltd vs. Raymond Buuri M'riemberia [1998] eKLR** in her finding that the defence comprised of mere denials of the existence of the primary suit. It was the learned trial magistrate's finding that if the Appellant intended to avoid its statutory obligation, it ought to have filed a declaratory suit against the Respondent to the effect that it was entitled to avoid its obligations under the contract of insurance. In the end the learned trial magistrate found that there was no reason why the Appellant ought not to satisfy the judgement in the primary sought and proceeded to allow the application effectively granting the orders sought in the plaint together with the costs.

9. It is that decision that has provoked this appeal in which the following grounds of appeal have been identified:

**1) The learned magistrate erred in law and fact in striking out the Defendants defence filed on 16<sup>th</sup> March, 2017 without any legal and/or evidential justification.**

**2) The learned magistrate erred in law and fact in entering summary judgment in favour of the plaintiff against the Defendant.**

**3) The learned magistrate erred in law and fact in entering judgment in favour of the plaintiff against the defendant for the sum of Kshs. 179,246/=.**

**4) The learned magistrate erred in law and fact in condemning the Defendant to pay Kshs. 179,246/= without any legal and/or evidential justification.**

**5) The learned magistrate erred in law and fact in failing to appreciate the impeccable defence filed by the defendant and thereby arriving at a wrong and erroneous conclusion.**

**6) The learned magistrate erred in law and fact in failing to appreciate the long established principle of stare decisis, bringing law into confusion and thereby driving an erroneous finding and conclusion.**

10. It was submitted on behalf of the Appellant that though the court exercises discretionary powers in striking out pleadings, Order 2 rule 15(1) of the **Civil Procedure Rules**, has established clear principles which guide the court in the exercise of that power. It was submitted that striking out of pleadings is a drastic remedy that should only be resorted to only where a pleading is a complete sham and reliance was placed on the case of **D.T. Dobie and Company (Kenya) Ltd vs. Muchina (1982) KLR 1**. According to the Appellant, these principles now draw, not only from judicial precedent, but from the principles of justice enshrined in the Constitution especially in Article 47, 50 and 159. The first guiding principle is that, every Court of law should pay homage to its core duty of serving substantive justice in any judicial proceeding before it, which explains the reasoning that the Court should aim at sustaining rather than terminating a suit.

11. It was submitted that in accordance Constitutional Principle and Policy, Courts should recognize the act of striking out a pleading (plaint or defence) completely divests a party of a hearing, thus, driving such party away from the judgment seat. Therefore, the power to strike out a suit or defence should be used sparingly and only on the clearest of cases where the impugned pleading is 'demurer or something worse than a demurer' beyond redemption and not curable by even an amendment. Thirdly, in case of a defence, the court must be convinced upon looking at the defence, that it is a sham; it raises no bona fide triable issue worth a trial by the court. And a triable issue need not be one which will succeed but one that passes the **Sheridan J's** test in **Patel vs. E.A. Cargo Handling Services Ltd. [1974] E.A. 75** at P. 76 (**Duffus P.**) that "...a triable issue ...is an issue which raises a prima facie defence and which should go to trial for adjudication." Therefore, on applying the test, a defence which is a sham should be struck out straight away.

12. According to the Appellant, its defence is not a sham and the same should be reinstated since it clearly sets out triable issues that should be determined in Court.

13. As regards summary judgement, the Appellant relied on **Mercy Karimi Njeru & Another vs. Kisima Real Estate Limited [2015] eKLR**, **I CDC vs. Daber Enterprises Ltd (2000) 1 EA 75**, **Kenya Trade Combine Ltd v N. M. Shah [2001] eKLR**, **Job Kilach v Nation Media Group Ltd, Salaba Agencies Ltd & Michael Rono [2015] eKLR** and submitted that in the instant suit, whether the Defendant in the primary suit was the insured of the Appellant/Defendant in the present suit is a triable issue that can only be determined upon parties being heard on merit before a Court of law. Therefore, the Appellant cannot be called upon to settle the Judgment sum of Kshs.179, 246/= if motor vehicle registration number KSS 593 was never insured by it.

14. It was further submitted that *the Appellant's Statement of defence filed on 16<sup>th</sup> March, 2017 raises triable issues and thus they should be given a chance to defend their case. The said issues were identified as whether* it was the insurer of motor vehicle registration number KSS 593 at the material time when the accident occurred; it denies knowledge of **Magret Muvate Peter** and that she ever procured insurance cover for motor vehicle registration number KSS 593 from the Appellant; that it did issue a policy of insurance to the said **Magret Muvate**

Peter in respect of motor vehicle registration number KSS 593; it also denied that there was an accident involving motor vehicle registration number KSS 593 and the Respondent on the material date and that judgment had been obtained by the Respondent in respect of the said accident; that a statutory notice was served as required by the law and in particular Cap 405; whether the Respondent is under any contractual or statutory duty to satisfy the judgment as the Respondent was not a person covered under the subject policy under the provision of **Insurance (Motor Vehicle Third Party Risks Act) Cap 405**. According to the Appellant, the issues raised in this defence can be collapsed into two which are whether there was a valid policy of insurance in respect of motor vehicle registration number KSS 593 and who was the insured and whether a statutory notice served upon the Respondent.

15. Based on the foregoing the Appellant prayed that the summary Judgment be set aside and the Defence reinstated.

16. In opposing the appeal, it was submitted on behalf of the Respondent that the Appeal herein is unmerited and ought to be disallowed. According to the Respondent, the Appellant has not shown what irrelevant factors the trial court took into account or what relevant factors it failed to take into account when it made its ruling.

17. According to the Respondent, the trial court's decision was very clear in allowing the Application and it has not been demonstrated by the Appellants that she erred in so holding. The Appeal herein is therefore only intended to delay the course of justice and the court was urged to dismiss the same with costs to the Respondent.

#### **Determination**

18. I have considered the issues raised in this appeal.

19. The principles guiding the striking out of pleadings and cases is now well settled. These principles, as set out in **D T Dobie & Company (K) Ltd vs. Muchina [1982] KLR 1**, are 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. The rationale for this is due to a realisation that the exercise of the powers for summary procedure are draconian, coercive and drastic. And because a party may thereby be deprived of his right to a plenary trial, the court exercises those powers with the greatest care and circumspection and only in the clearest of cases as regards the facts and the law. The summary procedure should therefore only be adopted when it can be clearly seen that a claim or case is clear and beyond doubt unarguable and the judicial system would never permit a party to be driven from the judgement seat without any court having considered his right to be heard, except in cases where the cause of action was obviously and almost incontestably bad.

20. As already indicated the application before the trial court was brought under Order 2 rule 15 of the **Civil Procedure Rules**. Subrule (1) of the said provision provides as follows:

***At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—***

***(a) it discloses no reasonable cause of action or defence in law; or***

***(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.***

21. In the exercise of its powers under the said provision there are certain well established principles that a court of law is to adhere to. Whereas the essence of the said provisions is the striking out of an action or defence, that is a jurisdiction that must be exercised sparingly and in clear and obvious cases and unless the matter is plain and obvious, a party to civil litigation is not to be deprived of his right to have his suit tried by a proper trial. 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 or striking out a defence for not disclosing a reasonable cause of action defence for being otherwise an abuse of the process of the court.

22. The power to strike out pleadings must be sparingly exercised and it can only be exercised in clearest of cases. If a pleading raises a triable issue even if at the end of the day, it may not succeed then the suit ought to go to trial. However, where the suit is without substance or groundless or fanciful and or is brought is instituted with some ulterior motive or for some collateral one or to gain some collateral advantage, which the law does not recognise as a legitimate use of the process, the court will not allow its process to be a forum for such ventures. To do this would amount to opening a front for parties to ventilate vexatious litigation which lack bona fides with the sole intention of causing the opposite party unnecessary anxiety, trouble and expense at the expense of deserving cases contrary to the spirit of the overriding objective which requires the court to allot appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

23. The grounds upon which the application was based were that the defence filed was scandalous, frivolous, vexatious and was otherwise an abuse of the process of the Court.

24. A pleading is scandalous if it states (i) matters which are indecent; or (ii) matters that are offensive; or (iii) matters made for the mere purpose of abusing or prejudicing the opposite party; or (iv) matters that are immaterial or unnecessary which contain imputation on the

opposite party; or (v) matters that charge the opposite party with bad faith or misconduct against him or anyone else; or (vi) matters that contain degrading charges; or (vii) matters that are necessary but otherwise accompanied by unnecessary details. See **Blake vs. Albion Life Ass. Society (1876) LJQB 663; Marham vs. Werner, Beit & Company (1902) 18 TLR 763; Christie vs. Christie (1973) LR 8 Ch 499.**

25. However, the word “scandalous” for the purposes of striking out a pleading under Order 2 rule 15 of the Civil Procedure Rules is not limited to the indecent, the offensive and the improper and that denial of a well-known fact can also be rightly described as scandalous. See **J P Machira vs. Wangechi Mwangi and Nation Newspapers Civil Appeal No. 179 of 1997.**

26. But they may not be scandalous if the matter however scandalising is relevant and admissible in evidence in proof of the truth of the allegation in the plaint or defence so that when considering whether the matter is scandalous regard must be had to the nature of the action.

27. A matter is frivolous if (i) it has no substance; or (ii) it is fanciful; or (iii) where a party is trifling with the Court; or (iv) when to put up a defence would be wasting Court’s time; or (v) when it is not capable of reasoned argument. See **Dawkins vs. Prince Edward of Save Weimber (1976) 1 QBD 499; Chaffers vs. Golds Mid (1894) 1 QBD 186.**

28. Again a pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble and expense. See **Bullen & Leake and Jacobs Precedents of Pleading (12<sup>th</sup> Edn.) at 145.**

29. A matter is said to be vexatious when (i) it has no foundation; or (ii) it has no chance of succeeding; or (iii) the defence (pleading) is brought merely for purposes of annoyance; or (iv) it is brought so that the party’s pleading should have some fanciful advantage; or (v), where it can really lead to no possible good. See **Willis Vs. Earl Beauchamp (1886) 11 PD 59.**

30. Pleading tend to prejudice, embarrass or delay fair trial when (i) it is evasive; or (ii) obscuring or concealing the real question in issue between the parties in the case. It is embarrassing if (i) it is ambiguous and unintelligible; or (ii) it raises immaterial matter thereby enlarging issues, creating more trouble, delay and expense; or (iii) it is a pleading the party is not entitled to make use of; or (iv) where the defendant does not say how much of the claim he admits and how much he denies. See **Strokes vs. Grant (1878) AC 345; Hardnord vs. Monk (1876) 1 Ex. D. 367; Preston vs. Lamont (1876).**

31. A pleading which tends to embarrass or delay fair trial is described as a pleading which is ambiguous or unintelligible or which states immaterial matters and raises irrelevant issues which may involve expenses, trouble and delay and that which contains unnecessary or irrelevant allegations which will prejudice the fair trial of the action and lastly a pleading which is abuse of the process of the court really means in brief a pleading which is a misuse of the Court machinery or process. See **Trust Bank Limited vs. Hemanshu Siryakat Amin & Company Limited & Another Nairobi HCCC No. 984 of 1999.**

32. A pleading is an abuse of the process where it is frivolous or vexatious or both.

33. Where the pleading as it stands is not really and seriously embarrassing it is wiser to leave it un-amended or to apply for further particulars. See **Kemsley vs. Foot (1952) AC 325.**

34. In the **Raghibir Singh Chatte vs. National Bank of Kenya Limited Civil Appeal No. 50 of 1996,** the Court of Appeal held:

**“If a general traverse...were held to be sufficient and effectual, that would render meaningless provisions such as Order VI Rule 9(3) of the Civil Procedure Rules and even the decisions of this Court such as Magunga General Stores vs. Pepco Distributors Limited [1988-92] 2 KAR 89. The position of the law...is that a mere denial or general traverse in defence is not sufficient and a defendant who does not specifically plead to all the issues raised in a plaint risks the probability of his defence being struck out or being held to constitute an admission of the issues raised in the plaint.”**

35. In **Magunga General Stores vs. Pepco Distributors Ltd. [1987] KLR 150; [1988-92] 2 KAR 89 [1986-1989] EA 334** the same Court held:

**“Mere denial is not a sufficient defence in a claim for breach of contract for goods sold and delivered and cheques issued in settlement thereof. There must be a reason why the defendant does not owe the money. Either there was no contract or it was not carried out or failed. It could also be that payment had been made and could be proved. It is not sufficient therefore to simply deny liability without some reason given.”**

36. However, in **The Co-Operative Merchant Bank Ltd. vs. George Fredrick Wekesa Civil Appeal No. 54 of 1999** the Court of Appeal stated as follows:

**“The power of the Court to strike out a pleading under Order 6 rule 13(1)(b)(c) and (d) is discretionary and an appellate Court will not interfere with the exercise of the power unless it is clear that there was either an error on principle or that the trial Judge was plainly wrong...Striking out a pleading is a draconian act, which may only be resorted to, in plain cases...Whether or not a case is plain is a matter of fact...Since oral evidence would be necessary to disprove what either of the parties says, the appellant’s defence cannot be said to present a plain case of a frivolous, scandalous, vexatious defence, or one likely to prejudice, embarrass or delay the expeditious disposal of the respondent’s action or which is otherwise an abuse of the process of the court. The defence raises a fundamental issue, namely, whether there was any misrepresentation as alleged by the respondent, a question which, cannot possibly be answered at the stage of an application for striking out; nor will it be competent for the court of appeal to try to answer it as its jurisdiction only extends to identifying whether, if any, there are issues which are fit to go for trial. The court has no doubt whatsoever, that the above is a fundamental triable**

issue...A Court may only strike out pleadings where they disclose no semblance of a cause of action or defence and are incurable by amendment. The appellant's defence cannot be said to fall into that category and had the trial Judge considered fully all the matters alluded to, he would not have come to the same conclusion as he did."

37. In **Yaya Towers Limited vs. Trade Bank Limited (In Liquidation) Civil Appeal No. 35 of 2000** the same court expressed itself thus:

**"A plaintiff is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant can demonstrate shortly and conclusively that the plaintiff's claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court, it must be allowed to proceed to trial...It cannot be doubted that the Court has inherent jurisdiction to dismiss that, which is an abuse of the process of the Court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved...If the defendant assumes the heavy burden of demonstrating the claim is bound to fail, he will not be allowed to conduct a mini trial upon affidavits...It is not the length of arguments in the case but the inherent difficulty of the issues, which they have to address that, is decisive... The issue has nothing to do with the complexity or difficulty of the case or that it requires a minute or protracted examination of the documents and facts of the case but whether the action is one which cannot succeed or is in some ways an abuse of the process of the Court or is unarguable...Where the plaintiff brings an action where the cause of action is based on a request made by the defendant he must allege and prove inter alia, both the act done and the request made for doing such an act. In the absence of any request shown to have been made by the defendant in the particulars delivered of such allegation, it would not be possible for the plaintiff to prove any request made by the defendant and without this the essential ingredient of the cause of action cannot be proved and the plaintiff is bound to fail...No suit should be summarily dismissed unless it appears so hopeless that it is plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment."**

38. Section 10(1) of the said Act provides as hereunder:

***(1) If, after a policy of insurance has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of section 5 (being a liability covered by the terms of the policy) is obtained against any***

***person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.***

39. The side note to that section is "**Duty of insurer to satisfy judgments against persons insured**". In **Bushell vs. Hammond [1904] 2 KB 563**, it was held that though it is true that the marginal notes do not form part of a statute, yet some help can be derived from the side note to show what the section is dealing with. From the side note it is clear that the section deals with the obligation by the insurer to satisfy judgements obtained against persons insured. What clearly comes out from the said provision it is clear that for an insurance company to be under a statutory obligation to satisfy a decree certain condition precedent must be satisfied. Firstly, before a judgement is obtained, there must have been a policy of insurance in effect. Secondly, the judgement must have been in respect of a liability required to be covered by a policy under paragraph (b) of section 5 (being a liability covered by the terms of the policy). Thirdly, the judgement must have been obtained against a person insured by the policy.

40. In this case, apart from the police abstract report which indicated the owner of the vehicle as one **Laban Maina Mwangi**, there was no evidence that it was the said person who was insured by the appellant herein. The Learned Trial Magistrate proceeded on the premise that there was no tangible evidence proving that the Appellant was not the insurer of the accident vehicle in the primary suit. In arriving at that decision, the learned trial magistrate seems to have shifted the onus of proving the fact of existence of the policy onto the Appellant. That, in my view, was a misdirection since the Learned Trial Magistrate expected the Appellant to prove a negative. However, as was held by **Seaton, JSC** in the Uganda Case of **JK Patel vs. Spear Motors Ltd SCCA No. 4 of 1991**:

**"The proving of a negative task is always difficult and often impossible, and would be a most exceptional burden to impose upon a litigant."**

41. Therefore, when the Appellant denied that it insured the said person against whom judgement was obtained, it became incumbent upon the Respondent to adduce evidence proving that the said vehicle was not only insured by the Appellant but that judgement was in fact obtained against a person insured by the policy. In this case there was no evidence that **Laban Maina Mwangi** was such a person. The fact that a statutory notice was given to the Appellant does not necessarily make the Appellant liable if in fact, it was not liable under the Act.

42. In the ruling the Learned Trial Magistrate alluded to the fact that since the Appellant was aware of the proceedings in the primary suit which it neither defended nor appealed against, that was evidence of liability. With due respect that was a misdirection since the Appellant had no obligation to defend a suit filed against a person who in its view was not a person insured by the policy. Of course if the person sued was insured and it fail to defend, it would, subject to satisfaction of the other conditions have no defence. Again the learned trial magistrate stated that if the Appellant intended to avoid its statutory obligation, it ought to have filed a declaratory suit against the plaintiff to the effect that it was entitled to avoid its obligations under the contract of insurance. Section 10(4) of the Act provides as hereunder:

***No sum shall be payable by an insurer under the foregoing provisions of this section if in an action commenced before, or within three months after, the commencement of the proceedings in which the judgment was given, he has obtained a declaration that, apart from any provision contained in the policy he is entitled to avoid it on the ground that it was obtained by the non-disclosure of a material fact, or by a representation of fact which was false in some material***

*particular, or, if he has avoided the policy on that ground, that he was entitled so to do apart from any provision contained in it:*

*Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not thereby become entitled to the benefit of this subsection as respects any judgment obtained in proceedings commenced before the commencement of that action, unless before or within fourteen days after the commencement of that action he has given notice thereof to the person who is the plaintiff in the said proceedings specifying the non-disclosure or false representation on which he proposes to rely, and any person to whom notice of such action is so given shall be entitled, if he thinks fit, to be made a party thereto.*

43. In my view, contrary to the position taken by the Learned Trial Magistrate, the declaratory suit by the insurer is to be filed against the insured with a notice to the claimant who may opt to be joined to those proceedings.

44. It must now be clear that the defence filed by the Appellant disclosed at least one triable issue regarding the issue whether the person against who judgement in the primary suit was obtained was a person insured by the policy. Accordingly, the decision striking out the Appellant's defence and entering judgement was improper. Accordingly, this appeal succeeds, the ruling of the learned trial magistrate delivered on 7<sup>th</sup> September, 2017 in Machakos CMCC No. 104 of 2017 is hereby set aside and it is hereby directed that the case be heard on its merits.

45. From the ruling, the Appellant did not comply with the directions of the learned trial magistrate with respect to the filing of the submissions. Accordingly, each party will bear own costs of this appeal. It is so ordered.

**Read, signed and delivered in open Court at Machakos this 27<sup>th</sup> day of April, 2020**

**G V ODUNGA**

**JUDGE**

**Delivered at 9.30 am in the absence of the parties having been notified through their known email addresses. CA Josephine**