



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

Civil Case 51 of 2007

PETER KONDE PLAINTIFF

VERSUS

INVESCO ASSURANCE COMPANY LTD DEFENDANT

RULING / JUDGMENT

In a plaint amended on 18th July, 2007, the plaintiff claims against the defendant the sum of Kshs. 919,926/- together with interest until payment in full. The defendant is sued as the insurer of Kenya Bus Services (Msa) Limited which owned motor vehicle registration number KAK 997S. It is averred that the said vehicle on or about 3.10.1999 at 7.30am during the currency of the said insurance was so recklessly and/or negligently driven managed and/or controlled by the said insured's driver that it overturned causing the plaintiff loss and damage. The plaintiff sued the said insured in **Mombasa HCCC No. 232 of 2002** for damages for negligence in respect of injuries loss and damage suffered thereby and by a judgment delivered on 1.8.2003, general damages were assessed at Kshs. 400,000/-, special damages at Kshs. 317,030/- together with costs and interest which totaled to Kshs. 919,926/- as at 31.8.2004 which sum attracts interest at court rates from 1.9.2004 until payment in full.

It is further averred that by virtue of the provisions of Section 10 of the Insurance Motor Vehicle (Third Party Risks) Act (Cap 405 Laws of Kenya) the defendant became and is liable to pay to the plaintiff the said sum together with interest thereon but the defendant has failed and/or refused to pay to the plaintiff the said sum or any part thereof. The plaintiff demanded payment of the said sum but the defendant has not complied with the demand and hence this suit.

In the defence delivered by the defendant the plaintiff's claim is denied on the main ground that the defendant was not a party in Mombasa HCCC No. 22 of 2002 and is therefore not liable to the plaintiff. It is against that background that the plaintiff dodged the Notice of Motion now before me in which he seeks summary judgment against the defendant on the main ground that the defendant cannot maintain a tenable defence to the plaintiff's claim as it is statutorily bound by law under the Insurance Motor Vehicles (Third Party Risks) Act to indemnify the plaintiff and the defence filed is a sham and calculated to delay due process of the court.

The motion is supported by an affidavit sworn by the plaintiff. The defendant filed a replying affidavit sworn by its claims officer, Samson Makepondo. In the affidavit the defendant reiterates the stance taken in its written statement of defence. When the application came up before me for hearing on 28.4.2010 neither a representative of the defendant nor its counsel attended the court. Since I was satisfied that counsel for the defendant had been served with a hearing notice, I ordered that the motion be heard in the absence of the defendant and its counsel.

In **Gohil –V- Wanai (1983) KLR 489**, the Court on Appeal held, *inter alia* as follows:-

“The Civil Procedure Rules Order XXXV Rule 2(1) requires the defendant to show either by affidavit or by oral evidence that he should have leave to defend. The burden is on the defendant to satisfy the court that he is entitled to leave to defend the suit. Leave to defend will not be granted if he merely states that he has a good defence on merit, he must go further and show that the defence is genuine or arguable, or raises triable issues.”

The defendant's duty is therefore limited to showing prima facie, the existence of bona fide triable issues or that he has an arguable case. On the other hand, a plaintiff who is able to show that a defence raised by the defendant in an action falling within the purview of Order XXXV is a sham, is entitled to summary judgement. (See **Nairobi Golf Hotels (Kenya) Ltd –V- Lalji Bhimji Sanghani Builders & Contractors [Civil Appeal No. 5 of 1997] (UR)**). In **Giciem Construction Company –V- Amalgamated Trades & Services (1983) KLR 156**, the Court of Appeal held, *inter alia*, that *“the object of Order XXXV of the Civil Procedure Rules is to enable a plaintiff with a liquidated claim, in which the defendant has no reasonable defence to a quick judgment without being subjected to a lengthy unnecessary trial.”* (See also **Zola –V- Ralli Brothers [1969] EA 691**).

I will be guided by those decisions in considering this Notice of Motion. The plaintiff has demonstrated that in or about

3.10.1999 he traveled as a lawful fare paying passenger in motor vehicle registration Number KAK 997S when the said vehicle overturned along Nairobi Mombasa road near Steel Makers at Mazeras as a consequence of which, the plaintiff sustained severe personal injuries, loss and damages. The said motor vehicle was at the material time, insured by the defendant in respect of Third Party Claims vide Policy Number IN2/084/1/2600/99/9. The defendant issued a Certificate of Insurance No. A. 0154227 to Kenya Bus Services (Msa) Limited which was the defendant in **HCCC No. 232 of 2002**. the plaintiff has further demonstrated that in the said suit a judgment was passed on 1.8.2003 in his favour in the sum of Kshs. 400,000/- general damages Kshs. 317,030 special damages plus costs and interest at court rates. That judgment is annexed to the supporting affidavit and so is the Decree that was extracted therefrom. Also exhibited is a Certificate of Taxation issued on 3.5.2007.

The plaintiff through his advocates served a statutory notice under Section 10 of the Insurance Motor Vehicle (Third Party Risks) Act. The same is also exhibited. In view of all those documents, the defendant is statutorily bound to settle the plaintiff's claim. The defence delivered is clearly, no answer to the plaintiff's claim. The replying affidavit does not also raise any bonafide triable issue. The defendant did not send its representative nor did its counsel attend at the hearing of this Notice of Motion. The defendant therefore lost the last opportunity to show that it has a genuine defence. In the end I allow the plaintiff's application as prayed.

It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 20TH DAY OF MAY, 2010.

F. AZANGALALA
JUDGE

Read in the absence of the parties or their advocates:-

F. AZANGALALA
JUDGE
20TH MAY, 2010