



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 130 OF 2006

DOMINIC MUTUA MAWEU PLAINTIFF

V E R S U S

OCCIDENTAL INSURANCE CO. LIMITED DEFENDANT

RULING

1. Plaintiff was injured in an accident involving motor vehicle Registration No. KAM 280L registered in the name of Bestway Plumbers Ltd. The Insurer of that motor vehicle is the Defendant herein. Plaintiff sued and obtained judgment against Bestway Plumbers Ltd in **Mbsa HCCC No. 255 of 2001** of Kshs. 3,421,200/-. By this suit Plaintiff seeks a declaration that Defendant is statutorily bound to settle that amount of Kshs. 3,421,200/-. By paragraph 3 of the plaint the Plaintiff pleaded.

“At all material times to the suit herein, the Defendant was the Insurer of Motor Vehicle Registration Numbers KAM 280L make Toyota Pick-up owned by BESTWAY PLUMBERS LIMITED, under Policy Number COMP/08/10301/5 or COMP/88/103061/5 which said motor vehicle was on the 16th day of July, 2000 involved in a road accident along the Mtito Andei/Kilaguni Lodge road while the Plaintiff was lawfully traveling aboard the said motor vehicle registration number KAM 280C in the course of his employment with Bestway Plumbers Limited as a result of which, the Plaintiff sustained very severe and incapacitating injuries.”

2. This case was partly heard before Ibrahim, J and Mwera, J (as they both were then). The Plaintiff filed his written submission. It is in those submissions the Plaintiff faulted Defendant for failing to produce in evidence the Insurance Policy.
3. This Ruling relates to Defendant’s Notice of Motion dated 8th March 2013. Defendant seeks an order for leave to re-open the defence case to call a witness to produce the Insurance policy. The application was opposed.
4. Defendant learned Counsel, Mr. Noorani relying on the affidavit in support of the application stated that the Insurance Policy was inadvertently omitted when defence tendered its evidence. That it was Plaintiff’s Counsel Mr. Tindika who alerted defence Counsel by his letter dated 12th October 2012. It is essential to reproduce that letter as follows-

Ms. Inamdar & Inamdar

Advocates

MOMBASA

Attention: Mr. A. Noorani

Dear Sir,

RE: HCCC NUMBER 130 OF 2006

We refer you to the above mentioned matter and to the telephone discussions had between you and the undersigned this morning.

This is to reiterate that in the cause of printing our Submissions, the undersigned realized that your client did not produce the policy of insurance as an exhibit in which case we believe is crucial document which will enable the Honourable Court fairly and reasonably adjudicate the issues in controversy. Your client, in paragraph 3 of its Written Statement of defence, intimated reliance on the terms of the policy of insurance herein.

In the premises, we propose that your client do produce that policy of insurance, which we may do by consent, or we will make an Application to reopen the Plaintiff's case and have him produce a copy which was forwarded to us by Messrs Balala & Company Advocates, who were asking for Bestway Plumbers Limited. Enclosed herewith, please find a copy thereof.

Kindly let us hear from you urgently. In the meantime, we will hold finalizing and/or filing our Submissions pending the resolution of this issue.

Yours faithfully,

TINDIKA & COMPANY

R. M. TINDIKA

Encls.

c.c. The Deputy Registrar

High Court of Kenya

MOMBASA

Defence Counsel replied to that letter consenting to the production of the policy by consent. Defence deponed through its Counsel's affidavit that Plaintiff's learned Counsel resiled on the content of the letter dated 12th October 2012.

5. Plaintiff opposition to the application is on two broad grounds. Firstly that the Rules cited by the defence in support of the application do not allow a party to re-open a case and accordingly the application is bad in law. Secondly that the policy of Insurance previously shown to Plaintiff did not correspond to the one now sought to be produced.
6. On the first ground I respond by stating that an application is not defeated by the citing the wrong Order, Rule or Section. This is so if the opposite party is not prejudiced by such wrong citation.

In this regard I refer to the case **NAIROBI HCC NO. 1823 OF 2000 PAUL OJIGO OMANGA -VS- JAPHETH ANGITA** where the Court stated-

“The Respondent has not been prejudiced by the failure to refer to XLVI in the application and the order sought cannot be refused solely on that ground that Order XLVI 5(2) (sic) was not cited or that no order or wrong order has been cited.”

The only prejudice Plaintiff’s Learned Counsel referred to cannot be termed as prejudice. The fact that Plaintiff was very badly injured and is now bound on a wheel chair is not a reason to deny a party to reopen a case to produce a document that is vital for the determination of this case.

7. The second ground of opposition was that the Defendant was producing a document that had not been shown to Plaintiff’s Learned Counsel. If indeed the document is not genuine the Plaintiff will have an opportunity when the case is reopened to cross examined the person producing.
8. I cannot find any basis of refusing the prayer sought by Defendant. As rightly submitted by defence this Court is obligated to give effect to the overriding objective of Section 1A of Civil Procedure Act Cap 21. The pertinent part of that objective is that this Court should facilitate the just resolution of Civil dispute. In my view the ends of justice would best be served by allowing the prayer sought.
9. Accordingly the Defendant is granted leave to reopen the defence case for the sole reason of producing the Insurance policy. The costs of Notice of Motion dated 8th March 2013 shall be in the cause.

Ruling by;

MARY KASANGO

JUDGE

DATED and DELIVERED at MOMBASA this 27TH day of FEBRUARY, 2014.

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JUDGE