REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

HCCA NO. 34 OF 2015

DIRECTLINE ASSURANCE COMPANY LIMITED.....APPELLANT

VERSUS

ANDERSON MUINDI & PETER MBAE SEBASTIAN

(Suing as the legal Representatives of

JOY GITUGI (DECEASED).....RESPONDENTS

CONSOLIDATED WITH

CIVIL APPEAL NO. 15 OF 2016

CIVIL APPEAL NO. 16 OF 2016

CIVIL APPEAL NO. 17 OF 2016

CIVIL APPEAL NO. 18 OF 2016

CIVIL APPEAL NO. 19 OF 2016

CIVIL APPEAL NO. 20 OF 2016

CIVIL APPEAL NO. 21 OF 2016

***(Being an appeal from the ruling and orders of Hon. A.G . Kibiru Senior Principal Magistrate at Chuka Law Courts delivered on 28th October, 2015*)**

J U D G M E N T

1. These Appeals were consolidated on 13th October, 2016 and Appeal No. 34 of 2015 was constituted the lead file. The background to the appeals is that on or about 14th August, 2011, motor vehicle registration No. KAW 351 W (hereinafter "*the said motor vehicle")* was travelling along Chuka-Meru road while carrying passengers when it overturned and rolled at Mitheru area. As a result of the said accident, various people perished including those in appeal numbers 34 and 15 of 2015 while others, including those in appeal numbers 16, 17, 18, 19, 20 and 21sustained various injuries (hereinafter collectively referred to as "*the Respondents").*

2. Pursuant to the said accident, those affected commenced suits before the Chuka Principal Magistrate's Court (hereinafter *"the Primary Suits")* against one Peter Micheni Miguongo (hereinafter *"the Insured")*

for compensation. Those suits were prosecuted and various judgments obtained against the insured.

3. On obtaining judgment as aforesaid, the Respondents commenced suits before the Chuka Principal Magistrate's Court for enforcement of the said suits against the Appellant under Section 10 of the Insurance (Motor Vehicle Third Party Risks) Act, Cap 405 of the Laws of Kenya (hereinafter *"the Act"*). Thereafter, the Respondents took out Motions on Notice for judgment on admission in the alternative for the Appellant's defence to be struck out. The Appellant had in the meantime on 24th March, 2015 applied for stay of proceedings pending the determination of Chuka PMCC No. 50 of 2012 in which it had sued the insured with a view to avoid policy No.7001109 issued by it to the insured. In a ruling delivered on 28th October, 2015, the trial court entered judgment on admission against the Appellant and dismissed the Appellant's application for stay. That ruling applied to all the primary suits. That ruling triggered the present appeals.

4. In its Amended Memorandum of Appeal, the Appellant set out 13 grounds of appeal which were quite correctly summarised into four (4) by Mr. Kissinger, Learned Counsel for the Appellant as follows:-

a). that the trial court erred in entering judgment on admission;

b). that the trial court erred in relying on obsolete law as pronounced in the case of **Thomas Muoka Muthoka & Anor .v. ICEA [2008] eKLR;**

c). that the trial court entered in relying on the Supporting Affidavit of Don Z. Ogweno, Advocate for the Respondent; and

d). that the trial court erred in failing to consider the Appellant's application dated 18th March, 2015.

5. This being a first appeal, this court is enjoined to review and re-evaluate the facts afresh and come to its own independent findings and conclusions (see case of **Selle .v. Associated Motor Boat Co. Ltd & Others [1963] EA 123)**. This court has carefully reviewed the record and considered the respective counsels submissions and authorities relied on.

6. The first ground was that the trial court erred in entering judgment on admission. Mr. Kissinger learned counsel for the Appellant submitted that, the trial court did not consider the principles applicable in an application for judgment on admission as set out in the cases for **Choitram .v. Nazali [1984] KLR 327 and Kassam .v. Sachani [1982] KLR 191**; that there was no clear and unequivocal admission of liability; that the Appellant had denied the allegations in the plaint and singled out the denial of service of notice under section 10 (1) of the Act. That on the authority of **Blue Shield Insurance .v. Joseph Mboya Oguttu [200] eKLR,** the alleged notice by the Respondents was no notice at all. That the notice appearing at page 35 of the record had not been acknowledged. On his part, Mr. Ogweno for the Respondents submitted that the trial court did not enter Judgment on admission but had allowed the application as it was unopposed.

7. I did not understand Mr. Ogweno's submissions well. His submission that the trial court did not enter judgment on admission but that it only allowed the application because it was unopposed have no basis. Looking at the Ruling at pages 234 to 236 of the record, the trial court determined the dispute before it as follows:-

"The upshot of the foregoing is that the defendant's application to stay this suit fails and is dismissed with costs. The plaintiff's application is not opposed. I proceed to grant the same as prayed in terms of prayer 1 with costs to the applicant/plaintiff. This ruling apply mutatis mutandix to civil cases number 12, 13, 14 and 15 all of 2015 and civil case numbers 144, 145 and 146 of 2014."(Underlining supplied).

Prayer Number 1 of the Motion had sought judgment on admission. It is therefore clear that the trial court had entered judgment on admission as had been prayed for in the application.

8. In the case of **Choitram .v. Nazari [1982-1988] 1KAR 437** Madan, JA (as he then was) stated at pages 441 to 442:-

> ***"For the purposes of OX11 r.6, admissions have to be plain and obvious, as plain as a spike staff and clearly readable because they may result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning. Much depends on the language used. The admission must leave no room for doubt that the parties passed out the stage of negotiations on a definite contract. It matters not even if the situation is arguable, even if there is a substantial argument; it is an ingredient of jurisprudence, provided that a plain and obvious case is established upon admission by analysis." (Underlining supplied.)***

From the foregoing, it is clear that before a judgment on admission can be entered, the admission must be clear and unequivocal. It should be discerned from either the pleadings themselves or the correspondence exchanged between the parties. It matters not if there be argument provided however, that such admission is discernible from analysis.

9. The ruling does not show if the trial court referred to the above principles. However, the question is whether in arriving at the ruling of 28th October, 2015, there sufficient admissions to support that decision. The Respondents cases were that they were passengers in the said motor vehicle at the time it was involved in the subject accident; that they issued notices of intention to sue to both the Insured and the Appellant before lodging the primary suits; that on lodging the primary suits, various judgments were entered in their favour and that they sought to enforce the same against the Appellant as the insurer of the insured for the use of the said motor vehicle at the material time.

10. In its defence filed on 24th March, 2015, the Appellant admitted that the insured had taken out a policy of insurance with itself. The Appellant indicated however, that due to non disclosure of material facts, it had commenced **Chuka PMCC No. 50 of 2012** to avoid that policy. In paragraphs 5 and 6 of its defence which was uniform in all the suits, the Appellant denied the alleged deaths and/or injuries of the claimants as well as the notices of the intention to sue.

11. In their Motions for judgment on admission, the Respondents exhibited amongst others, the following documents; the demand notices dated 3rd January, 2012, the plaints in the primary suits, death certificates and/or treatment notes and Medical Reports, Police Abstracts, the decrees in the primary suits, a letter dated 18th January, 2012 from the Appellant to the Respondents Advocates; a plaint in Chuka PMCC No.50 of 2012 and documents relating to policy No.7001109.

12. An analysis of the said documents shows the following; the Police Abstract and death certificates and/or Medical Reports proved that the Respondents were passengers in the said motor vehicle and were involved in the subject accident; that the Respondent issued notices on 3rd January, 2012 to amongst others the Appellant, of the intention to sue under Section 10 (1) of the Act; that they had sued the Appellant's insured in the primary suits and had obtained various decrees therein against him. As regards the notices to sue, the letter by the Appellant dated 18th January,2012 to the Respondents Advocates is clear, it admitted receipt of the notices dated 3rd January, 2012 in the following terms:-

> ***"We refer to the above matter and acknowledge receipt of your demand letters dated 03/01/2012.***
>
> ***Kindly note that our investigations are ongoing and we shall revert in due course". (Underlining supplied).***

13. The reference of that letter was the subject accident and various claimants including the Respondents. There can never be any better evidence of receipt of notice of intention to sue dated 3rd January, 2012 than the Appellants letter dated 18th January, 2012. To my mind, the production of the police Abstract, death certificates and/or medical reports, the decrees in the primary suit, the notices of 3rd January, 2012 and acknowledgment dated 18th January, 2012 appearing at page 177 of the record, completely obliterated any defence that had been raised in the defence filed on 24th March, 2015. In this regard, the

Appellant having admitted to have issued a policy of Insurance to the insured as well as receipt of the notices dated 3rd January, 2012, this was a clear case of admission which only depended on analysis. The analysis which the trial court undertook was whether in the circumstances, the Appellant was liable under section 10 of the Act which the trial court found for the Respondents.

14. Mr. Kissinger submitted that on the authority of **Blueshield Insurance .v. J.M Mboya** (supra), the trial court should have found that there was a triable issue that the demand notice was not akin to the notice under section 10 of the Act. Looking at the Act, it does not specify what the notice should contain or how it should look like. To my mind, all that is required is to notify an insurer that an accident involving a third party and its insured has occurred and that as a result thereof, the insured intends to pursue compensation. It is a notice that is only meant to notify the insurer the likelihood of liability to settle a judgment obtained by a third party against its insured. In the circumstances of this case, I find that the notices dated 3rd January, 2012 and acknowledged on 18th January, 2012 was sufficient. For this reason, the trial court cannot be faulted for admitting the documents produced on behalf of the Respondents and which were never opposed or denied by way of a Replying Affidavit. The assertions on behalf of the Respondents were unopposed and that none of the documents were relied on was denied or challenged. In this regard, the trial court in my view, was right in entering the judgment as it did. Ground 1 is hereby rejected.

15. The second ground was that the trial court erred in relying on obsolete law pronounced in the case of **Thomas Muoka Muthoka & Anor .v. ICEA** (**supra).** It was submitted that this case was determined in 2009 before the **Blue Shield decision** of 2009. That since the decision in the **Thomas Muoka** case, there has been changes in the law notably the Insurance (Motor Vehicle Third Party Risks) Amendment, Act 2013 which imposes many obligations before a holder of a decree can be paid. Mr. Ogweno submitted that the 2013 Amendment Act did not repeal sections 8 and 16 of the Act; that it only brought about structured payments.

16. I have considered the decision in **Thomas Muoka Muthoka** Case. The case was considering the effect of section 10 (1) of the Act. The court found in that case that, once a judgment has been obtained by a 3rd party in a primary case, provided such party has complied with the provisions of section 10 of the Act as to the issuance of the notice, an insurer cannot escape liability to settle such a claim unless it brings itself under the exceptions set out under that section. I have also carefully considered the Court of Appeal decision in the **Blue Shield Insurance .v. JM Ogutu** (supra) case. In the **Blue Shield Case,** the court of Appeal's decision was based on the grounds that the policy number relied on in the notice and Affidavit in support of the application to strike out the defence conflicted. The insurer in that case denied issuing the subject policy. That case neither changed the law nor did it specify how a notice under section 10 of the Act is to look like. Further, I have considered the Insurance (motor vehicle Third Party Risks) Amendment, 2013 and have seen that the amendments that are relevant are those that were effected in section 5 of the Act, detailing the various awards to be made on the categories of injuries. The amendments that sought to impose unreasonable requirements on the decree holder under section 10 of the Act were declared unconstitutional by **Onguto J in LSK .v. Attorney General & 3 Others [2016] eKLR**. To my mind, that decision has not been overturned and I consider it to be good law.

17. To the contrary, the **Thomas Muoka Case** (supra) reiterated what the law under section 10 of the Act was decreed to be by the Court of Appeal in **New Great Insurance Company of India Ltd .v. Lilian Evelyn Cross and Another [1966] EA 90** and by **Warsame J** (as he then was) in **Edwin Ogada Odongo .v. Phoenix of E.A Assurance Company Ltd KSM HCCC NO. 132 of 2003 (UR).** In the latter case, **Warsame J** set out the only four (4) defences open to an insurer under section 10 of the Act. These are:-

a. that no notice has been served upon the insurer before or within (14) days after commencement of the primary suit;

b. that there is a stay of execution;

c. that the policy was cancelled by mutual consent or by virtue of a condition precedent; or

d. that the insurer has obtained a declaration that he is entitled to avoid the policy within three (3) months after or before commencement of the primary suit.

18. In the **New Great Insurance Company of India Case** (supra) the Court of Appeal delivered itself at pg 97 thus;

> ***"The effect therefore, of this section is that a condition in a policy of insurance providing that no liability shall arise under the policy is ineffective in so far as it relates to such liabilities as are required to be covered by a policy under section 5 (b) of the Act and in so far as any such condition is prayed in aid to avoid liability to a third party who has been injured. In so far, however, as the relationship of the insurer is concerned, then, by virtue of the proviso to the section, if the policy contains provision requiring the insured to repay to the insurer the amount which the insurer has had to pay to a third party in circumstances in which the condition applies, such a provision is perfectly valid."***

19. This court fully subscribes to the foregoing pronouncements and holds that the **Thomas Muoka** case does not constitute obsolete law. It is but the restatement of what the law is and should be under section 10 of the Insurance Act. The trial court was not in error in feeling bound by that decision and ground number 2 is accordingly rejected.

20. The third Ground was that the trial court erred in relying on the Supporting Affidavit of Don Z. Ogweno Advocate for the Respondents. Mr. Kissinger submitted quite correctly that, an Advocate cannot swear an Affidavit in controversial matters on behalf of his client. That on the authority of **Janet Osebe Gechuki** (supra) case the Supporting Affidavit should have been struck out. On his part, Mr. Ogweno submitted that he only relied on pleadings and there was nothing controversial in his supporting Affidavit.

21. It is not in dispute that the Affidavit in support of the application was sworn by Mr.Don Z. Ogweno, Advocate having the conduct of the matters on behalf of the Respondents. Rule 8 of the Advocates (Practice) Rules, 1966 prohibits Advocates from appearing or giving evidence in a matter he is appearing. However, the proviso to that rule reads:-

> ***"Provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit or formal or non-contentious matter of fact in any matter in which he acts or appears."***

That proviso, in my view, allows an advocate to swear an affidavit where the matter in question is not contentious. Where the matter is merely formal. Where it is unlikely to call him to be cross-examined to prove the allegations sworn to in such an Affidavit.

22. In the present matter the only denial in the defence was that the Respondents were injured or perished in the subject accident or that the requisite notice under section 10 was ever given. I have carefully considered the Supporting Affidavit of Don Z. Ogweno sworn on 25th June, 2015. In that affidavit, Mr. Ogweno stated that; he had the conduct of the suits on behalf of the Respondents; that he had in his lawful custody the documents relating to their claim; that on their instructions, he had issued notices to the Appellant before action; that his firm had filed suits against the Appellant's insured and had obtained various judgments; that in the documents filed in court, the Appellant had admitted the Respondent's claim. I have carefully scrutinised the averments of Mr. Ogweno in said Affidavit as well as the documents he produced before the trial court. I have found that all the said averments were based on the documents which he either authored or were in his possession. None of the said document or averment was controverted or challenged as to be said to have been contentious and therefore requiring proof. They were matters of a formal nature. In my view, there was nothing controvertial that was contained in his affidavit to fall under rule 8 of the Advocates (Practice) Rules aforesaid. In this regard, the trial court was not in error in admitting or relying on the said Supporting Affidavit. Ground No. 3 is therefore rejected.

23. The fourth and final ground was that the trial court erred in failing to consider the Appellant's application dated 18th March, 2015. It was submitted for the Appellant that the Appellant's said

application had sought to stay the proceedings yet the trial court had failed to consider and determine it in terms of the case of **K.P.L.C .v. Esther Wanjiru Wokabi [2014] eKLR**. On his part Mr. Ogweno submitted that, the Appellants application was considered and dismissed and that the **K.P.L.C .v. Esther Wanjiru case** was not applicable as the said case was concerned with an application for stay of proceedings pending appeal yet there was no appeal pending in this case.

24. At pages 106 to 111 of the record, is the Appellant's Motion brought under a Certificate of Urgency seeking, inter alia, to stay the proceedings of the suits pending the hearing and determination of **Chuka PMCC No. 50 of 2012 Directline Assurance Co. Ltd .v. Peter Micheni** (*"the said suit").* The main ground was that the Appellant had filed the said suit seeking an order that it was not entitled to indemnify the insured from the liability arising from the subject accident; that the object of the said suit will be prejudiced if the suit was not stayed and that it was in the interests of justice that the order of stay was granted. The application was opposed vide grounds of opposition filed on 28th April, 2015 to the effect that; it was premised on vacuo; that it was overtaken by events and therefore non-starter and that it was premised on misconceptions in view of the admissions contained in the Affidavit in support.

25. Looking at the Ruling, the trial court indicated that it had considered both the applications and the grounds of opposition by the Respondent to the Appellants application. The trial court indicated that in view of the holding in the **Thomas Muoka Case** (supra) it dismissed the Appellant's application with costs. Can it then be said that in the circumstances trial court did not consider the said application? I do not think so. Although the trial court did not go to the nitty-gritties of the application, I don't think it dismissed it peremptorily, This is so because, the trial court seems to have considered the main ground for the said application. The application, was made on the basis that, the Appellant had filed the **Chuka PMCC No. 50 of 2012 Directline Assurance Co. Ltd .v. Peter Micheni**; that it would be prejudicial if the Respondents' suits were determined before that suit; that the said suit sought to avoid Policy No.7001109 which the Appellant had issued to the insured. The trial court cited the case of **Thomas Muoka Muthoka Case** in dismissing the said application. It made a finding that, once section 10 of the Insurance Act has been met, the insurer has no defence to a claim by a third party in an enforcement suit. In other words, the trial court found that, the fact that an insurer has a pending suit meant to avoid a contract of insurance (read a policy), that is no defence to a suit by a third party who is seeking to enforce a judgment/decree obtained in a primary suit. That in my view, was a proper interpretation of section 10 of the Act.

26. In the event it is found that the trial court did not conclusively consider the Appellant's application dated 18th March, 2012, this court can still consider the same by virtue of section 78 of the Civil Procedure Act. The said section provides:-

> ***"78(1) Subject to such conditions and limitations as may be prescribed an appellate court shall have power-***
>
> ***a. to determine a case finally;***
>
> ***b. .....***
>
> ***c. .....***
>
> ***d. .....***
>
> ***e. .....***
>
> ***(2) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits, instituted therein."***

This means that this court can still consider that application and make the requisite orders as the justice of the case shall demand.

27. I have already set out what the said application was seeking. The Principles applicable in an application for stay of proceedings of a suit were well set out in the case of **Global Tours & Travels Ltd NBIHC W.U. Cause No. 43 of 2000** (UR). In that case the court held that:-

> ***"As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice. The sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the utilization of judicial time and whether the application has been brought expeditiously." (Underlining mine).***

These principles are applicable pending in all applications for stay of proceedings pending appeal or pending some other step.

28. It would seem from the ruling of the learned magistrate that although he did not refer to those principles, he singled out the principle of the prima facie unarguability of the **Case No. 50 of 2012**. That case was as against the insured and not the Respondents. That is why he cited and relied on the **Thomas Muoka case** which held that whether or not an insurer is entitled to avoid the policy, once a third party satisfies the provisions of section 10 of the Act, the insurer is bound to satisfy a judgment entered in a primary suit and thereafter seek any relief he might have against the insured under the policy between itself and the insured.

29. The application dated 18th March, 2015 was on the basis that the Appellant had commenced a suit (Chuka PMCC No. 50 of 2012) to avoid the policy between it and the insured. Under section 10 (4) of the Act, the insurer can avoid a judgment made in favour of a third party if *".... before or within three months after the commencement....."* of the primary suit, the Insurer has obtained a declaration that he was entitled to avoid the policy. The subject provision reads:-

> ***"(4) No sum shall be payable by an insurer under the foregoing provisions of this section if in any 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, if he has avoided the policy on that ground, that he was entitled so to do apart from the provision contained in it."***

30. I have carefully looked at the said application. The suit seeking to avoid the policy was filed on 23rd March, 2012; the cases in these appeals were filed on 4th July 2012 and the application by the Appellant was filed on 29th July, 2015 by which time no declaration to avoid the contract had been made. That application would have made sense, in my view, if the Appellant would have obtained a declaration that it was entitled to avoid the policy by the 4th of October, 2012 which would have been three (3) months from the commencement of the primary suits. As at the time the subject application was being considered by the trial court, no such declaration had been obtained. In this regard, since there was no declaration in its favour, its defence in the suits against it by the Respondents were unarguable. That I believe weighed heavily in the mind of the trial court in dismissing the application. In any event, applying the principles in the **Global Tours and Travels Case (supra).** I find that the Appellant's application dated 18th March, 2015 had no merit and was properly dismissed by the trial court.

31. In the premises, I find that the Appeals have no merit, the same are hereby dismissed with costs to the Respondents.

It is so decreed.

DATED and Delivered at Chuka this 13th day of December, 2016.

A.MABEYA

JUDGE

Judgment read and delivered in open court in the presence of all Counsels

A.MABEYA

JUDGE

13/12/2016