



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

Civil Case 99 of 2009

1. JONNES EHAPAYA OLUMASAYI

2. PHELISTUS AYIETA OLUMASAYI

(Suing as the legal representatives

of MICHAEL MUKAVANA OLUMASAYI, Deceased)..... PLAINTIFFS

VERSUS

BLUE SHIELD INSURANCE CO. LTD.....DEFENDANT

R U L I N G

1. The Plaintiffs have applied by **chamber summons dated 19th May 2009** for an order that the Defendant's statement of defence dated and filed on 24th March 2009 be struck out and judgment be entered in their favour. The application is brought under **Order VI, rule 13(1) (b), (c) and (d)** of the then **Civil Procedure Rules** (the **Rules**). The grounds for the application are that the statement of defence is scandalous, frivolous or vexatious; that it may prejudice, embarrass or delay the fair trial of the action; and that it is otherwise an abuse of the process of the court. There is a supporting affidavit sworn jointly by the Plaintiffs to which a number of documents are annexed.

2. The Plaintiffs are the legal representatives of the estate of the Deceased who died as a result of injuries received in a road accident. They filed suit for damages in respect of the Deceased's death vide **Nairobi HCCC No. 1368 of 2006** (the **judgment suit**) and obtained there a decree for KShs 16,811,909/00. They then filed the present suit (**declaratory suit**) seeking the main relief of a declaration that the Defendant, as insurer of the accident motor vehicle, is under a statutory obligation under **section 10(1)** of the **Insurance (Motor Vehicles) (Third Party Risks) Act, Cap 405** (the **Act**) to satisfy the decree in the judgment suit.

3. The Defendant herein entered appearance and filed defence dated 24th March 2009. It denied at paragraph 5 that the Deceased was involved in a fatal accident on 1st February 2005 and/or that the accident motor vehicle was insured by it. At paragraph 6 the Defendant pleaded without prejudice that if any policy of insurance had ever been issued by it as alleged the same was cancelled and did not subsist at the time of the alleged accident.

4. At paragraph 8 the Defendant denied that it was duly served with the statutory notice required by **section 10(2)** of the Act.

5. In response to the application the Defendant filed replying affidavit on 14th August 2009 which

is sworn by one David Kirimi, the head of the legal department of the Defendant.

6. The Application was canvassed by way of written submissions which I have read, including the authorities cited. I have also read the supporting and replying affidavits.

7. The Defendant has raised the following main issues in its statement of defence-

(i) Whether the Deceased died in the accident as alleged?

(ii) Whether the accident motor vehicle (registration No. KAA 682 E) was insured by the Defendant under policy number BSI/070/1/12/015942/04 in favour of Minial H Lalji?

(iii) Whether the policy of insurance of the accident motor vehicle under which the Plaintiffs claim was cancelled and did not subsist at the time of the accident?

(iv) Whether the requisite statutory notice required by section 10(2) of the Act was duly served upon the Defendant.

8. Whether the Deceased died in the accident as alleged was an issue that must have been before the court in the judgment suit, and the same must have been resolved in the affirmative there. It cannot be an issue in the present declaratory suit.

9. Regarding insurance of the accident motor vehicle, the Defendant has admitted in the replying affidavit at paragraph 12 that indeed it had insured the motor vehicle for the period 20th December 2004 to 19th December 2005 vide policy number BSI/070/1/12/015942/2004. The accident was on 1st February 2005. But the Defendant has provided evidence that the policy of insurance was taken out by one WILLIAM OLOO OKIRING and not by MINAL H. LALJI KOYEDIA who was apparently registered owner of the vehicle at the time of the accident.

10. What is the effect of this state of affairs? It is possible that the registered owner of the vehicle had already disposed of it to William Oloo Okiring at the time of the accident and had not bothered to inform the Registrar of Motor Vehicle. It is also possible that the Defendant insured the vehicle without first ensuring that William Oloo Okiring was the registered owner of the vehicle. But the important thing here is that the motor vehicle was insured against third party risks, irrespective of who the registered owner of the vehicle was.

11. It is to be noted that the Defendant appears not to have taken any step as contemplated in section 10(2) of the Act to avoid liability. There is no evidence that it had cancelled the policy of insurance before the accident occurred. It did not notify the Plaintiffs in writing that the policy was avoided upon grounds of material non-disclosure or misrepresentation or otherwise.

12. Regarding service of statutory notice, the Plaintiffs have provided evidence in the supporting affidavit that a statutory notice dated 13th September 2006 was received by the Defendant on 14th September 2006. Both pages of the notice bear the impression of what appears to be the Defendant's date-stamp. The Defendant has not denied this receipt; nor has it alleged that the date-stamp is a forgery that did not belong to it.

13. The Deceased was a third party (he was a pedestrian who was apparently hit by the accident motor vehicle). The judgment obtained in the judgment suit was in respect to his death, a third party liability as is required to be covered by a policy of insurance under **section 5(a)** of the Act.

14. Due statutory notice having been served under section 10(2) of the Act, and there being no hindrance as set out thereunder, the Defendant is under statutory obligation to satisfy the decree under section 10(1) of the Act.

15. I am thus not satisfied that the Defendant's statement of defence raises any triable issue to require

the suit to go to trial. The defence is thus frivolous and vexatious. It is hereby struck out and judgment entered in favour of the Plaintiffs as prayed in the plaint with costs. It is so ordered.

16. The delay in preparation of this ruling is deeply regretted. It was caused by my poor state of health the last few years. But thank God I have now regained my full health.

DATED AT NAIROBI THIS 11TH DAY OF SEPTEMBER 2012

H. P. G. WAWERU
JUDGE

DELIVERED AT NAIROBI THIS 14TH DAY OF SEPTEMBER 2012