



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NYERI**  
**Civil Case 75 of 2008**

**NYAMODI OCHIENG NYAMOGO**  
**WILLYS NYAMODI NYAMOGO Both trading as**  
**NYAMOGO & NYAMOGO ADVOCATES.....PLAINTIFFS**

**VERSUS**

**THE CO-OPERATIVE INSURANCE COMPANY (K) LIMITED...DEFENDANT**

**JUDGMENT**

**NYAMODI OCHIENG NYAMOGO** and **WILLYS N. NYAMOGO** trading as **NYAMOGO & NYAMOGO ADVOCATES**, hereinafter referred to as “the Plaintiffs” filed nine suits before this court against **CO-OPERATIVE INSURANCE COMPANY** of Kenya Limited, hereinafter referred to as “the Defendant”. The aforesaid suits are **NYERI H.C.C.C. NO. 75-78, 95-99 OF 2008**. Those suits were consolidated by an order of this court made on 18<sup>th</sup> June 2009 by the Honourable Mr. Justice Makhandia. The main orders sought in all the suits is an order of declaration that the Defendant is liable to pay the Plaintiff taxed costs against the Defendant’s insured plus costs and interest at court rates from 12<sup>th</sup> June 2008 until full payment. The Defendant filed a defence in each suit to deny the Plaintiffs’ claim.

The suit proceeded for hearing before the Hon. Mr. Justice Makhandia. The parties to this dispute recorded a consent order directing the suit to proceed for further hearing before this court from where Mr. Justice Makhandia left. Nyamodi Ochieng Nyamogo was the only witness (P.W. 1) who testified on behalf of the Plaintiffs. P.W.1 told this court that their firm i.e. Nyamogo & Nyamogo Advocates was instructed to defend various suits filed against the Defendant’s insured. At the end of those suits, P.W.1 said his law firm taxed its costs against **JOSEPH MWANGI**, the Defendant’s insured vide **NYERI H.C. MISC. APPLICATIONS NO. 200-205 OF 2006**. It is P.W.1’s evidence that he filed two motions in each Miscellaneous application. P.W. 1 admitted that he was paid for the first Notice of Motion in **NYERI H.C. MISC. APPLICATION NO. 200 OF 2006**. The Plaintiff stated that he is only claiming for payment in a total of nine Motions. In cross-examination Mr. Nyamodi Ochieng Nyamogo confirmed that the Plaintiffs’ claim is

based on the instructions given to their firm by the Defendant. P.W.1 further restated that the cases were taxed against Joseph Mwangi whereupon he filed several bills of cost. Mr. Nyamogo also stated that the advocate-client bills of costs were taxed and paid and that what the Plaintiffs are claiming are costs in respect of Notice of Motions filed by the Defendant against the Plaintiffs. P.W.1 also confirmed having filed references challenging the certificates of taxation which have since been dealt with by the court and concluded.

At the close of the Plaintiffs' case, the Defendant closed its case without presenting evidence in support of its case. In the end learned counsels from both sides were permitted to file written submissions. I have considered the evidence tendered by the Plaintiff and the written submissions. There is no dispute that the Plaintiffs filed the following suits (which were later consolidated) against the Defendant:

1. ***NYERI HCCC NO. 75 OF 2008, for recovery of Kshs.202,202.20, the party and party costs taxed in Nyeri High Court Misc. Application No. 205 of 2006.***
2. ***NYERI HCCC NO. 95 OF 2008, for recovery of Kshs.217,655.96, the party and party costs also taxed in Nyeri High Court Misc. Application 205 of 2006.***
3. ***NYERI HCCC NO. 76 OF 2008, for recovery of Kshs.202,202.20, the party and party costs taxed in Nyeri High Court Misc. Application No. 201 of 2006.***
4. ***NYERI HCCC NO. 97 OF 2008, for recovery of Kshs.152,154.40, the party and party costs also taxed in Nyeri High Court Misc. Application No. 201 of 2006.***
5. ***NYERI HCCC NO. 77 OF 2008, for recovery of Kshs.202,202.20, the party and party costs taxed in Nyeri High Court Misc. Application No. 202 of 2006.***
6. ***NYERI HCCC NO. 98 OF 2008 for recovery of Kshs.217,655.96, the party and party costs also taxed in Nyeri High Court Misc. Application No. 202 of 2006.***
7. ***NYERI HCCC NO. 78 OF 2008, for recovery of Kshs.202,202.20, the party and party costs taxed in Nyeri High Court Misc. Application No. 203 of 2006.***

8. *NYERI HCCC NO. 99 OF 2008, for recovery of Kshs.217,655.96, the party and party costs also taxed in Nyeri High Court Misc. Application No. 203 of 2006.*
  
9. *NYERI HCCC NO. 96 OF 2008, for recovery of Kshs.217,655.96, the party and party costs taxed in Nyeri High Court Misc. Application No. 200 of 2006.”*

The Plaintiffs are seeking for a declaration that the Defendant, an insurer, is liable to pay the party and party costs taxed against their insured, one **JOSEPH MBOI MWANGI**. This fact is confirmed by the certificate of taxation which stated that costs has been taxed “in favour of the Advocates and against the Respondent”. It is the Defendant’s submission that they are seeking for declaratory orders against the Defendant which should actually be directed at Joseph Mboi Mwangi. The main issue posed to this court is whether or not the Defendant is legally bound to settle taxed costs made against its insured? To begin with, there is ample evidence that the Plaintiffs were duly instructed by the Defendant to represent Joseph Mboi Mwangi, their insured in Thika Chief Magistrate’s Court. The Plaintiffs successfully defended the Defendant’s insured as per the Defendant’s instructions. There is no dispute also that the no reference has been filed against the taxed costs. The Defendant filed a defence but it chose to close its case without tendering evidence to support its defence. The Defendant also has not denied that it was the insurer of the person against whom the bills of costs were taxed nor did it deny instructing the Plaintiffs to defend their insured before the Thika Chief Magistrate’s Court. It is important at this stage to set out the background of the dispute so that one can understand the relationship between the Plaintiffs, the Defendant and the insured. Joseph Mboi Mwangi was and probably he is still the registered owner of Motor vehicle registration No. KAM 914 U. On the 17<sup>th</sup> day of June 2001, the aforesaid motor vehicle was driven along Thika-Gatanga road when the same was involved in a road traffic accident. As a result of the accident, some people sustained serious injuries while others suffered fatal injuries. The victims filed various compensatory suits against the known owner, Joseph Mboi Mwangi. At the time of the accident it has emerged that the aforesaid motor vehicle was insured by Co-operative Insurance Company of Kenya Ltd., the Defendant herein. The documents availed to this court indicate that the insured presented the plaint and summons to enter appearance served upon the Defendant who in turn instructed the firm of Nyamogo & Nyamogo Advocates to defend the suits on behalf of the insured. *Section 10(1)* of the Insurance (Motor Vehicle third Party Risks Act, Chapter 405 Laws of Kenya, states 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 interest on that sum by virtue of any enactment relating to interest on judgments.”*

It is plain in the words of the aforesaid section that the Defendant (insurer) is duty bound to meet the Defendant's (insured's) liabilities arising out of the contract of insurance. This position was restated by the Court of Appeal in **BLUE SHIELD INSURANCE CO. LTD. =VS= MARTIN BUNDI C.A. NO. 73 OF 1997 (unreported)** in which the Court of Appeal stated at page 3 *inter alia* as follows:

*“It is obvious therefore that under the aforesaid provision of the Act (i.e. S. 10(1) and (2) of Cap. 405 L.O.K. emphasis mine) the appellant is obliged to satisfy the judgment entered against its insured, the defendants, and we agree with the learned judge that under the statutory provisions of the Act the respondent was entitled to judgment requiring the appellant to satisfy the judgment against the defendants so long as it stands and has not been set aside or varied on appeal.”*

It is clear from the evidence of the Plaintiff that costs have been taxed against the insured and there is no challenge to the same. Under Section 51(2) of Advocates Act, the legal position is clearly stated as follows:

*“Section 51 (2) The certificate of the taxing officer by whom any bill has been taxed shall, unless it is set aside or altered by the Court, be final as to the amount of the costs covered thereby, and the Court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs.”*

In the end I am convinced the Plaintiffs have proved their case to the required standards on a balance of probabilities. I enter judgment in favour of the Plaintiffs and against the Defendant as prayed in the Plaint.

*Dated and delivered at Nyeri this 17<sup>th</sup> day of September 2010.*

**J. K. SERGON**

**JUDGE**

In open court in the presence of Miss Muchoki holding brief Kinyanjui for Defendant and no appearance for the Plaintiff.

**MISS MUCHOKI:** I apply for stay.

**COURT:** An order of stay of execution is given to last for 21 days pending the filing of a formal application.