

JAMES MURIITHI MUGO.....PLAINTIFF

VERSUS

KENYAN ALLIANCE INSURANCE CO. LTD.....DEFENDANT

RULING

By a judgment dated 7th March 2008, a decree was entered in favour of James Mureithi Mugo who was the plaintiff in Nakuru HCCC No. 261 of 2005. James Mureithi Mugo had sued Francis Kimani Munyi and Bernard Macharia Mahugu (*now plaintiff in this suit*) for general and special damages for injuries he suffered in a road traffic accident involving motor vehicle registration number KAN 160C. The plaintiff in this suit was the 2nd defendant; he has now filed the present suit against Kenyan Alliance Insurance Company Limited being the insurance of motor vehicle registration number KAN 160C.

The plaintiff's claim is that by a policy of insurance number R12MV023416 issued to him from 1st December 2004, to 30th November 2005, motor vehicle registration number KAN 160C was insured in respect of any liability under the provisions of the **Insurance Motor Vehicle Third Party Act (Cap 405) of the Laws of Kenya by the defendant** The plaintiff alleged that on the 25th January 2005, during the currency of the policy the said motor vehicle was involved in an accident as a result of which James Muriithi Mugo sustained severe injuries. The said James Muriithi Mugo brought an action being Nakuru HCCC No. 261 of 2005 claiming damages for pain suffering and loss of amenities.

The defendants were duly served with a notice as required under **section 10 (1) (a) of the Act** and the insurance company defended that suit by appointing their own counsel. Judgment was delivered in favour of the said James Muriithi Mugo for Kshs 4.4 million thus the defendant became liable to fully satisfy that amount on behalf of the plaintiff. The plaintiff further alleged that the defendant purported to cancel the insurance policy on allegations of non- payment of premiums.

The plaintiff claims to have paid a sum of Kshs 2.2 million for all the premiums which were duly acknowledged by the defendants thus the defendant has the obligation under the insurance policy and is also bound by law to fully satisfy the judgment pursuant to the provisions of Cap 405 of the Laws of Kenya. The plaintiff therefore sought for a declaration that the defendant is liable to satisfy and settle the entire decretal sum in Nakuru High Court Civil Case No. 261 of 2005, **James Muriithi Mugo vs. Francis Kimani Munyi and David Macharia Mahugu.**

The defendant filed a defence denying any liability. The defendant contends that the plaintiff has no locus standi to bring this suit under Cap 405 of the Laws of Kenya. The suit should be for indemnity and not for enforcement. The defendant further contends that although it issued the insurance policy in respect of the motor vehicle number KAN 160C, the plaintiff failed to remit the insurance premiums thus the policy was repudiated and the defendant has no legal obligation to settle the claim. Further, although the defendant appointed an advocate to defend the plaintiff in HCCC No. 205 of 2005 that decision was discretionary and subject to the plaintiff paying the requisite insurance premiums on time. The policy issued to the plaintiff did not extend to his employees in view of the provisions of the insurance Act. Lastly it was argued on behalf of the defendant that they were not served with the notice under **Section 10 of Cap 405 of the Laws of Kenya**. Moreover under the provisions of **section 5(b) (4) of the Act**, the defendant is only legally bound to settle a claim of Kshs 3 million.

The plaintiff/applicant filed this chamber summons of 12th September 2008, seeking for orders that the statement of defence filed by the defendant be struck out. Further, he sought for orders that the court do compel the defendant to pay the plaintiff a sum of Kshs 4.4 million together with costs of Kshs 150,000/- as awarded in Nakuru HCCC No. 261 of 2005. This application is supported by the grounds that the defence by the defendant is calculated at delaying the expeditious recovery of the decretal sum awarded to the plaintiff. The other grounds are detailed in the supporting affidavit sworn on 12th September 2008.

This application was opposed by the respondent. They relied on the grounds of opposition which raised issues of law. Principally the respondent alleged that they were not served with the notice under **Section 10 of cap 405** which is mandatory. Secondly, the defendants contend that the claim was under the **Workman's Compensation Act** and not for general damages suffered. However the award was for pain and suffering for a workman which cannot be enforced under the Act as there was no cover that extended to the plaintiff's workers.

Upon consideration of the arguments by both counsels for the plaintiff and the defendant, I find the allegations put forward need to be proved by way of oral evidence. There are triable issues raised in the defence. The case of **D.T. Dobie & Company Kenya Ltd vs. Joseph Mbaria Muchina CA No. 37 of 1978** laid down the principles to be taken into account on whether or not to strike a defence. The Court of Appeal, in that case held that;

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shown a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”

The defence raises allegations, inter alia, that the policy was cancelled because the premiums were not paid. The policy did not cover the claim lodged by the plaintiff; further the plaintiff has no locus standi to file a claim for enforcement but for indemnity, that the defendant can only pay Ksh 3 million under the policy. All these matters cannot be wished away. For those reasons the application to strike is disallowed. Costs shall be in the cause.

Ruling read and signed this 27th day of March 2009

M. KOOME

JUDGE