



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Appeal 219 of 2002**

**BLUE SHIELD INSURANCE CO. LTD.....APPELLANT**

**VERSUS**

**AGNES MUENI WAMBUA.....RESPONDENT**

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

This is an appeal arising from a suit filed in Thika SRMCC. No. 1233 of 2001 by Agnes Mueni Wambua. The suit was a declaratory suit for judgment against Blue Shield Insurance Co. Ltd (hereinafter referred to as the appellant) in accordance with the provisions of the Insurance Motor vehicle 3<sup>rd</sup> Party Risks Act Chapter 405 Laws of Kenya. In the plaint filed in the lower court, it was contended that the appellant had insured one Benson Michuki Muchiri against all 3<sup>rd</sup> party liability arising from the use of motor vehicle Reg. No. KAL 890 A. (hereinafter referred to as the subject vehicle). It was further contended that the respondent sustained injuries as a result of an accident involving the subject vehicle, and that the accident was caused by the negligence of the appellant's insured or his agent or driver. The respondent filed suit and obtained judgment against the appellant's insured. The respondent therefore sought a declaration that the appellant has a statutory duty to satisfy that judgment.

The appellant filed a defence in which it denied having insured the subject vehicle and further contended that it was never served with any notice under the Insurance 3<sup>rd</sup> Party Motor Vehicle Risks Act. The appellant therefore maintained that it was not bound to satisfy the alleged judgment.

On the 1<sup>st</sup> of March, 2002, the respondent brought an application under Order VI Rule 13, (1), (b), (c), (d) of the Civil Procedure Rules, and Section 3A of the Civil Procedure Act, to have the appellant's defence struck out and judgment entered for the plaintiff in the sum of Kshs.88,705/= as prayed in the plaint.

This application was argued before the Principal Magistrate Thika, who delivered a ruling on the 7<sup>th</sup> May, 2002 allowing the application and entering judgment as prayed. Being aggrieved, the appellant moved to this court and filed a memorandum of appeal raising six grounds.

Order VI Rule 13 (1), (b), (c) & (d) of the Civil Procedure Rules provide for striking out of pleading on any of the following grounds: -

1. Where the pleading is scandalous, frivolous or vexatious
2. Where the pleading may prejudice, embarrass or delay the fair trial of the action

3. Where the pleading is otherwise an abuse of the process of the court.

Paragraph 2, 3, 4 and 5 of the defence filed on 10<sup>th</sup> January, 2002, provided the core of the appellant's defence. The said paragraph stated as follows: -

- “2. The defendant denies that it was the insurer of motor vehicle registration number KAL 890 A at the time of the alleged accident or at all and puts the plaintiff to strict proof thereon.
3. The defendant further avers that the policy if any had already expired at the time of accident and the same was not in force and therefore it is not bound by the alleged judgment.
4. The defendant is a stranger to the averments contained in paragraph 4 of the plaint and puts the plaintiff to strict proof thereon.
5. the defendant avers that it was never served with the requisite notice under Insurance (Third Party Motor Vehicle **Risks**) Act cap 405 Laws of Kenya as alleged in paragraph 5 of the plainti and therefore it is not bound by the alleged judgment in Thika PMCC No.1080 of 1999.”

The replying affidavit sworn by Kennedy Moseti in response to the respondent's chamber summons, reiterated this defence contending that the policy of insurance between the appellant and the insured had already expired at the time of the accident and that the appellant was not the insurer of the subject motor vehicle at the time of the alleged accident. In her short ruling, the trial magistrate's reasoning was as follows: -

*“The defendant has submitted that the motor vehicle was not on cover. But it is noteworthy that the defendant was served with the statutory notice which they duly received and stamped but did not raise any objection at that juncture. The statutory notice having been duly served on the defendant who raised no objection there can be no feasible defence to this suit and the court orders the defence on record struck off and enters judgment in favour of the plaintiff as prayed in the plaint.”*

From the above, it is evident that the trial magistrate did not address the issue as to whether the defence was scandalous, frivolous or vexatious or whether it could prejudice, embarrass or delay the fair trial of the action, or whether it was otherwise an abuse of the process of the court. The trial magistrate found that the appellant's defence was not feasible. This means the trial magistrate treated the application as if it was brought under Order VI Rule 13(1) (a) of the Civil Procedure Rules which was not the case.

Further, the trial magistrate did not make a specific finding as to whether the subject motor vehicle was insured by the appellants. The fact that the appellant may have received the statutory notice without raising any objection did not necessarily confirm that the subject motor vehicle was insured by the appellant. The issue as to whether the subject motor vehicle was insured by the appellant at the time of the accident was a pertinent which was neither scandalous, frivolous or vexatious. It was an issue which could only be settled by way of evidence at the trial. It is a cardinal principle that the striking out of pleadings is a drastic cause of action to be undertaken cautiously. It can only be undertaken in very clear circumstances. *Civil Appeal No. 37 of 1978 D.T. Dobie & Co Ltd vs Joseph Mbaria Muchina & Another* refers. In my considered view the circumstances herein did not justify a striking out of the appellant's defence.

It was submitted that the appellant had already satisfied the decree that was issued in favour of the respondent and that therefore the appeal has already been overtaken by events. This submission cannot hold. The fact that the appellant may have satisfied the decree cannot in any way prejudice its appeal. The appellant having been successful in this appeal, he is entitled to be restituted by the respondent to the position it was in before the execution of the decree.

Accordingly, I allow this appeal and set aside the order made by the Principal magistrate on the 7<sup>th</sup> May, 2002 and all consequential orders. I further order that the suit in the lower court shall proceed to full trial. I make no orders as to costs.

**Dated and delivered this 22<sup>nd</sup> day of May, 2008**

**H. M. OKWENGU**

**JUDGE**