



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**

**CIVIL APPEAL NO.138 OF 2011**

***(APPEAL FROM THE JUDGMENT OF HON. K. T. KIMUTAI (SRM) DATED AND  
DELIVERED ON 28<sup>TH</sup> JUNE, 2011, IN THE ORIGINAL KISII CMCC NO. 420 OF 2010)***

**AFRICA MERCHANT ASSURANCE CO. LTD.....APPELLANT**

**VERSUS**

**CONFAS MARANGA NTABO.....RESPONDENT**

**JUDGMENT**

**Background**

1. This is an appeal from the ruling and decree of the lower court (K.T. Kimutai SRM) delivered on 28<sup>th</sup> June, 2011 in **Kisii CMCC 420 of 2010**.
2. On or about 15<sup>th</sup> January, 2008, the respondent herein, Confas Maranga Ntabo, was travelling as a passenger in motor vehicle registration number **KAP 642T Toyota Nissan/Datsun** (herein referred to as the “**suit motor vehicle**”) belonging to Charles Miyogo (herein referred to as the “**the insured**”) along Kisii-Sotik Road when at Rianyandaro shopping centre, an accident occurred in which the respondent sustained serious bodily injuries.
3. On 15<sup>th</sup> March 2010, the respondent sued the insured in **Kisii CMCC 103/2010** (herein the “**accident suit**”) for damages arising out of the said accident.
4. On 27<sup>th</sup> July 2010, judgment was delivered in favour of the respondent against the insured the accident suit for the sum of **Kshs. 754,055/=** general damages plus costs and interest.
5. On 13<sup>th</sup> September, 2010 the respondent sued the appellant in **Kisii CMCC 420 of 2010** (the enforcement suit) seeking a declaration that the appellant is under Section 10 of the insurance motor vehicle third party bound to pay the decretal amount in **Kisii CMCC 103 of 2010** in view of the fact that the decretal amount was in respect of a liability covered by an insurance policy **NO. AMA/070/1/00B19/0712** issued by the appellant to the insured.
6. On 20<sup>th</sup> October 2010, the appellant filed his defence to the enforcement suit through M/s Nyamurongi & Co. advocates in which it generally denied knowledge that the accident ever occurred. It further denied that it issued the insurance cover as alleged or that the suit accident which the respondent was given an award of **Kshs. 754,055/=** existed. The appellant further contended that if at all it insured the suit motor vehicle, then the said cover did not extend to any liability arising out of the use of the said motor vehicle

by the respondent, and therefore, the appellant was not liable to make good the decree issued in the accident suit being **Kisii CMCC 103 of 2010**.

7. By a chamber summons application dated 8<sup>th</sup> November, 2010 brought under **Order 6 Rule 13 (1) (b) (c) and (d) of the Civil Procedure Rules**, the respondent sought for orders to strike out the appellant's defence to the enforcement suit while stating that the said defence was scandalous, frivolous and was solely intended to delay the fair hearing of the subject matter as, according to the respondent, the appellant was duty bound and legally enjoined to satisfy the judgment obtained against her insured in the accident suit. The respondent also prayed that judgment be entered for him in the sum of **Kshs. 796,841/=** plus costs and interest.

8. In his supporting affidavit to the chamber summons sworn on 8<sup>th</sup> November 2010, the respondent deponed that he had indeed sued the appellant's insured in the accident suit and attached a copy of the pleadings, the police abstract and duly served notice of institution of suit at annexures "**CMN1**", "**CMN2**" and "**CMN3**" to attest to the fact that the appellant had not only insured the suit motor vehicle against third party risks, but was also fully aware of the existence of the case after having been duly served with the notice of institution of suit. The respondent also attached a copy of the accident suit's decree as annexure "**CMN4**" to the supporting affidavit.

9. By her affidavit in reply to the chamber summons dated 8<sup>th</sup> November, 2010, Daphine Kemunto, the appellant's legal officer/Company Secretary stated that the appellant's defence to the enforcement suit was not frivolous but raised several triable issues a few of which she listed as, whether;

**i. There is in existence a judgment in favour of the plaintiff as pleaded in the plaint.**

**ii. Indeed the plaintiff (hereinafter referred to as "the applicant" was awarded the sum of Kshs. 754,055.00 plus costs and interest as pleaded in the plaint.**

**iii. The respondent had insured motor vehicle KAP 642T vide Policy of Insurance No. P/No.AMA/070/1/OOB19/07/12.**

**iv. If at all the respondent had insured motor vehicle KAP 642T, whether the policy of insurance afforded to its alleged insured, Charles Miyogo Mudne, covered liabilities arising out of the use of motor vehicle KAP 642T by passengers.**

**v. The suit against the respondent is an abuse of due process.**

10. The appellant's Company Secretary also deponed that the enforcement suit was predicated upon a non-existent judgment since aggregate award in the said case being **Kshs. 746,220/=** was markedly different from the sum pleaded in the plaint.

11. The appellant's deponent also took issue with the decree issued in the accident suit on 27<sup>th</sup> July 2010 by stating that the said decree was a nullity because the respondent had not paid the further court fees demanded by the court after the judgment vide a letter dated 18<sup>th</sup> August 2010.

12. The appellant contended that a decree obtained without the payment of the further court fees amounted to a subversion of the due process of court and therefore such a decree could not form the foundation of the enforcement suit.

13. The appellant's deponent added that its attention was not drawn to the existence of the judgment sought to be enforced before the institution of the enforcement suit and therefore, the suit was premature.

14. In his ruling on the chamber summons application delivered on 28<sup>th</sup> June 2011, which is the subject matter of this instant appeal, Hon. K. T. Kimutai stated as follows:

**“I have also taken the existent (sic) to peruse the defendant’s statement of defence dated 20<sup>th</sup> October, 2010. I find that what is raised therein are mere denials. And even the few issues said to be triable per the replying affidavit (para 2 (a)) have been duly answered in my ruling hereto fore already. Besides Section 10 (1) of Cap 405 comprehensively answers the other lingering question (s). Reasons wherefore, I do hereby find that the instant application has merit and is properly before court. The same is hereby granted as prayed. No further proceedings by the plaintiff prior to payment of further court fees.”**

15. The appellant, being aggrieved by the said ruling/judgment appeals to this court.

16. The grounds of appeal are listed in the memorandum of appeal as follows:

**1. The learned trial magistrate misdirected herself on the law respecting the entry of summary judgment vis a vis sections 5 (b) and 10 (2) of Cap 405 of the Laws of Kenya.**

**2. The learned trial magistrate did not (appropriately consider) and/or treated the appellant’s submissions and legal authorities perfunctorily.**

**3. The learned trial magistrate failed to apply his mind to issues raised in the appellant’s Defence in Kisii CMCC No. 420 OF 2010 (hereinafter referred to as “the primary suit” and thereby misdirected himself.**

**4. The learned trial magistrate failed to appropriately appraise the evidential and/or probative value of the purported decree exhibited in the respondent’s Chamber Summons dated 8<sup>th</sup> November, 2010.**

**5. The learned trial magistrate erred in holding that the appellant’s defence in the primary suit contained mere denials whereas the same raised bonafide triable issues among which is whether indeed the cover allegedly issued by the appellant extended to and covered the risk complained of by the respondent in the primary suit.**

**6. The learned trial magistrate failed to address his mind on the probative value of a decree and Certificate of costs purportedly issued in the original suit which the respondent admitted should not have been in existence without the requisite court fees having been paid.**

**7. The learned trial magistrate erred in holding that the Decree purportedly issued in the primary suit was good in law notwithstanding admissions to the contrary by the respondent upon being cross examined.**

**8. The learned trial magistrate erred in failing to hold that the respondent’s costs could not have been assessed and certified upon his admitted failure to pay further court fees.**

**9. The learned trial magistrate failed in his ruling to appreciate that where court process is subject to payment of court fees, default to pay court fees renders any process otherwise obtained, an abuse of its process and a nullity.**

17. When the appeal came up for hearing before me on 10<sup>th</sup> February 2016, parties agreed to canvass their argument on appeal by way of written submissions which the appellant and respondent filed on 22<sup>nd</sup> February 2016 and 22<sup>nd</sup> April 2016 respectively.

### **Appellant’s submissions**

18. The appellant through its advocates M/s O. M. Otieno & Co. advocates argued that the trial court ought not to have struck out its defence as it raised numerous triable issues such as, whether or not the respondent fell in the class of person covered under the policy in terms of Section 5 of the Insurance

(Motor Vehicles Third Party Risks) Act (hereinafter referred to as ‘**the Act**’), thereby giving rise to an obligation to the appellant to settle the claim.

19. The appellant further contended that the respondent had not paid further court fees demanded by the court prior to the issuance of a decree, and therefore, the decree issued, without the payment of the further court fees, was a nullity and not capable of being acted upon by the court. On this point the appellant cited the case of **South Nyanza Sugar Co. Ltd vs Samuel Osewe Ochillo & Co. Advocates [2007] eKLR** where the court stated at page 3:

**“The Deputy Registrar, however, had no power to exempt the respondent from paying the requisite fee with the result that the plaint was not properly filed and that being so, there was no valid plaint upon which the learned judge of the superior court could proceed to deliver his judgment. The judgment was based on no valid plaint.”**

20. The appellant’s case was that the trial court ought not to have entered judgment in favour of a person who had admitted that he had not paid the requisite court fees.

21. The appellant also argued that paragraph 6 of the statement of defence was categorical that the policy of insurance issued to the insured did not extend to or cover the use of the suit vehicle by the respondent and as such this was a triable issue which the trial court ought not to have overlooked or wished away. The appellant supported his argument on this point by citing the case of **Solomon Okeyo Okwama & Another vs Kenya Alliance Insurance Co. Ltd [2009] eKLR** in which it was held that:

**“What is the position in the instant case? My finding is that the plaintiff has not demonstrated to this court that motor vehicle KAL 129T, owned by Collins Otiwo was being so driven as a passenger ferrying motor vehicle. I also find and hold that there is no evidence before me to show that the deceased herein was travelling in the Defendant’s motor vehicle as a fare paying passenger. Section 5 of the Act seems to say that the statutory cover does not cover risks of death or bodily injury to employees of he insured arising out of or in the course of employment, or to the death or injury to passengers save in those cases of motor vehicles which such persons are carried for reward or hire or by reason or in pursuance of a contract of employment; or to any contractual liability. In the instant case, there is no evidence by the plaintiff to show that the motor vehicle in question was used for purposes other than personal use by the insured. It is my view therefore that the risk which the deceased eventually suffered was not covered under the policy of insurance that was then in force. That being the case herein, the Defendant is not obliged to satisfy the judgment and the decree in the primary suit.”**

### **Respondent’s Submissions**

22. M/s Ochoki and Co. Advocates for the respondent submitted that the mere fact that further court fees had not been paid at the time the decree was obtained could not render the decree a nullity as the appellant had not proved that the said decree was obtained through fraud and/or misrepresentation and neither was the integrity of the court that issued the decree in question. The respondent argued that the decree before the court was a legal and authentic document and this is why the court, when making the ruling the subject of this appeal, directed the respondent to pay the further court fees before taking any further step in the matter.

23. The respondent relied on the provisions of Article 20 (3) (b) of the Constitution which provides that the court ought to adopt the interpretation that most favours the enforcement of a right or a fundamental freedom.

24. The respondent further cited article 48 of the Constitution which states that:

**“The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.”**

25. The respondent argued that it would have been unfair for his suit to be dismissed on the ground that he had not paid further court fees yet he already had a judgment in his favour.

26. The respondent further stated that it was the appellant's primary duty to demonstrate that it had a defence that is genuine, arguable and raises triable issues and not merely state that he had a good defence on merit.

27. According to the respondent, the appellant's defence consisted of mere blanket denials and did not address every single allegation of fact contained in the plaint.

28. The respondent contended that the appellants defence filed before the lower court served no useful purpose raised no bona fide triable issues, but was meant to save face and delay the respondent's realization of the fruits of his judgment.

29. The respondent cited numerous authorities to fortify his argument on what constitutes triable issues and instances where the court will be justified to strike out defence for disclosing no triable issues and observed that the instant appeal lacks merit since the defence filed by the appellant before he lower court was scandalous, frivolous, vexatious and raised no reasonable cause of action.

30. The respondent also argued that the appellant is liable to satisfy the decree issued against its insured and it had not shown that the contract between it and the insured did not satisfy the requirements set out in Section 5 of the Act in any part of the statement of defence. The respondent's case was that the appellant had not avoided or cancelled the insurance policy upon being made aware of the claim in the original suit and it was therefore bound to satisfy the judgment passed against its insured. The respondent added that the decree is properly on record having been issued by a court of competent jurisdiction.

### **Analysis and Determination**

31. After considering the contents of the record of appeal, the grounds of appeal stated in the memorandum of appeal and the submissions of counsel, I note that my main task is to determine whether the lower court was justified in striking out the defence filed by the appellant to the respondent's declaratory suit.

32. It is worthy to note that the appellant does not dispute the fact that the lower court had in **Kisii CMCC 420 of 2010** entered judgment against its insured in favour of the respondent in the sum of **Kshs754, 055/=** general damages plus costs an interest, and that it is this initial judgment that led the respondent to file a declaratory suit against the appellant which declaratory suit ended in the upholding of the judgment entered in the primary suit after the appellant's defence was struck out.

33. In its arguments in this appeal, the appellant contended that its defence ought not to have been struck out for three reasons.

Firstly, the appellant stated that the defence raised numerous triable issues; secondly, since the respondent had not paid the further court fees demanded by the court prior to the issuance of the decree, the decree obtained by the respondent was a nullity incapable of being acted upon by the court in the declaratory suit and lastly; that the policy of insurance issued to the insured did not cover the use of the suit motor vehicle by the respondent.

34. In determining whether or not the lower court was justified to strike out the appellant's defence and enter judgment for the respondent, this court will be enjoined to consider the following three issues:

**(a) Whether the appellant's defence raised triable issues.**

**(b) Whether nonpayment of further court fees invalidated the court's decree issued in the primary suit.**

**(c) Whether the respondent was covered under the policy of insurance issued by the appellant to its insured. This point is closely tied to the first issue of the defence having triable issues and insurance policy.**

35. The only triable issue alluded to by the appellant in its submissions, was at paragraph 6 of the statement of defence, that was struck out, where it is alleged that the policy of insurance issued over the insured's suit vehicle did not extend to or cover any liability arising out of the use of the motor vehicle by the respondent.

36. The appellant's case was that the Act clearly provides for classes of people who are excluded from the insurance cover and since the appellant raised this before the lower court, it was a triable issue which ought to have been determined on merit after a full trial.

37. This brings me to question if the allegation that the insurance cover did not extend to the respondent was a triable issue. I do not think so. Courts have time and again, when confronted with the same question, held that the answer is under **Section 10 (1) of the Act**, which stipulates that an insurer under an obligation to satisfy the judgment obtained against the insured and pay to the person entitled to the benefit of the said judgment all sums payable thereunder with costs and interest, notwithstanding the fact that the insurer may be entitled to avoid or cancel the policy vis a vis the insured or may have even avoided or cancelled it. **Section 5 (b) of the Act** states as follows:

**“5. Requirements in respect of insurance policies.**

**In order to comply with the requirements of section 4, the policy of insurance must be a policy which—**

**(b) Insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of, or bodily injury to, any person caused by or arising out of the use of the vehicle on a road: Provided that a policy in terms of this section shall not be required to cover— (i) liability in respect of the death arising out of and in the course of his employment of a person in the employment of a person insured by the policy or of bodily injury sustained by such a person arising out of and in the course of his employment; or (ii) except in the case of a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, liability in respect of the death of or bodily injury to persons being carried in or upon or entering or getting on to or alighting from the vehicle at the time of the occurrence of the event out of which the claims arose; or (iii) any contractual liability; (iv) liability of any sum in excess of three million shillings, arising out of a claim by one person.”**

**Section 10 (1) of the Act** on the other hand states as follows:

**“(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.”**

38. The only instances when the appellant would not have been liable to satisfy the decree in are set out under **Section 10 (2) of the Act** as follows:

**“(2) No sum shall be payable by an insurer under the foregoing provisions of this section—**

(a) in respect of any judgment, unless before or within fourteen days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings; or

(b) in respect of any judgment, so long as execution thereon is stayed pending an appeal; or

(c) in connexion with any liability if, before the happening of the event which was the cause of the death or bodily injury giving rise to the

liability, the policy was cancelled by mutual consent or by virtue of any provision contained therein, and either—

(i) before the happening of the event the certificate was surrendered to the insurer, or the person to whom the certificate was issued made a statutory declaration stating that the certificate had been lost or destroyed; or

(ii) after the happening of the event, but before the expiration of a period of fourteen days from the taking effect of the cancellation of the policy, the certificate was surrendered to the insurer, or the person to whom the certificate was issued made such a statutory declaration as aforesaid; or

(iii) either before or after the happening of the event, but within a period of twenty-eight days from the taking effect of the cancellation of the policy, the insurer has notified the Registrar of Motor Vehicles and the Commissioner of Police in writing of the failure to surrender the certificate.”

39. In the instant appeal, the appellant has not shown that it was not served with the statutory notice before or within 14 days after the commencement of the proceedings giving rise to the decree. In fact, the respondent had shown, in his affidavit in support of his application to strike out the defence at paragraph 5 of the said affidavit, through annexure “CNM3” that he had properly served the appellant with statutory notice on 18<sup>th</sup> March, 2010 which notice was received and stamped by the appellant at its Nairobi office. The respondent has also not argued that there was a stay of the lower court’s decree pending appeal, or that the policy of insurance was cancelled or that it had obtained a declaration under **Section 10 (4) of the Act** so as to entitle it to repudiate liability in this case.

40. It is therefore my finding that the mere allegation by the appellant that the policy of insurance issued to the insured did not extend cover to the respondent who was a passenger in the suit motor vehicle was a defence coming too late in the day as the appellant ought to have sought and obtained a declaration from court to the effect that it was not liable to satisfy a decree obtained by the respondent immediately upon being served with the statutory notice and not at the enforcement suit stage of the case. The allegation that the policy did not cover risk of injury to the respondent while travelling as a passenger in the suit motor vehicle could not be a triable issue in the enforcement suit as that was a matter between the appellant and its insured.

41. A similar scenario arose in the case of **BlueShield Insurance Ltd vs Raymond Buuri M’Rimberia** and the court held as follows:

**“Thus once statutory liability Under Section 5 (b) is covered by the terms of the policy, which in the instant case was, and is not denied by the appellant, the insurer is obliged under Section 10 (1) of the Act to satisfy the judgment obtained against the insured and pay to the person entitled to the benefit of the judgment all sums payable thereunder with costs and interest, notwithstanding that the insurer may be entitled to avoid or cancel the policy vis a vis the insured or may have even avoided or cancelled it.”**

42. In the instant case, I find that the appellant’s denial of the existence of a judgment and decree in the

accident amounted to mere denial of the obvious. I further find the appellant's contention that nonpayment of the further court fees resulted in the nullity of the judgment and decree issued as a consequent thereof to be misguided for the following reasons:

43. Firstly, a demand for payment of further court fees normally happens long after a judgment has been rendered in a case. Nonpayment of further court fees therefore cannot undo what the court has already done, which is to deliver a judgment. The fact still remains that a judgment had already been delivered in favour of the respondent in the accident suit and the respondent was entitled to seek enjoy the fruits of such a judgment as it already existed on the court record and had not been varied or set aside. The situation in the instant appeal is very different from the circumstances in the case of **South Nyanza Sugar Company vs Samuel Osewe Ochillo (supra)** cited by the appellant. In the cited case, the court struck out a suit for non-payment of court filing fees required to file the plaint in which case the court held that there was no valid plaint upon which the court could proceed to deliver a judgment.

44. In the instant case however, the plaint in respect to the enforcement suit was validly on record and filed upon the payment of the requisite court filing fees. The further court fees was in respect to the accident suit and these two suits, while relating to the same accident, were distinct in nature and thus, non-payment of further court fees in one case cannot be imported in the next suit.

45. Secondly, it is my humble opinion that payment of further court fees is enforceable through the administrative function of the court normally enforced by the same court by staying any further court action by the decree holder until the further court fees is paid in full. In the instant case, for reasons not at disclosed by either the appellant or the respondent, the court in its wisdom issued the respondent with a decree, non-payment of the further court fees notwithstanding.

46. At this point of the proceedings the lower court's decree has not been invalidated or proven to be a forgery. It remains a valid decree of the court and I find no reason to declare it a nullity in view of the fact that the judgment of the accident suit is also still a valid judgment of the court.

47. For the reasons stated hereinabove, I hold that the trial court was justified in striking out the appellants defence and entering judgment against it as he deed. I do not find any merit in the appeal and hereby dismiss it with costs to the respondent.

**Dated, signed and delivered in open court this 17<sup>th</sup> day of August, 2016**

**HON. W. A. OKWANY**

**JUDGE**

**In the presence of:**

- Mr. Otieno for the Appellant
- Mr. Ochoki for the Respondent
- Omwoyo court clerk