REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 156 OF 2006

JOSEPH MBUTA NZIU ……...……..……...……..…… PLAINTIFF

V E R S U S

KENYA ORIENT INSURANCE COMPANY LTD ……..DEFENDANT

JUDGMENT

1. The Plaintiff **JOSEPH MBUTA NZIU** was a passenger in motor vehicle Registration No. KAG 407X (the vehicle) on 12th December 1998 when it was involved in an accident. That accident claimed the life of the driver **SAMMY NZIOKA MUSAU** (Deceased) and left the Plaintiff seriously injured. The injuries the Plaintiff suffered left him disabled and bed ridden for a year after the accident.

2. It is not denied that the Plaintiff hired the vehicle from Tsavo Tours and Safaris Ltd (the hire company) on the very day the accident occurred. The Plaintiff filed a claim under **Case No. Mbsa HCCC No. 438 of 2001** against the Estate of the Deceased's driver of the vehicle. On 17th March 2005 judgment was entered by consent, in that suit, against the Defendant for Kshs. 1,500,000/- inclusive of interests and costs. According to that consent recorded in that judgment amount was payable within 45 days of that consent. It was not paid as per that consent and the Plaintiff filed this suit against the Insurer of the vehicle **KENYA ORIENT INSURANCE CO. LTD** seeking to enforce the judgment in **Mbsa HCCC No. 438 of 2001** as provided under Section 10 of the Insurance (Motor Vehicles Third Party Risks) Cap 405.

3. The Plaintiff's case was heard by Justice Maraga (as he then was|) and I heard the defence case.

ISSUES FOR DETERMINATION

a. What is the Defendant's liability vis-à-vis:-

i. **The Plaintiff being the hirer;**
ii. **There being no privity of contract between the Plaintiff and Defendant on the Policy of Insurance;**
iii. **Requirement for Notice under Section 10(2) of Cap 405;**
iv. **Failure of Plaintiff to sue the Insured.**

4. Before delving into the above issues I will state that in my opinion the mischief that Section 10(1) of Cap 405 was intended to address was a situation where an accident victim would obtain

judgment against an insured person but be unable to recover from such an insured the judgment amount because such an insured person is indigent. That Section is in the following terms-

> **"10. (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."**

ISSUE: PLAINTIFF THE HIRER

5. The Defendant by its defence pleaded that the Plaintiff's claim fails because the Plaintiff failed to sue the insured of the Defendant. The Defendant submitted that its insured was the hire company and not the Deceased driver. That the Plaintiff having obtained judgment against the Deceased driver, and not the insured company, the claim against the Hire Company, cannot succeed. The Defendant argued that Section 10 of Cap 405 provided that judgment could only be enforced against the Insurance Company when that judgment is entered against the insured.

6. The facts that emerged from the evidence adduced by the Plaintiff was that the Plaintiff hired the vehicle which was to be driven by the Deceased driver, and that the hire company authorized the Deceased to drive the vehicle. The car hire agreement was adduced in evidence and indeed there is a note in that agreement reflecting the name of the Deceased driver.

7. The Defendant relied on the Court of Appeal decision of **KENINDIA ASSURANCE CO. LTD – Vs- JAMES OTIENDE [1989]2 KAR 162**. The Defendant relied on the holding of that case as follows-

> **"The requirement in s 10(1) of the Insurance (Motor Vehicle Third Party Risks) act that judgment is obtained against the insured before the insurer becomes liable under the Act is an essential pre-condition of liability under the Act: without it the court has no jurisdiction to order the insurer to pay damages for injuries to the Respondent."**

8. The reporter of the case of **KENINDIA** (supra) failed to fully capture the facts of the case and accordingly when one reads the Judges' Ruling it is not possible to understand how the judges reached their conclusion.
9. The Plaintiff in this case cited the case of **PHILIP KIMANI GIKONYO –Vs- GATEWAY INSURANCE COMPANY LTD [2007]eKLR** which considered the **KENINDIA** case. The holding of the case shows that, as I stated before, the reporter of the case failed to communicate well. The Court stated thus-

> **"Now, it is important to note that in the Kenindia case the claimant was an employee of the insured, not a third party, and therefore was an exception to the categories of the people required to be covered under Section 5 of the act. The issue before that Court was one of "jurisdiction", that is, whether the High Court in the first place had jurisdiction to entertain a claim by an "employee" against the Insurance Company. And, of course, applying Section 5(b) (i), the Court held that there was indeed no judgment against the insured capable of enforcement. That, indeed, is a very different situation from the facts in the case before this Court. Here, the Appellant (Plaintiff in the Lower Court) was a third party in respect of whom it was mandatory to take out third party insurance covering the risk of death or bodily injury."**

10. The reporter of the **KENINDIA** case in his summary of facts stated in part-

> **"… in the instant suit the judgment had not been obtained against the <u>owner or the driver of the matatu</u>, being the <u>persons insured</u> under the Policy with the Appellant."** (underlining mine)

11. From the discussion of the **<u>KENINDIA</u>** case (supra) the **<u>GIKONYO</u>** case (supra) and from the reporters notes reproduced above, it is clear that the Learned Justices were dealing with very different set of facts in the **<u>KENINDIA</u>** case as opposed to the facts in this case. In this case there was unrebutted evidence, by the Plaintiff, that the Deceased driver was authorized by the hire company to drive the vehicle and to confirm that the hire company noted his name in the hire agreement. This is what the Plaintiff said in evidence on that issue:

> **"I had hired the vehicle from M/s Tsavo Tours & Safari Ltd. Both I and Sammy Musau were authorized to drive the vehicle."**

The Defendant did not call the hire company, its insured to rebut that evidence and accordingly the Plaintiff's evidence that the Deceased driver was authorized to drive by the hire company remained unchallenged.

12. The Defendant, although it had not pleaded the same, submitted that the Plaintiff's claim must fail because the Plaintiff having been the hirer of the vehicle he, by virtue of Section 3 of Cap 405 was not a third party and cannot claim cover under the Insurance Policy.

13. Section 3 of Cap 405 is the definition Section. Defendant referred to the definition in that Section of the word "***owner***" which is defined thus:

> **"In relation to a vehicle which is the subject of a hiring agreement or a hire-purchase agreement, means the person in possession under that agreement."**

Defendant laid emphasis on mention of hire in that Section and submitted that because Plaintiff was a hirer he was not a third party who would be covered by the Policy.

14. The Plaintiff's response was that the Defendant could not raise the issue that he was not a third party because that issue had not been pleaded. Further that the Defendant is stopped from raising that issue because it was represented at the hearing of **<u>Mbsa HCCC No. 438 of 2001</u>** when consent judgment was recorded.

15. The two responses raised by the Plaintiff are well taken; the Defendant was wrong to argue that being a legal issue it needed not to be pleaded. In my view it ought to have been pleaded that the Plaintiff's claim would fail because he was not a third party and such pleading would have put the Plaintiff on notice that he need to adduce evidence to rebut the same.

16. The Court of Appeal recently had to consider two cases in determining whether a party can rely on unpleaded issue as follows-

> "**The Court of Appeal in the case <u>INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & ANOTHER –Vs- STEPHEN MUTINDA MULE & 3 OTHERS [2014]eKLR</u>, considered with approval two foreign cases on the issue of parties being bound by their pleadings as follows-**
>
> > **"… the decision of the Malawi Supreme Court of Appeal in MALAWI RAILWAYS LTD –Vs- NYASULU [1998]MWSC 3, in which the learned Judges quoted with approval from an article by Sir Jack Jacob entitled "The present Importance of Pleadings." The same was published in [1960] <u>Current Legal problems</u>, at P174 whereof the author had stated-**
> >
> > **'As the parties are adversaries, it is left to each one of them to formulate his case in his**

own way, subject to the basic rules of pleadings … for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice….

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice.'

The Appellants also cited the Ugandan case of LIBYAN ARAB UGANDA BANK FOR FOREIGN TRADE AND DEVELOPMENT & ANOR Vs. ADAM VASSILIADIS [1986]UG CA 6 where the Uganda Court of Appeal (judgment of Odoki J.A) cited with approval the dictum of Lord Denning in JONES Vs. NATIONAL COAL BOARD [1957]2 QB 55 THAT-

'In the system of trial which we have evolved in this country, the Judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries.'"

Referring also to a decision of Nigerian Supreme Court our Court of Appeal

stated-

"ADETOUN OLADEJI (NIG) LTD Vs. NIGERIA BREWERIES PLC S.C. 91/2002, Judge Pius Aderemi J.S.C. expressed himself, and we would readily agree, as follows;

'…. it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded."

17. Having referred to the above, it is not entirely correct to say that the Court cannot base its judgment on an issue that is not pleaded. This was stated by the Court of Appeal in the case **DR. LEONARD KIMEU MWANTHI V RUKARIA M'TWERANDU M'IRIUNGI [2013]eKLR** viz-

"In our respectful view even if there was no specific application, the issue of how to conclude the succession cause was an issue that was left with the Court. See the case of ODD JOBS V MUBIA, 1970 EA Page 476, where it held:

i. **a Court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue has been left to the Court for decision;**

ii. **On the facts, the issue had been left for decision by the Court as the advocates for the**

appellant led evidence and addressed the Court on it."

18. The issue of whether the Plaintiff can be defined as the owner, and hence not a third party, ought however to have been pleaded and not left to be the subject of written submission.

19. That as it may be I am of the view that Defendant is in error to define the Plaintiff as the owner. In my view Section 3 which defines the owner would only be used when there was a dispute of who the owner is. There was no dispute in the case of ownership. Even the Defendant's own witness did not refer to the Plaintiff as the owner.

20. It follows that in respect of issue (a) (i) I find in favour of the Plaintiff. That is the Deceased driver was authorized driver and the Plaintiff is a third party as contemplated in Cap 405.

ISSUE: PRIVITY OF CONTRACT

21. The Defendant submitted that the Plaintiff not being a party in the contract of insurance could not enforce the same, that accordingly Plaintiff has no *locus standi* to sue to enforce that contract. In support of that submission Defendant relied on the holding in the case **STANDARD CHARTERED BANK KENYA LTD –Vs- INTERCOM SERVICES LTD & 4 OTHES [2004]2KLR** viz-

> **"If the complaint arose from breach of contract, then the party to the contract who could have enforced the contract was the first Respondent, an independent corporate entity capable of suing and being sued in its own capacity and which indeed did sue. The fifth Respondent, and for that matter the other Respondents, upon whose accounts no inquiry was made could not seek to enforce that contract."**

22. My simple response to that submission is that Plaintiff is by this suit enforcing judgment against Defendant as provided under Section 10 of Cap 405. It is that Section which draw the Plaintiff into the Policy of Insurance. It follows that because of that Section the principle of Law on privity of contract is not applicable.

23. On issue (a) (ii) I also find in favour of the Plaintiff.

ISSUE: FAILURE TO REBUTT EVIDENCE OF NO SERVICE OF NOTICE BEFORE SUIT

24. Section 10(2) (a) provides that judgment cannot be enforced against an insurance company unless notice is served on such company at least 14 days before commencement of suit. That Section is in the following terms-

> **"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."**

25. The Defendant pleaded in its defence that Plaintiff's claim must fail for lack of the Notice envisaged in Section 10(2)(a). Defendant then submitted that because the Plaintiff did not file a reply to that defence that issue was unrebutted.

26. In response to that submission the Plaintiff, quite rightly referred to the evidence of learned Advocate Kishore Nanji who, according to his evidence both in chief and in cross examination confirmed that he was instructed by the Defendant's Insurance Company to represent the Defendant sued in **Mombasa HCCC No. 438 of 2001**. He confirmed he entered the consent

judgment in that case under the instruction of the Defendant Insurance Company in this case.

27. While giving evidence in chief Mr. Nanji stated that the Defendant Insurance Company admitted receiving the Notice before commencement of suit dated 21st June 2001. The suit **Mbsa HCCC No. 438 of 2001** was filed on 30th August 2001. The following are Mr. Nanji's exact words-

> **"Para. 6 [of the Plaint] thereof states that the Notice had been given to the Defendant in that case. We admit Notice in that case. Following the consent judgment … I wrote to my clients Kenya Orient [the Defendants herein] …. The notice mentioned in paragraph 6 of the Plaint was sent to me along with the letter of instructions. That is a letter before action."**

28. Section 18(1) of the Evidence Act Cap 80 provides that statements made by parties to a suit or their agent is deemed as admission. The Section is in following terms-

> **"Statements made by a party to the proceeding, or by an agent to any such party, whom the Court regards in the circumstances of the case as expressly or impliedly authorized by him to make them, are admissions."**

29. Mr. Nanji as stated before when examined in chief and cross examined confirmed he represented Kenya Orient, the Defendant. Indeed it was on that basis that Counsel for the defence successfully objected to production of letters exchanged between the Defendant and Mr. Nanji on the ground that they were privileged as provided under Section 134 of Cap 80.

30. The Defendant through Mr. Nanji admitted that Notice as required under Section 10(2) of Cap 405 was served on the Defendant. That admission was not watered down by the evidence of the Defendant Mombasa Branch Manager who was the defence witness in this case. That witness confirmed that at the material time of this case he was not employed by the Defendant Company and that the evidence he gave was from the records he found in the file. It is therefore no wonder on being examined in chief by defence Counsel on whether the Defendant was served with the Statutory Notice before commencement of suit he responded-

> **"I had not received any other Statutory Notice."** (underlining mine)

On being asked if he was aware that a consent judgment had been entered in case **Mbsa HCCC No. 438 of 2001** he stated-

> **"I am not aware that a consent was recorded."** (underlining mine)

It will be noted he was retorting to questions in the singular, "***I***" and not in the plural "***We***," meaning the Defendant. The question that should be asked is, was he saying he personally was not served with the Statutory Notice and was not personally aware of the consent judgment. If that is what he meant then how could he have known or received the Notice when he only got employed by the Defendant in the year 2011, yet the Notice and Consent judgment were of the years 2001 and 2005 respectively.

31. It follows that the fact that the Plaintiff did not reply to the defence on the issue of Statutory Notice was not fatal because the Defendant's agent, Mr. Nanji, admitted receipt of the Statutory Notice from the Defendant, as part of his instructions and accordingly by virtue of Section 18(1) of Cap 80 that admission is on the part of the Defendant.

32. It follows that issue (a) (iii) is in favour of Plaintiff.

ISSUE: FAILURE TO SUE THE INSURED

33. The Policy of Insurance No. 204980004/D/W provided that the authorized drivers, and the ones

covered by the Policy were:

> **"(a) The Insured (b) Any person driving on the insured's order or with his permission. The Deceased driver, as discussed above was noted as an authorized driver, by the hire company in the hire agreement. He therefore was covered by the Insurance Policy which the Plaintiff seeks to enforce by this judgment.**

34. It follows that the Plaintiff's claim cannot fail for failing to sue Hire Company because the hire company had authorized the Deceased driver to drive the vehicle.

35. Issue (a) (iv) is also in the Plaintiff's favour.

CONCLUSION

36. In view of the above findings I do find that the Plaintiff has proved his case on a balance of probability. Judgment is entered for the Plaintiff for Kshs. 1,500,000/- plus interest at Court rate from the 30th April 2005 until payment in full. The Plaintiff is awarded costs of the suit which costs on being taxed shall attract interest at 14% from 30th April 2005 until payment in full.

37. The Defendant, on its instructions entered into consent judgment for Kshs. 1,500,000/- for the Plaintiff on 17th March 2005 and payment of that amount by consent was to be paid within 45 days of 17th March 2005. We are now in the year 2015. The Plaintiff, due to no fault on his part, has had to wait for 10 years to have judgment enforced against the Defendant. This Court by today's judgment has found all the issues raised in favour of Plaintiff. In view of that, and because the Plaintiff suffered most severe injuries, incurred medical costs amongst others I order that execution do proceed immediately and before taxation.

It is so ordered.

DATED and DELIVERED at MOMBASA this 26TH day of FEBRUARY, 2015.

MARY KASANGO

JUDGE