



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION AT MILIMANI LAW COURTS

BANKRUPTCY NOTICE NO 288 OF 2011

JASON NGUMBA KAGU (Suing as the personal representative of

NANCY NYAWIRA NGUMBA (Deceased).....1ST PLAINTIFF

GATHONI NGUMBA.....2ND PLAINTIFF

NYAMBURA NGUMBA.....3RD PLAINTIFF

Versus

INTRA AFRICA ASSURANCE CO. LIMITEDDEFENDANT

JUDGMENT

Plaintiffs' claims and evidence in support

[1] The Plaintiffs filed this case and sought judgment against the Defendant for:-

- a) **A declaration that the Defendant is under a statutory obligation to make payment in respect of the judgment in High Court at Nairobi being Civil case No 1320 of 1993.**
- b) **The total sum of Kshs. 6,447,962 plus costs and interest being the decretal amount in High Court at Nairobi being Civil case No 1320 of 1993 plus interest at court rates from the date of judgment until payment in full.**
- c) **Costs of this suit with interest thereon at court rates from the day of filing herein until the date of payment in full.**

[2] The 1st plaintiff testified on his own behalf and that of the other plaintiffs who gave him the requisite authority to do so. The 1st plaintiff adopted his statement filed in the case and gave oral evidence in court on 22.1.2014. Further, the plaintiffs filed and produced the following documents in evidence;

[3] In his statement, evidence-in-chief and during cross-examination, the 1st plaintiff emphasized that the defendant had effectively covered motor vehicle registration mark KYT 007 under an insurance cover note and was bound under Cap 405 to satisfy the judgment herein. He relied mostly on the following documents;

- a. A police abstract (page 2 of documents) which indicated the subject Motor Vehicle was insured by the defendant under Policy number Temporary D850772.
- b. Letter dated 22nd May 1991 by O.C. Traffic – Nairobi Area in which the police confirmed the defendant had issued the policy (see page 6)
- c. Letter to defendant dated 1.9.1992, which gave the defendant Notice of intended suit (Page 8)
- d. Judgment in the primary suit (page 17)

[4] During cross-examination, he insisted that, despite the defendant maintaining that it was not on cover at the time of the accident, there was displayed on the windscreen of motor vehicle registration mark KYT OO7 a temporary cover note for 14 days. He could not understand why they denied being on cover. The defendant did not also provide any good reason why they took that position. The only reason they initially gave was that they were not notified of the accident. He stated that he filed case **NBI HCCC NO 1320 OF 1993** (hereafter the primary suit) and judgment was entered against the insured in the sum of Kshs. 6,306,100. The judgment by Rawal J (as she then was) was produced in evidence. He maintained that the defendant was represented in the suit. Before the current suit was filed, the plaintiffs' advocates M/S Kaplan & Stratton Advocates had entered into negotiations with the defendant herein but later on those negotiations broke down when the defendant insisted that they were not on cover at the time of the accident.

[5] In re-examination, the 1st plaintiff referred the court to the investigation by the traffic commandant and a letter of the result of the investigation dated 22.5.1991, which concluded that motor vehicle registration number KYT 007 was covered by Intra Africa Insurance Company at the time of the accident.

The defence and evidence in support

[6] The defendant filed a defence to this claim. It also produced documents in support of its standpoint. The defence called only one witness, i.e. Mr Solomon Mwangi, a Senior Claims Supervisor with the defendant company. He told the court that he has worked with the defendant for 12 years now. He adopted his statement filed in court.

[7] He testified that the temporary cover that had been displayed on the windscreen for motor vehicle registration number KYT 007 was obtained fraudulently since the customer, i.e. the insured had stopped cheques which had been deposited with them toward payment for the premium of the said cover. He referred the court to the letter dated 16.2.1994. The defendant did not issue any policy of insurance as a result. There had been no payment of the premiums and there was no cover at all. To him, there was nothing to repudiate in the first place. He denied that they had engaged any lawyer to represent the company in the primary suit. He said they needed not to defend the suit for the reasons he has already stated.

[8] He, however, confirmed that a temporary cover, once issued should be displayed on the vehicle conspicuously. And, that display shows the vehicle is covered. Further, he agreed that the defendant company did not communicate with their agent about the issues they were now raising; to wit, the bounced cheques and their denial of liability. Their letter of 16.2.1994 did not also give details of the cheques which bounced. In addition to this, the witness confirmed that the cover note in question was intended to cover 6.6.1990 although he insisted it had been obtained fraudulently. A cover note subsists for 14 days when it has been paid for. When the defendant discovered that the cover note had been displayed on the vehicle registration number KYT 007 at the time of the accident, they informed the plaintiff of that fact but they saw no need of reporting the matter to the police. They learnt of the non-payment much later but they did not communicate that fact to the insured or the agent. The agent had not given the defendant anything to show the cheque had bounced, and indeed they did not ask for any information on the matter. The witness thought that the defendant had no obligation to ask for the information from the agent.

SUBMISSIONS BY THE PLAINTIFFS

[9] The plaintiffs filed written submissions. They argued that this suit is for the enforcement of a judgement delivered in Nairobi Civil Suit HCCC NO. 1320 of 1993 (henceforth referred to as the 'primary suit') in which a judgment was delivered against one Michael Kaminda who was the insured of defendant herein. According to them, the defendant is bound by the provisions of Chapter 405 (Insurance (Motor Vehicle Third Party Risks) Act to settle the said judgment. The denial by the defendant in their defence dated 2.8.2011 that it ever insured the said Michael Kaminda either under Cap. 405 or otherwise, is untenable. So also is the defendant's argument that any policy issued to the Michael Kaminda was void ab initio and irregular.

[10] On the evidence by the plaintiffs, documents and the law, it has been established that the defendant had indeed an effective insurance policy on the motor vehicle registration number KYT 007 and was bound under Cap 405 to satisfy the judgment in the primary suit. Most relevant documents include;

- a) A police abstract (page 2 of documents) which indicated the subject Motor Vehicle was insured by the defendant under Policy number Temporary D850772.
- b. Letter dated 22nd May 1991 by O.C. Traffic – Nairobi Area in which the police confirmed the defendant had issued the policy (see page 6)
- c. Letter to defendant dated 1.9.1992, which gave the defendant Notice of intended suit (Page 8)
- d. Judgment in the primary suit (page 17)

[11] The plaintiff took issue with the claim by the defence witness, DW- Solomon Mwangi that; although the defendant received Notice of institution of the suit, it repudiated the cover since no consideration had been paid by the said Michael Kaminda; that the temporary cover was issued by the defendant's agent Kikemu Assurance Consultant and was indeed displayed one Motor Vehicle; that the cheques for the premium were stopped by the insured; and that the cover note was invalid due to non-payment of premium. is contradictory and self-defeatist. The plaintiffs contended that no evidence whatsoever of the said payment cheques or that they were stopped or of any communication on those cheques was availed. The plaintiffs then addressed each issue framed for determination in seriatim as here below.

Whether there was a valid insurance cover issued by the defendant in respect of Vehicle registration number KYT 007

[12] Considering the evidence adduced and concurrence of the evidence of parties in most aspects, it is the plaintiffs' view that the question for investigation is whether the defendant postulation that premium was never paid is sustainable in law or by evidence. The law relating to Agents to insurance company and the payment of premiums is to be found under section 156 of the Insurance Act Cap 487. Under that section it is provided as follows;

1. **No insurer shall assume a risk in Kenya in respect of insurance business unless and until the premium payable thereon is received by him or is guaranteed to be paid by such person in such manner and within such time as may be prescribed, or unless and until a deposit, of a prescribed amount, is made in advance in the prescribed manner.**
2. **Deleted**
3. **No agent shall collect the premium of a policy of insurance canvassed or solicited by him, and no agent shall signify acceptance of the risk on a policy of insurance canvassed or solicited by him, except in so far and to the extent that he has been authorized by an insurer to collect the premium or to issue cover notes, as the case may be; but nothing in this subsection shall prohibit an agent from collecting and transmitting to an insurer a cheque drawn in favour of an insurer.**
4. **A premium collected by an agent or cheque received by him shall be deposited with, or despatched and received by the insurer before the commencement of the insurance cover.**
5. **The requirements of this section may be relaxed by regulations in respect of particular categories of the policies.**

[13] Taking into account the above provision vis-a-vis the evidence adduced before the court, it is the plaintiffs' submission that the defendant had issued an insurance cover in respect of the motor vehicle on the following grounds;

- i. Kikemu (the agent of the Defendant), issued a cover note that signified acceptance of risk on behalf of the defendant, evidently he had been allowed to collect premiums by the defendant. He indeed collected the premiums to cover a third party using the motor vehicle or using the Kenya Roads. There was indication that the insured was on cover because certificate of insurance had been issued. DW1 confirmed that a properly issued temporary cover would suffice as valid insurance.
- ii. The question as to whether the defendant received the premiums or whether indeed the agent had any bounced cheques to warrant the position that no premium was paid could have been easily answered than by the defendant availing the cheques but it chose to avoid their duty and leaving to the agent to clear the air. The assertion by the defendant that the agent had bounced cheques remained hollow. No communication was availed or evidence that any cheque bounced. The court is being asked to trust what the agent allegedly said verbally to the Insurer if at all. At best that was merely hearsay.

The plaintiff took the view that, once the agent accepted to issue the cover note, it did so with the authority of the defendant. The other propositions by the defendant herein are matters which are best known only to the agent and the insurer. If the agent chose to mislead the insurer then that does not dilute the principal's authority. The plaintiffs relied on a persuasive decision in **KARANJA v PHOENIX EA ASSURANCE CO. LTD [1991] eKLR**; once the agent accepted payment from the Mr. Kaminda (the defendant in the primary suit) the contract of insurance arose as between him and the defendant. The court is referred to yet another decision in **KENYA INLAND MASS MARKETING AGENCIES VS ANERICO ADONGO ONGWEN [2006] eKLR**.

- iii. Section 9, of Chapter 405 of the laws of Kenya also provides that any person driving a motor vehicle on a road or owning a motor vehicle so driven, in respect of a policy of insurance, shall carry and display or cause to be carried and displayed on the vehicle a certificate of insurance in the prescribed form, place and manner and the certificate ought to be availed to the police in the event of injury to person in the course of use of the Vehicle. There was a certificate availed to the police in this instance and was prima facie evidence that the defendant had issued the policy. In the absence of credible evidence to the contrary, that proved the existence of insurance cover by the defendant.

Whether the suit is sustainable against the defendant

[14] The plaintiffs' suit is founded on Section 10 of Cap. 405 of the laws of Kenya which deals principally with the duty of insurer to satisfy judgments against persons insured thereby. They submitted that the plaintiffs have demonstrated that there was an insurance cover issued by the defendant as at the time of the accident- the subject of the primary suit. The plaintiffs demonstrated by evidence that they fulfilled all the requirements under section 10 and draw the court to the following;

- i. The defendant was given Notice before institution of the primary suit; see the letter dated 1/9/1992, (Page 8 on plaintiff's list of documents). The defendant actually acknowledged the letter and purported not to be on cover.
- ii. The defendant never cancelled the policy nor notified the Registrar of Motor Vehicles and the Commissioner of Police in writing of the failure to surrender the certificate of insurance within the given time.
- iii. The Plaintiffs have an undisputed judgment against the insured.
- iv. The defendant never obtained nay declaration that it had avoided the policy for any ground as was required of it under section 10 (4) of Cap 405 of the laws of Kenya.

[15] Therefore, the plaintiffs submitted that they have met the entire ingredients which are pre-requisite to bringing themselves within the provisions of Section 10; they properly moved the court. The defendant, on issuing insurance policies does not only have contractual obligations between it and the insured person but also to third parties. The contract of insurance had implications on third parties. The Defendant did nothing to comply with the provisions of the law in order to avail itself of the option of avoiding the policy. The third party obligations include the need to adopt a proper process for avoidance or repudiation of a policy of insurance by an insurer. It could not have been intended to be as casual as the defendant in this matter would want the Court to believe. The court in the case of **BLUE SHIELD INSURANCE CO. LTD v SAMUEL NYAGA NGURUKIRI 2008 eKLR** observed that in the absence of following the clear rules for avoidance of a policy of insurance, an insurer cannot avoid a policy in any other way. This court should so hold. The plaintiffs have properly instituted this suit.

Who pays Costs

[16] The cost should ideally follow the event. It has been demonstrated that the plaintiffs have a strong case and the court should hold in favour of the plaintiffs and award them costs of the suit.

DEFENDANT'S SUBMISSIONS

[17] The defendant urged, in its written submissions that it filed its Defence on 5th August 2011. It filed Defendant's Witness Statement by Solomon Mwangi filed on 29th March 2012.

[18] The 1st plaintiff, the only witness called by the plaintiffs, maintained that the vehicle that caused the subject accident was insured by the defendant and that, therefore the defendant should take up the liability flowing from the primary suit. The Defendant only witness Solomon Mwangi, who is a senior claims supervisor with the defendant company, confirmed that the defendant company is not and was never liable to satisfy the judgment, for, reasons that;

- a. No premium was ever paid and received by the Defendant for the alleged insurance cover.
- b. There being no consideration by way of payment of premiums no contractual obligation attaches to the defendant under the alleged insurance cover.
- c. The insurance cover was obtained fraudulently and was void from inception.

[19] The defendant addressed the following issues:

Validity of Insurance Cover

[20] The Defendant maintains that the insurance cover that was allegedly issued by its agents Ms Kikemu Insurance Agency over the motor vehicle number KYT 007 which caused the subject accident did not amount to an Insurance Policy within the meaning of the Insurance Act Cap (405) Laws of Kenya. The Defendant further submitted that the temporary cover note that its agents issued to the insured was invalid and incapable of giving rise to any liability for three reasons as follows;

Non Payment of Premium:

[21] The fact that the cheque issued by the insured, one Michael [21] Kaminda towards payment of the premium for the cover was stopped by him is not contested. In these circumstances, it cannot be said that there was a valid contract between the Defendant and the said Michael Kaminda. Solomon told the court that the Defendant never received any premium from the insured. That he (insured) deliberately stopped the cheque he had issued. He referred your Lordship to **page 6** of the Plaintiff's bundle of documents which was a report from the Officer Commanding Traffic- Nairobi area addressed to the 1st Plaintiff. The report stated as follows in part;

“...payment confirmed in cross-examination that he was aware that the premium was never received by the Defendant. He was referred to his letter dated 19th October, 1995 (at page 12) where he had stated in part..

“ Whereas I am informed that the payment was not received by them (Insurance Company)”

[22] Solomon further explained that the Defendant did not have any evidence of the stopped cheques because it was done between the insured and their agent. Thus, no policy was ever issued following the stoppage of the cheques by the insured. Solomon further told the court that the defendant is a reputable insurance company which appreciates its obligations to insured's. The present case involved fatalities and the financial exposure was huge. If the Defendant was not fully convinced that there was no valid cover, it would not have sat back as it did. The Defendant formed an informed opinion that it was not on cover based on the facts obtaining.

[23] It is trite contract law that a contract without consideration is void and unenforceable. The deliberate non-payment of the premium by the insured is a fundamental breach of the terms of the contract which renders it invalid. In his book, *General Principles of Insurance Law* ER Handy Irancy states, at page 62.

“The cover note is in itself a Contract of Insurance governing the rights and liabilities of the parties in the event of loss taking place during its currency. The assures is, therefore entitled to enforce the contract, contained in the cover note, provided that he has complied with its conditions e.g. as to payment of premium.

In the case of held as **MC ELORY VS. LONDON ASSURANCE CORPORATION (1897)** 24R LORD MACHAREN follows;

“The company is not bound to deliver a policy without payment of premium before delivering a policy. I should be disposed to hold that the acceptance of the premium and the delivery of the receipt therefore was sufficient to create the obligation to issue a policy”

Closer home; in the case of **HCCC NO 174 OF 1997, NIZAR VIRAN T/A KISUMU BEACH RESORT v PHOENIX OF EAST AFRICA ASSURANCE COMPANY LIMITED** Tanui J observed as follows;

“The first defence to this claim is based on the submission that the Plaintiff did not pay the premium and as such there was no consideration. It was stated that there was a balance of Kshs. 20,000/- unpaid on the premium. This amount was admitted by the Plaintiff when he was cross-examined. He also admitted that the brokers whom he was using went burst and that the Defendant had written to cancel the cover for non-payment of premium. This in my view is a valid defence. A failure to pay a premium would show that the consideration has failed and the insurer would be entitled to cancel the deal as was done in this case.

Similarly in **KENYA NATIONAL ASSURANCE CO. LTD v KIMANI & ANOTHER (1987)** KLR 236 Platt JA held as follows;

“The premium is the consideration of the contract and it can be said that payment of the premium keeps the contract alive. The payment of the excess is done as part of the performance of the contract. The excess is not of the same nature as these conditions which must be fulfilled in order the contract will not be avoided ab initio”

In **COMMUNITY CREDIT UNION LTD v TRANSAMERICA LIFE CANADA THE COURT OF QUEEN'S BENCH OF CANADA** states as follows in regard to non-payment of

premium;

“If this premium by the terms of the policy had been payable by quarterly instalments, as default in the payment of any one of them, even for a day would have released the company from payment, and no court could relieve against it”.

Temporary Cover:

[24] It is important to consider that the defendant’s agent issued a temporary cover note. In the book *“The Law of Insurance”* by Raoul Colinvanx, a temporary cover note is described as being temporary or provisional contract of insurance, quite distinct from the contract embodied in the policy. It is also stated that a temporary cover note renewing a policy and sent to the assured does not itself constitute a contract of insurance unless the assured takes some step to accept it, it may be treated simply as an offer to insure for the future. In the case of **TAYLOR v ALLON (1965) ALL E.R. 557** the appellant’s car insurance expired on 5th April, 1994. He intended to change to another insurer and obtained a temporary cover note from the new insurer for 30 days. His old insurance company sent him a temporary cover note for 15 days. On 15th April, 1994 he was against third party risks. His old insurance company stated that it would assume liability. However, the court held that:

- a. **Sending the temporary cover note was an offer to insure for the future.**
- b. **Appellant had not shown that he had accepted this offer and had not paid the renewal premium.**
- c. **There was no enforceable contract of insurance.**

In this case there was no policy that was issued by the Defendant because in ordinary insurance practice the policy is issued after payment of premium. The insured deliberately stopped the payment and in the circumstances the Defendant was not obligated to issue a policy.

Insured’s Fraudulent Conduct;

[25] The insured obtained a temporary cover for 14 days from the Defendants agent and issued cheques in payment of the premium. He then proceeds to instruct his bankers not to pay the cheques but he did not inform the agent and/or offer alternative payment. As it were, the cheque was returned after presentation for payment. Even after the occurrence of the accident, the insured did not report the accident to the Defendant. This fact was confirmed by Solomon in his testimony and he referred to the letter of 28th November, 1990 at **page 4** of the Plaintiff’s bundle of documents. It is clear beyond doubt that the insured had the intention to derive benefit from the Defendant’s temporary cover without paying the requisite premium. He should not be allowed to benefit from his own fraudulent conduct.

Sustainability of the Suit against the Defendant

[26] The Defendant submitted that for the foregoing reasons, the present suit is not sustainable as against it. It would appear from the evidence that both the insured and the Defendant by their respective conducts, seemed to agree that there was no valid cover for the following reasons;

- i. The insured did not report the accident to the Defendant
- ii. The insured instructed his own advocate to defend the primary suit without any participation whatsoever from the Defendant.
- iii. The Defendant, at the earliest opportunity informed the insured and all those claiming through him that there was no valid cover and that it (the Defendant) was not obligated to satisfy any claims arising therefrom. See letters at **pages 4-13** of the Plaintiff’s bundle of documents.

[27] The suit should, therefore, be dismissed with costs to the Defendant.

COURT'S RENDITION

Issues

[28] The court, with the consent of the parties formulated the following issues for determination by the court:

- 1) Whether there was a valid insurance cover by the defendant issued on KYT 007 as at 6.6.1990**
- 2) Whether the present suit is sustainable against the defendant; and**
- 3) Who pays the costs?**

WAS THERE A VALID INSURANCE COVER BY THE DEFENDANT ON KYT 007 AS AT 6.6.1990?

[29] This question will be answered by looking at several factors; 1) the facts of the case; 2) the law on cover notes or temporary covers; and 3) the law on avoidance of policy by the insurer.

[30] From the documents produced herein and the evidence by the witnesses for the plaintiff and the defendant the following important matters emerge; 1) that the defendant is an insurance company duly permitted to undertake insurance business in Kenya; 2) that Kikemu Assurance Consultant was a duly authorized agent of the defendant to collect the premium and to issue cover notes; 3) a cover note duped Temporary Cover D850772 was issued by Kikemu to one Michael Kaminda (hereafter the insured) to cover motor vehicle registration number KYT 007 for 14 days which included 6.6.1990; and 4) at the time of the accident, the said cover note had been displayed on the said motor vehicle. The only issue in dispute is that the said cover note had been obtained fraudulently and, therefore, null and void. The fraud, according to the defendant consists in the fact that; the insured issued cheques for payment of premium for the cover note, but stopped payment of those cheques; and so, there was no payment of premium on the cover note. The defendant proposes another factor which vitiated the purported insurance contract created by the said cover note; it argued that the cover note was just an offer to insure in the future unless it was accepted by the insured. The defendants quoted several cases to support their stand. What does the law say about cover notes?

Cover note

[31] Ordinarily, a cover note is a written statement by an insurance agent confirming that coverage is in effect. It is normally issued for a limited and short period of time as the policy of insurance is under consideration by the insurer. Mostly, it is for 14 days. In law, a cover note, unless it is vitiated by accepted legal grounds, constitutes a contract of insurance between the insured and the insurer; and governs rights and obligations of parties in the event of loss occurring during its subsistence. No doubt about that and I adopt fully the writing by ER Handy Irancy, *General Principles of Insurance Law* at page 62 that;

***“The cover note is in itself a Contract of Insurance governing the rights and liabilities of the parties in the event of loss taking place during its currency. The assures is, therefore entitled to enforce the contract, contained in the cover note, provided that he has complied with its conditions e.g. as to payment of premium.*”**

[32] The only question is whether it was a valid contract. The defendant strongly objected that the cover note was a valid contract and insisted it had been obtained fraudulently. That was the defendant's allegation and, therefore, bore the onus of proving it. I am just being guided by well-known legal adage; he who asserts must prove. Notably, the defendant did not produce the cheques it claims were stopped by the insured. It did not also call their agent M/S Kikemu

Assurance Consultancy to testify on that fact. Worse still, the defendant's witness admitted that they never informed the insured or the agent of the dishonoured cheques. Indeed I found it quite reckless or arrogant of the defendant's witness to suggest that they did not see any need of informing the agent or calling for any information in respect of the alleged stopped cheques. Further shortcoming; the defendant did not produce its bank statements or accounts to show that those cheques were dishonoured. Things did not end there. The defendant did not seek to join the insured in this suit yet the major defence was that the insured did not pay premiums on the cover note and on that basis the insurance herein should be voided by the court. The person who was the proper party to answer those allegations is the insured. He was not a party.

[33] The defendant and the plaintiff seem to all rely on the letter- duped report- written by the O/C TRAFFIC- NAIROBI AREA dated 22.5.1991. The said letter is not sufficient proof that the premium was not paid. The author stated that: *“The police have carried out extensive enquiries and have discovered that vehicle KYT 007 was insured by Intra Africa Assurance Co. Ltd through their agent Mr Peter Sira Kikemu Proprietor of Kikemu Assurance Consultants, Box 130 Kitui. An Insurance Certificate No. D 850775 was issued. Payment for the insurance premiums was paid by issue of 5 cheques which were apparently never paid through the bank as it is underst (sic or missing text) that a stop order was issued by the Account Holder”*. That “report” makes two contradictory statements; 1) confirmation that the subject motor vehicle was covered by the defendant; and 2) that it is understood a stop order to the 5 cheques had been issued by the Account Holder. The cheques are not attached to the report. The stop order or instructions were not attached to the report. The identity of the Account Holder is not provided; is it the agent or the insured. What the evidence establishes beyond dispute is that there was a temporary cover *Insurance Certificate No. D 850775* displayed on the vehicle registration number KYT 007. What does the law say about payment of premium especially through an agent?

Premiums

[34] Section 156 of the Insurance Act Cap 487 provides that;

1. ***No insurer shall assume a risk in Kenya in respect of insurance business unless and until the premium payable thereon is received by him or is guaranteed to be paid by such person in such manner and within such tie as a may be prescribed, or unless and until a deposit, of a prescribed amount, is made in advance in the prescribed manner.***
2. ***Deleted***
3. ***No agent shall collect the premium of a policy of insurance canvassed or solicited by him, and no agent shall signify acceptance of the risk on a policy of insurance canvassed or solicited by him, except in so far and to the extent that he has been authorized by an insurer to collect the premium or to issue cover notes, as the case may be; but nothing in this subsection shall prohibit an agent from collecting and transmitting to an insurer a cheque drawn in favour of an insurer.***
4. ***A premium collected by an agent or cheque received by him shall be deposited with, or despatched and received by the insurer before the commencement of the insurance cover.***

[35] Section 156(3) and (4) of the Insurance Act are quite instructive in this case. The section envisages a situation where an agent shall collect the premium of a policy of insurance canvassed or solicited by him, and shall signify acceptance of the risk on a policy of insurance canvassed or solicited by him, as long as and to the extent that the agent has been authorized by an insurer to collect the premium or to issue cover notes, as the case may be. And the section does not prohibit an agent from collecting and transmitting to an insurer a cheque drawn in favour of an insurer. It is not in dispute that the cheques herein were collected by the agent and transmitted to the insurer. From the scanty evidence, the cheques were received and deposited by the insurer in their bank account. This chain of events is not disputed, except the mere statements by the defendant that the cheques were stopped; there is absolutely no tangible evidence to prove that claim. The acts of the agent bound the defendant as the principal.

[36] With great legal magnanimity, in light of the evidence herein, the court cannot reach any other conclusion other than the defendant miserably failed to prove their allegation of fraud and non-payment of premium. The court cannot assume or infer out of conjecture that, since the defendant has maintained all along that they were not on cover or that they did not defend the primary suit; therefore, there must be some truth in what they are saying. Every allegation must be proved to the required standards-balance of probabilities. The plaintiff has shown the subject motor vehicle was covered by the defendant at the time of the accident through a temporary cover *No D 850775* which ran for 14 days including 6.6.1990. The police abstract and the report by the police show the cover note was displayed on the subject motor vehicle and received it in accordance with section 9 of Chapter 405 of the laws of Kenya. Moreover, the cover was not repudiated as by law required, but this aspect will be dealt with in detail under issue 2. Accordingly, in the absence of repudiation of a contract of insurance as by law required, there existed a contract of insurance on which this claim is founded. The case of **TAYLOR v ALLON** dealt with different circumstances, for, the insured was not aware of the cover note and had not shown in his evidence that he had accepted the offer. That is why the court deemed the cover note to be just an offer to insure in the future. In the present case, the cover note was accepted and displayed on the subject motor vehicle until the time of the accident. I think relevant cases are **KARANJA v PHOENIX EA ASSURANCE CO. LTD [1991] eKLR**; and **KENYA INLAND MASS MARKETING AGENCIES VS ANERICO ADONGO ONGWEN [2006] eKLR**.

Whether this suit is legally sustainable against the defendant

[37] From the pleadings, evidence tendered and the submissions of the parties, I discern two standpoints from which I should address this issue. One, from the defendant's point of view; that the suit is not legally sustainable against them because there was no insurance cover in the first place. Indeed they were categorical that they needed not defend the primary suit. I presume they defended this one because they were the named parties. Two, from the plaintiffs' eye; the suit is proper having been filed under section 10 of Cap 405 Laws of Kenya; and that there was no repudiation of the policy of insurance herein. First let me describe the nature of this case.

Nature of suit: declaratory suit

[38] The suit before me is of a nature of what is commonly known as declaratory suit in the world of insurance law. It is an enforcement against the insurer of a judgment obtained by the plaintiff against an insured pursuant to section 10 of the **INSURANCE (MOTOR VEHICLES THIRD PARTY RISKS), CHAPTER 405 LAWS OF KENYA**.

Section 10(1) of Cap 405 provides as follows:

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.

[39] The above section creates the obligation on the insured to satisfy a judgment which has been obtained against its insured by third parties upon a policy of insurance taken out for any injury caused by the use of the insured motor vehicle on the road. The provisions of Cap 405 constitute a statutory exception to the rule on privity of contract which was one of the most useful innovations in the law of insurance where third parties benefit from a contract they were not parties to. The plaintiffs have a judgment against the insured one Michael Kaminda for the sum of Kshs. 6,306,100, cost of the suit and interest at court rates arising in case number **NBI HCCC NO 1320 OF 1993**. The defendant has notice of institution of the suit in which the judgment was

obtained. This is signified by the various correspondences between the plaintiffs' advocates and the defendant including letters dated 22.11.1990, 28.11.1990, 10.1.1991, 1.9.1992, 23.3.1993 and 7.6.1993, only to mention but a few. I wish also to state for clarity in law, subject to rules on res judicata or limitation, there is nothing in law which prevent the plaintiff from instituting a declaratory suit directly against the defendant insurance company. Equally, the insured can as well institute a declaratory suit under this provision. That should be understood. It should be noted also that the liability arising out of the suit judgment has not been voided as by law required. Why do I say that? Consider what I have said below on repudiation of policy of insurance.

Repudiation of contract of insurance

[40] Proper repudiation of liability, which perhaps will entitle the insurer to avoid satisfying a judgment under section 10(1) of the Cap 405, is one which has been procured pursuant to the law. The law is contained in the same section 10 of Cap 405 which I reproduce below for ease of reference;

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

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.

3) *It shall be the duty of a person who makes a statutory declaration, as provided in subparagraphs (i) and (ii) of paragraph (c) of subsection (2), to cause such statutory declaration to be delivered to the insurer.*

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

Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not thereby become entitled to the benefit of this subsection as respects any judgment obtained in proceedings commenced before the commencement of that action, unless before or within fourteen days after the commencement of that action he has given notice thereof to the person who is the plaintiff in the said proceedings specifying the non-disclosure or false representation on which he proposes to rely, and any person to whom notice of such action is so given shall be entitled, if he thinks fit, to be made a party thereto.

5) *Deleted*

6) *In this section,*

“material” means of such a nature as to influence the judgment of a prudent insurer in determining whether he will take the risk, and, if so, at what premium and on what conditions; and “liability covered by the terms of the policy” means a liability which is covered by the policy or which would be so covered but for the fact that the insurer is entitled to avoid or cancel, or has avoided or cancelled, the policy.

7) *In this Act, references to a certificate of insurance in any provision relating to the surrender or the loss or destruction of a certificate of insurance shall, in relation to policies under which more than one certificate is issued, be construed as references to all the certificates, and shall, where any copy has been issued of any certificate, be construed as including a reference to that copy.*

[41] The law under section 10(4) requires that insurer should file an action for a declaration that it is entitled to and is absolved from liability arising from the insured acts or under the insurance policy in question. Notice of such declaration should also be given to the plaintiff in the primary suit. That has not been done and even with great ingenuity, this suit cannot be the suit envisaged under section 10(4) of Cap 405. Even if it were to serve that purpose, then, as I stated earlier, the insured should have been made a party; and that would of course be upon leave of the court. All the arguments which the defendant has proffered in his defence would have been useful in a suit under section 10(4) above.

[42] For the above reasons, I find and hold that this suit is proper and sustainable in law against the defendant. Accordingly, the defendant is obligated under section 10 of Cap 405 to satisfy the judgment obtained in **NBI HCCC NO 1320 OF 1993** in favour of the plaintiffs. I enter judgment in favour of the plaintiffs and against the defendant as prayed for in the plaint. Those are the orders of the court.

Dated, signed and delivered in open court at Nairobi this 31st day of March, 2014

F. GIKONYO

JUDGE