



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL COURTS**  
**CIVIL CASE NO 361OF 2010**

**PHOENIX OF EAST AFRICA ASSURANCE COMPANY LIMITED.....PLAINTIFF**

**VERSUS**

**PROLIFE KENYA LIMITED.....1<sup>ST</sup> DEFENDANT**

**ROSE WANJIKU KAMAU.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**INTRODUCTION**

1. The Plaintiff's Complaint dated and filed on 26<sup>th</sup> May 2010 sought the following reliefs:-
  - a. **A declaration that the plaintiff was not entitled to satisfy any judgment on a claim arising out of the use of Certificate of Insurance No. C5408108 after the 30<sup>th</sup> October, 2008 on the ground that the said Certificate of Insurance had been cancelled.**
  - b. **Such further and other relief as to the Court may seem just.**
  - c. **Costs.**
2. The Plaintiff relied on the List and Bundle of Documents that were dated and filed on 18<sup>th</sup> January 2013 in support of its case. Its Written Submissions were dated 1<sup>st</sup> April 2015 and filed on 2<sup>nd</sup> April 2015. It did not file any Witness Statement in line with the new Practise Directions of the High Court of Kenya Milimani Law Courts Commercial & Admiralty. In view of its duty to expeditiously determine disputes before it, the court accepted to take the oral evidence of George Kibura Karatu (hereinafter referred to as "PW 1) as his testimony was short and the matter was proceeding by way of formal proof, anyway.
3. It was apparent from the court record that though served with the Summons to Enter Appearance, the Defendants did not enter appearance or file a defence within the stipulated period. This matter was therefore uncontested.

**THE PLAINTIFF'S CASE**

4. It was PW 1's evidence that the Plaintiff provided insurance cover in respect of the 1<sup>st</sup> Defendant's Motor Vehicle Registration Number KAX 021M (hereinafter referred to as "the

- subject motor vehicle”). The policy was to run from 18<sup>th</sup> June 2008 to 17<sup>th</sup> June 2009 and was to indemnify the 1<sup>st</sup> Defendant in the event of an accident caused by or through or in connection with the said subject motor vehicle. The Policy Number was 2007/10/TPC/00062/06.
5. He stated that on 30<sup>th</sup> October 2008, the 1<sup>st</sup> Defendant sold the said subject motor vehicle as a result of which the insurance cover was automatically terminated. He said that the 1<sup>st</sup> Defendant did not return the Certificate of Insurance as it was required to do but that instead, Abdellaty Azzam swore a Statutory Declaration on behalf of the 1<sup>st</sup> Defendant on 11<sup>th</sup> March 2009, to the effect that the said Certificate of Insurance was lost or misplaced. It was his testimony that the Plaintiff received the said Statutory Declaration on 22<sup>nd</sup> April 2009.
  6. PW 1 further told this court that on 6<sup>th</sup> March 2010, the Plaintiff was surprised to be served with Summons to Enter Appearance in the case of **CMCC No 8577 of 2009** that had been filed by one Beatrice Wanjiru who had apparently been involved in an accident with the said subject motor vehicle while she was a pedestrian on 5<sup>th</sup> March 2009.
  7. It was the Plaintiff’s case that it ought to be granted a declaration to enable it escape the liability that would arise out of the proceedings in the subordinate court. It thus prayed that its Plaint be allowed as prayed.

### **LEGAL ANALYSIS**

8. The Plaintiff served Summons to Enter Appearance upon the Defendants but they never entered appearance or filed their Statement of Defence. Upon the Plaintiff’s Request for Judgment that was dated 10<sup>th</sup> January 2010 and filed on 27<sup>th</sup> January 2011, interlocutory judgment was entered herein and the matter listed for formal proof.
9. Bearing in mind the prayers that had been sought in the Plaint, court was very clear in its mind that no interlocutory judgment could have been entered against the Defendants herein as the reliefs were not liquidated in nature. In fact, the relief sought was declaratory in nature.
10. Order 10 Rule 4 (1) of the Civil Procedure Rules, 2010 stipulates as follows:-

**“4. (1) Where the plaintiff makes a liquidated demand only and the defendant fails to appear on or before the day fixed in the summons or all the defendants fail so to appear, the court shall, on request in Form No. 13 of Appendix A, enter judgment against the defendant or defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit, at such rate as the court thinks reasonable, to the date of the judgment, and costs.**

11. In the case of **Mint Holdings Ltd & Another vs Trust Bank Ltd [2000] eKLR**, the Court of Appeal held as follows:-

**“The prayers sought by the appellants in their plaint do not entitle them to an interlocutory judgment in any event. As pointed out there was no liquidated demand. Judgment could only have been entered upon formal proof. The entry of such interlocutory judgment was irregular as Order IXA (now Order 10) of the Civil Procedure Rules does not cater for entering of an interlocutory judgment when the nature of reliefs sought requires formal proof.”**

12. The interlocutory judgment herein was without a shred of doubt irregular and could not have withstood the test of time. Indeed, the court would have had no hesitation in setting aside the said interlocutory judgment upon the application of the defendants to set it aside. However, there was no defendant to apply for the setting aside of the said irregular interlocutory judgment under the provisions of Order 10 Rule 11 of the Civil Procedure Rules.
13. The Defendants waived their rights to object to the irregular interlocutory judgment when they never appeared or filed their defences and/or participated in the proceedings herein. Being a neutral arbiter, the court must leave the matter to rest so as not to be seen to be prosecuting one party’s case to the detriment of the other.
14. In the circumstances of the case, the court had no alternative but to proceed with the formal proof of the case as the provisions of Order 10 Rule 9 of the Civil Procedure Rules provide that the

- plaintiff may set the suit down for hearing where a party served does not appear.
15. Having said so, the court noted that M/S Bafana Insurance Brokers Limited wrote to the Plaintiff on 11<sup>th</sup> March 2009 and informed it that the subject motor vehicle had been sold. The said Brokers also requested that the policy be cancelled. In the said letter, the said Brokers attached the Declaration on Oath dated 11<sup>th</sup> March 2009 that was sworn by Abdellaty Azzam indicating that the Certificate of Insurance No C 5408108 had been lost or destroyed.
  16. It was evident from the Police Abstract Report that the accident involving the subject motor vehicle occurred on 5<sup>th</sup> March 2009. It was, however, not clear from the said Broker's letter when exactly the subject motor vehicle was sold making it difficult for the court to make a conclusive determination that the said subject motor vehicle had been sold by the time the accident herein occurred.
  17. Be that as it may, as the period of cover was from 18<sup>th</sup> June 2008 to 17<sup>th</sup> June 2009, there was no plausible explanation the court could think of that would have prevented the 1<sup>st</sup> Defendant from reporting the accident to the Plaintiff as it could have been indemnified for the loss as the loss fell within the period the insurance cover was still in force. It was worth of note that the Policy Schedule annexed to the Plaintiff's List and Bundle of Documents provided that the period of insurance was from 18<sup>th</sup> June 2008 to 11<sup>th</sup> March 2009, the latter which was the date the Brokers wrote to the Plaintiff advising it of the sale of the subject motor vehicle. In the absence of any evidence to the contrary, the court found that the only logical conclusion it could come to was that the subject motor vehicle was sold before the aforementioned accident occurred.
  18. Accordingly, having considered the pleadings, evidence, written submissions and the case law, to wit, **HCCC No 235 of 2004 Geminia Insurance Company Limited vs Beatrice Wanjiru & Another** (unreported) that were relied upon by the Plaintiff, the court was satisfied that the Plaintiff had ably demonstrated and proved its case to the required standard to the effect that it was entitled to avoid any claims that arose as a result of loss, injury or damage caused to or by the said subject motor vehicle to third parties after 30<sup>th</sup> October 2008. The court adopted this date as the same was not controverted and/or rebutted by the 1<sup>st</sup> Defendant.

## **DISPOSITION**

19. For the foregoing reasons, the upshot of this court's decision is that judgment is hereby entered in favour of the Plaintiff against the Defendants for Prayer Nos (a) and (c) of the Plaint dated and filed on 26<sup>th</sup> May 2010.
20. It is so ordered.

**DATED and DELIVERED at NAIROBI this 18<sup>th</sup> day of June 2015**

**J. KAMAU**

**JUDGE**