REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL CASE NO. 40 OF 2009

**SUSAN OLUOCH NYAMBANE………....……….APPELLANT**

**-AND-**

**BLUESHIELD INSURANCE CO. LTD. …..……..RESPONDENT**

*(Being an appeal from the Ruling of the Chief Magistrate, Ms. C.P. Mwangi delivered on 18th February, 2009 in CMCC No. 1938 of 2008 at Mombasa*

*Law Courts)*

**JUDGMENT**

Under the umbrella of a suit by plaint dated ***4th August, 2008*** the plaintiff filed an application by Notice of Motion dated ***15th September, 2008***. This was an application for summary Judgment, bearing the following substantive prayers:

*(i) "THAT the defence filed herein by M/s. Muraya & Wachira, Advocates be struck out on the grounds that it does not raise any triable issues [and] it may prejudice, embarrass or delay the fair trial of this action and/or it is otherwise an abuse of het due process of the Court";*

*(ii)"THAT Judgment be entered for the plaintiff against the defendant for Kshs.981,377/50 plus costs and interest as prayed in the plaint."*

The learned Chief Magistrate's Ruling was brief, and the final, critical passage thus reads:

***"…the Court heard the parties, and the defendant failed to produce the series of insurance certificates demanded. In [the] present suit the defendant…. Denies ever issuing the cover in question. I feel that in the interest of justice, the defendant should not be ordered to pay…the Judgment [sum] before the Court [hears] if [the defendant] had insured the parties against [whom] Judgment was entered…I thus dismiss the application by the plaintiff [for] Judgment [to be entered] against the defendant……"***

The Memorandum of Appeal, dated ***16th March, 2009*** sets out the grounds of appeal (in summary) as follows:

*(1)the learned Chief Magistrate erred in law and fact by dismissing the appellant's application seeking Orders to strike out the statement of defence and enter Judgment against the respondent;*

*(2)the learned Chief Magistrate closed her mind and refused to consider the fact that the appellant had served the respondent with statutory notice under s. 10(2) of the Insurance (Motor Vehicle Third Party*

*Risks) Act before filing suit for recovery of both special and general damages (Mombasa CMCC No. 2338 of 2007), and had complied with all other requirements of the law, and thus was entitled to Judgment in a declaratory suit;*

*(3)the learned Chief Magistrate, without good reason, overlooked an ascertained fact: evidence showed that motor vehicle Reg. No. KAR 811Y, Nissan bus which was involved in the accident of* ***19th September, 2004*** *was insured by the respondent Company under Policy No.015087/04/000112/2004 running from* ***2nd September, 2004*** *to* ***1st October, 2004*** *– and so the insurer was duty-bound to satisfy the Judgment entered, in accordance with section 10(i) of the Insurance (Motor Vehicle Third Party Risks) Act (Cap.405, Laws of Kenya);*

*(4)the learned Chief Magistrate erred in law and in fact in not applying relevant principles for the type of cases coming up, and in applying extraneous issues not in the pleadings;*

*(5)the learned Chief Magistrate overlooked the principles governing summary Judgments, and in this way, failed to arrive at the correct decision;*

*(6)the learned Chief Magistrate did not critically evaluate the facts of the case, and, in consequence, arrived at a wrong decision.*

Learned counsel for the appellant, speaking from the record on file, submitted that the original cause was founded on a traffic accident, in which the appellant's son, as a pedestrian, was knocked down and killed on impact with an autobus, Reg. No. KAR 811Y, Nissan; the appellant obtained limited grant of Letters of Administration, and lodged Mombasa CMCC No. 2338 of 2007, ***Susan Oluoch Nyambane v. Clement Tomako & Swift Coach Ltd.***, for the recovery of special and general damages; Judgment was entered against both defendants, who did not enter appearance, or file a defence. During the testimony in the formal proof, it emerged that the subject motor vehicle, which was being driven by 1st defendant at the material time, was owned by 2nd defendant and was insured by the respondent Company. In the Judgment of ***12th June, 2008*** the appellant was awarded **Kshs.892,300/=** with costs and interests.

On ***25th August, 2008*** the appellant filed a declaratory suit (Mombasa CMCC No.1938 of 2008) in the Chief Magistrate's Court, for the recovery of the sum of Kshs.981,377/50, being the sum awarded to the appellant in the original suit, Mombasa CMCC No.2338 of 2007. The respondent (original defendant) when served with summons to enter appearance on ***28th August, 2008*** filed a Memorandum of Appearance through its former Advocates, *M/s. Muraya & Wachira, Advocates* on ***10th September, 2008***, and filed a statement of defence on even-date. It is the destiny of the said defence, which was in question in the Notice of Motion leading to the Ruling now coming up on appeal.

The appellant (the original plaintiff), by the Notice of Motion of ***15th September, 2008*** sought a striking out of the defence. The learned Chief Magistrate dismissed the application with costs to the defendant.

Learned counsel submitted that the respondent had issued an insurance policy, in accordance with s.4 of the governing Act, and the said policy was current at the time of the accident. The appellant had duly notified the insurer before commencement of proceedings, as required under the Act. Counsel urged that "*the Judgment and the decree obtained in Mombasa CMCC No.2338 of 2007 imposes a duty on the insurer to pay the [decretal amount] in accordance with s.10(1) of the Act*"; and for effect, he invoked past decisions of the Courts.

Learned counsel relied on certain cases of the same category, ***Philip Wachira Mwaniki v. Blueshield Insurance Co. Ltd,*** Nairobi HCCC No. 1799 of 1991; ***Blueshield Insurance Co. Ltd. v. Raymond Buuri M'Rimberia,*** Civil Appeal No. 107 of 1997. In the latter case the Court of Appeal held that:

***"….Under s.10(4) [of the Insurance (Motor Vehicle Third Party Risks) Act (Cap.405)] the liability of the insurer to satisfy the Judgment under s.10(1) is excluded only if…the insurer [not only] had commenced an action within the time-scale prescribed thereunder, but [has] also…obtained a***

***declaration that [the insurance company] is entitled to avoid …..liability under the insurance policy."***

In that case, the insurance company had obtained no such declaration – just as is the state of affairs in the instant matter. Indeed the Court of Appeal went further to state that in view of the provisions in the governing statute, "*even if the [insurance company] [had] obtained the said declaration…., it may still not be entitled to the benefit of that declaration as against the respondent."*

Counsel for the respondent [the insurance company] asked that the appeal be dismissed and the Ruling of the Chief Magistrate in Mombasa CMCC No.1938 of 2009 be upheld: because the respondent *"never issued any policy of insurance whatsoever."* Counsel submitted that the Chief Magistrate was right in her Ruling, *"since she found that the defendant [respondent herein] had denied ever issuing the cover in question and that was a triable issue*"; and that "*the matters in controversy can only be resolved during the full hearing as opposed to being dealt with summarily."*

Counsel submitted that the authority relied on by the appellant, ***Philip Wachira Mwaniki v. Blueshield Insurance Co. Ltd***., Nairobi HCCC No. 1799 of 1991, should be distinguished: because in that case *"there was proof of the existence of an insurance policy issued by the defendant….*" In the instant case, it was urged, *"the appellant has not discharged this burden."*

Similarly, counsel urged that the earlier decision, ***Blueshield Insurance Co. Ltd v. Raymond Buuri M'Rimberia,*** Civil Appeal No.107 of 1997, be distinguished: for in that case the Court of Appeal found that "*the Statutory Notice for bringing the proceedings under section 10(2)(a) [of the governing statute] was duly given to the appellant and this was never denied by the appellant";* and consequently "*there was…no denying the fact that a policy of insurance was in place…"; "the fact was that there was in existence a policy which had not been avoided or cancelled."*

Counsel urged that in the instant case, "*there is no proof of the existence of a policy and this is a triable issue"*; and he called in aid the Ruling in a similar case, ***Esther Obaire Ongachi v. United Insurance Co. Ltd.,*** Kakamega HCCC No. 87 of 2000, in which the insurer contested an application for summary Judgment. ***Waweru, J*** held in that case as follows:

***"The issue of service of Statutory Notice is not clear beyond dispute. It is a matter to be tried and disposed of at the hearing of the suit. As already pointed out, the defendant's liability to pay the sum due upon the decree is [predicated] upon the statutory requirement of Notice under section 10(2) of [the Act]. Upon that one issue therefore, I will refuse to strike out the defence. At least one all-important triable issue is disclosed. The plaintiff's application will therefore stand dismissed with costs to the defendant."***

Quite consistent with the foregoing Ruling is the decision of ***Kimaru, J*** in ***Mary Adhiambo Onyango v. Jubilee Insurance Co. Ltd.,*** Kericho HCCC No. 114 of 2005 [2007] eKLR. On facts of a similar category, the learned Judge disposed of prayers for summary Judgment as follows:

***"Although the plaintiff annexed a certificate of insurance and further annexed a notice purportedly sent to the defendant, in light of the denial by the defendant that it….[insured] the motor vehicle [in] which the plaintiff was travelling as a fare-paying passenger, it is only right that the issues in dispute between the plaintiff and the defendant be ventilated in a full trial. This Court cannot, on affidavit evidence placed before it, reach a conclusive determination that the issues raised by the defendant in its defence are not triable. On the contrary, it is the finding of this Court that the defendant has established that its defence raises triable issues which ought to be heard by a Court in full trial. The defendant is thus given unconditional leave to defend [the] suit."***

The justice of a case ultimately flows from proven *facts,* as subjected to the evaluative perception and discretion of the Judge, with the *governing law* as the reference-point. It is on this specific account that the Court, in contested matters turning on evidence, attaches the greatest significance to the **full trial**; such trial, by providing an unlimited opportunity for the ventilation of evidence, and by its mechanism of cross-examination, places the Court in a position to render Judgment with finality, and in this way, laying

down the binding law to govern the dispute in question.

I attach much weight to the two High Court decisions relied on by counsel for the respondent. ***Waweru*** and ***Kimaru, JJ,*** in separate matters, in different Court stations, have expressed a distinct reluctance to enter summary Judgment in insurance disputes in which compliance with at least ***one*** statutory requirement, is in doubt. To render summary Judgment, in such a context, is to confer advance benefit upon one party, before arriving at the balances of justice.

Although, as already noted, the Subordinate Court's Ruling is cursory and has not accounted for its Orders in detail, those Orders turn out to be ***right***. It remains an open question whether a policy of insurance was in force at the time of the accident; and the insurance Company has disputed the claim that a Statutory Notice had been served upon it, as required by s.10(2) (a) of the Act. The Court will not come to know the truth until the suit, filed by plaint of ***4th August, 2008*** has been fully heard. Therefore the Court cannot at this stage, on the basis of judicial conviction, resolve the matter by conferring upon the plaintiff/appellant the fruit of the Judgment.

**The plaintiff's appeal of *16th March, 2009* is dismissed, with costs to the defendant/respondent.**

***Orders accordingly.***

**SIGNED** at **NAIROBI** ……………………………….

**J.B. OJWANG**
**JUDGE**

**DATED** and **DELIVERED** at **MOMBASA** this 5th day of March, 2012.

**MAUREEN ODERO**
**JUDGE**