



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**CIVIL SUIT NO. 76 OF 2010**

**GEMINIA INSURANCE CO. LTD.....PLAINTIFF**

**VERSUS**

**DWARA KANATH BHATT alias MUKUNDA A.D. BHATT.....DEFENDANT**

**J U D G M E N T**

The plaintiff Geminia Insurance Company Limited moved to this court by way of a plaint dated 24<sup>th</sup> day of May 2010, and filed the same date. For purposes of the record the following are salient features of the same:-

- Vide paragraph 5, that there was in place a contract of insurance between the plaintiff and the defendant. The cover related to defendant's motor vehicle Reg. No. KAN 939J in accordance thereof, policy number PC/01/0443210/1E was issued.
- Vide paragraph 6 and 7, that the insurance cover was in line with the requirements of prescription in the insurance (motor vehicle third party risks, Act chapter 405 Laws of Kenya).
- That it was a term of the condition of the insurance cover not to assign the said policy.
- That the defendant sold the insured vehicle on 23-11-2009 to one Rose Inguhiru but never surrendered the said insurance cover in breach of the terms of the said contract of insurance particularized in paragraph 9 of the plaint.
- Vide paragraph 10 thereof, that the said vehicle KAN 939J was involved in an accident which accident gave rise to civil claims leading to the filing of Kisumu CMCC No. 52 of 2010 in which the defendant herein and Rose Inguhiru are named as defendants among others.
- The plaintiff has become aggrieved and seeks to avoid any liability arising from the said civil claim.

In consequence thereof he seeks a declaration that the plaintiff has no statutory obligation at all to honour

any claims arising out of the user of motor vehicle Reg. No. KAN 939J after 23-11-2009 on the basis of insurance policy number PC/01/5044 3210/1E costs.

Apparently, the suit had been presented out of time as per requirements of Cap 405 Laws of Kenya. With a view to complying with that requirement, the plaintiff anchored on the plaint an interim application dated and filed simultaneously with the plaint brought by way of notice of motion under section 3A 63 (e) of the CPA. Among others the court was asked to enlarge time for presenting these proceedings and the pleadings herein to be declared to have been filed within the tenets of section 10 of chapter 405 Laws of Kenya. There was also a plea to stay the proceedings in CMCC 52 of 2010 pending determination of this case and that costs of the application be in the cause.

The plaintiff appeared before Aroni, J on the 24-5-2010 when directions were given that the application be served. The same was served and was heard by Karanja judge on the 28-6-2010 and orders granted as prayed.

Following the granting of the said orders, summons to enter appearance dated 26<sup>th</sup> day of May 2010 were taken out and served. There is a return of service by one Vincent O. Ogutu deponed on the 4<sup>th</sup> day of June 2010 and filed on 2-6-2010 indicating that the defendant was served but did not enter appearance or file a defence. He was also notified of the hearing date of the interim application on 28-6-2010 but he did not participate in the said interim proceedings.

Default of filing of the defence and entry of appearance resulted to the filing of a request for judgment dated 4<sup>th</sup> day of June 2010 and filed the same date. The request was endorsed by the Deputy Registrar on the same date of 4-6-2010, and thereafter the matter was listed for hearing by way of formal proof on 4-7-2011.

On the said 4-7-2011 the court being satisfied that the defendant had due notice but had not filed any opposing pleadings or attended court, allowed the plaintiff to proceed by way of formal proof.

One witness PW1 was founded. He gave evidence in his capacity as the area manager of the plaintiff's Kisumu branch. His testimony is a reiteration of the content of the plaint, followed by production of the supporting documents namely exhibits, the policy document evidencing the existence of a contract of insurance cover, for the defendant's motor vehicle registration no. KAN 939J, a sale agreement between the defendant and a third party, Exhibit 2, transfer of policy cover from KAN 939J to motor vehicle KBJ 404Z in favour of the defendant and lastly a plaint in CMCC No529 of 2010 showing that it is the defendant, herein and the third party who purchased the motor vehicle KAN 939J who are sued as defendants among others.

It is the plaintiff's stand that they have made out a case to warrant being granted the reliefs sought. The plaintiff's counsel elected not to file any submissions.

This court has given due consideration to the pleadings filed, exhibits produced, testimony of the plaintiff's sole witness, principles of law and case law applicable that this court has judicial notice of and the court proceeds to make the following findings on the same:-

**(i) Despite the non participation of the defendant in these proceedings the onus is on the plaintiff**

to prove its claim.

**(ii) The plaintiff has complied with the requirements of section 10(4) of cap 405 Laws of Kenya by seeking to forestall the progression of the case in the CMCC 52 of 2010 before he obtains a repudiation of any claims that may arise from their cover of KAN 939J.**

**(iii) Compliance has been demonstrated by the existence of the orders granted on the 28-6-2010 by Karanja judge.**

**(iv) There has been demonstration that the contract of insurance was between the defendant and the plaintiff which cover was for motor vehicle KAN 939J. The understanding was that the said cover was binding on the said containing parties.**

**(v) There has been demonstration that the insured vehicle was sold to a third party during the subsistence of the said insurance cover.**

**(vi) That there has been no demonstration that the defendant surrendered the said insurance policy cover after the sale of the motor vehicle to a third party.**

**(vii) There has been no demonstration that the plaintiff could remain bound to the terms of the said contract of insurance in the event that the vehicle concerned finds its way into the hands of a third party by way of sale or assignment or otherwise.**

**(viii) There has been demonstration that although the defendant never surrendered the policy for cancellation or assignment, he took steps to have the remainder of that insurance cover to be transferred to cover another motor vehicle of his KBJ 404Z.**

**(ix) That by reason of what has been stated in (i) – (viii) above the plaintiff is entitled to seek the court's protection against being called upon to meet claims arising from the sale of the insured motor vehicle to a third party by the defendant.**

The court is therefore satisfied that the plaintiff has established his claim on a balance of probability as against the defendant on the basis of the pleadings, exhibits and testimony notwithstanding that the pleadings were uncontested. The court therefore enters judgment in its favour as against the defendant along the following lines:-

**(a) An order be and is hereby issued and declared that the plaintiff has no statutory obligation or at all to honour any claims arising out of the user of motor vehicle registration number KAN 939J after the 23<sup>rd</sup> November 2009, on the basis of insurance policy number PC/01/0443210/1E.**

**(b) The plaintiff will also have cots of the formal proof.**

**Dated, read and delivered this 8<sup>th</sup> day of July 2011**

**ROSELYN NAMBUYE**

**JUDGE**

RNN/va