

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 491 OF 2010

GATEWAY INSURANCE COMPANY LIMITED... APPELLANT

VERSUS

RAWFORD LIMITEDRESPONDENT

From the ruling of Hon. A.K. Ndungu, SPM at Milimani Commercial Court, delivered on 27th October, 2010 in CMCC No. 7920 of 2008)

JUDGMENT

This appeal arises from a ruling of the lower court delivered on 27th October, 2010. The said ruling related to an application filed by the respondent for summary judgment under Order XXXV Rules 2 and 3 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act.

The facts were brief. The appellant insured a motor vehicle registration No. KAX 424 C said to be owned by the respondent. The motor vehicle was said to have been stolen and the respondent lodged a claim. The appellant refused and or declined to meet the claim. That defence is on record. The respondent then filed an application for summary judgment. The application was opposed. The lower court found that the defence raised no triable issues and that it consisted of mere denials. The application for summary judgment was therefore allowed. This appeal followed.

Both parties have filed submissions. The order sought is discretionary and I have considered all the material presented before me. I have looked at the pleadings and also the memorandum of appeal. Looking at the statement of defence filed by the appellant in the lower court, and more specifically paragraphs 3 to 10 thereof, it is clear that it cannot be said to be a mere denial by any standards. Several triable issues stand out.

The appellant denied that the plaintiff owned the subject motor vehicle or that it was stolen or at all. It was also denied that the appellant insured the said motor vehicle or that the policy was ever issued by it. It was also disputed that the motor vehicle was stolen. The appellant was also accused of breaching the terms of the policy, if at all it existed, and any loss suffered was also contested. Those issues cannot be wished away by an application of summary judgment.

The foregoing being the case, the finding of the lower court cannot be upheld. This is a proper case to interfere with the discretion of the court.

Accordingly this appeal is allowed and the ruling of the lower court set aside in its entirety. The lower court file shall be returned to the lower court for hearing on merit. The costs herein shall be awarded to the appellant.

I notice from the record that the decretal sum was deposited in an interest earning account. The ends of justice will be met if this sum is released to the appellant.

Orders accordingly.

Dated, signed and delivered at Nairobi this 26th Day of July, 2017

A. MBOGHOLI MSAGHA

JUDGE