



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

Civil Case 2 of 2008

NATHAN GITONGA MUNGANIA.....PLAINTIFF

V E R S U S

INTRA AFRICA ASSURANCE CO. LTD.....DEFENDANT

INSURANCE LAW

- **An Insurance company is bound to settle judgment entered against its insured.**
- **Exception from liability must be strictly Construed and proved – Insurance (Motor Vehicles Third Party Risks) Act (Cap. 405, Laws of Kenya)**

J U D G E M E N T

This Judgment relates to a Chamber Summons dated 21.2.2008 and filed on 22.2.2008 in which the Plaintiff/Applicant seeks four orders.

- (1) That the court do strike out the Defendant's defence for being vexatious frivolous, and an abuse of the court process.**
- (2) That the Plaintiff/Applicant be granted Judgment in terms of the Plaint, if the defence is struck out in terms of prayer 1.**
- (3) That alternatively the court do grant summary judgment in favour of the plaintiff against the defendant for a sum of Ksh.1,168,052/- being judgment and costs in HCCC No. 49 of 1997 at Meru High Court with interest.**
- (4) That costs of the Application be provided for.**

The Application is supported by the Affidavit of one Joyce Kaguri Mungania, the next friend of the Plaintiff sworn on 21st January 2008, and is premised upon the following grounds-

- (1) That the Defendant's defence has not raised any triable issue at all and amounts to a**

sham defence,

(2) That the Defendant does not deny it had insured motor vehicle registration No. KTR 809 under a policy cover for the purposes of the Insurance (Motor Vehicle Third Party Risks) Act, (Cap 405 Laws of Kenya) in respect of death of or injury to, any person caused by or arising out of the said motor vehicle on a road,

(3) That judgment obtained vide HCCC No.49 of 1997 at the High Court of Kenya at Meru against the Defendant's insured is acknowledged as the Defendant participated through its lawyers being M/S Kamau Kinga & Co. Advocates.

(4) That the allegations of non-cooperation of the Defendants insured is an extraneous issue which is between the Defendant and its insured and cannot at all form a triable issue in this matter.

The Defendant's Advocates on record M/S Waruhiu K'Owade Ng'ang'a & Co. were served on 16th May 2008 with a Hearing Notice dated 9th May 2008 for the hearing of this Chamber Summons on 5th June 2008, at 9.00 a.m. An Affidavit of Service sworn on 24th May 2008 by one Stanley Mworira, a licenced Process server of this court was filed on 5th June 2008.

Despite the said service the Defendant's counsel neither attended court nor sent any one to hold their brief. The Hearing of the Applicant's motion then proceeded ex-parte on 5th June 2008.

Mr. Gikunda Anampiu who urged the application on behalf of the Plaintiff/Applicant relied upon the said grounds on the face of the Chamber summons, the Supporting Affidavit of the Plaintiff/Applicant and cases of **Vishra Builders vs Moi University** [2002] 2 KLR 618, (on the prayer for summary judgment) and **Blue Shield Insurance Co Ltd Vs Raymond Buuri M'Rimberia** (Civil Appeal No. 107 of 1997) (on the question of enforcement judgment against an insurance Company) that an issue between an insured and an insurer does not concern a third party.

The facts briefly are that the Plaintiff/Applicant sued the Defendant/Respondent's insured in **Meru H.C.C. No. 49 of 1997 (Nathan G. Mungania vs Ranji Shanji and Another)** and obtained judgment in the sum of Ksh.1,000,800/- for general and special damages and a decree was drawn and issued in the said suit on 13th March 2002. Costs were taxed and a certificate of costs was issued on 30th July 2002 in the sum of ksh.167,252/= thus making the sum due to the plaintiff/applicant Ksh.1,168,052/= The Plaintiff/Applicant seeks a declaration that the Defendant is liable to pay the Plaintiff's claim in the said sum plus interest and costs.

In its defence dated 14.05.2008 and filed on 15/02/2008 the Defendant denies liability and prays that the Plaintiff's suit dated and filed on 14.01.2008 be dismissed with costs. The grounds for denying liability are set out in paragraphs 4 and 6 of the Defence and are termed particulars of breaches of the insured:-

- (a) Refusing and/or neglecting to cooperate with the Defendant in the conduct of the case/matter in court.
- (b) Failing and/or neglecting to attend court on the fixed hearing dates, despite his awareness of the same.
- (c) Failing to notify the defendant of the warrants of attachment.

For those reasons, the Defendant in paragraph 7 of the Defence specifically denies that it is obligated, statutorily or otherwise to pay to the Plaintiff the sum of money claimed in the plaint, or any sum at all.

In paragraphs 8 and 9 of the Defence, the Defendant contends that if the Plaintiff/Applicant's claim is to

be pursued at all the same should be made against the Defendant's insured, personally, and sought strict proof that any demand note was issued and invited the Plaintiff to strict proof thereof.

Those were the various contentions in the pleadings. The law regarding the liability of an insurer to satisfy any judgment passed by a competent court against its insured is set out in section 10(1) and (2) of the Insurance (Motor Vehicle Third Party Risks) (Cap 405, Laws of Kenya) which provides.

10 (1) If after a policy of Insurance has been effected Judgment 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 that section, pay to the persons entitled to the benefit of the judgment any sum payable there-under 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.

(2) No sum shall be payable by an insurer under the foregoing provisions of this section –

(a) in respect of any judgment, unless before or within fourteen days after the commencement of the proceedings in which the judgment was given, the insurance had notice of the bringing of the proceedings, or

(b) in respect of any judgment, so long as execution thereof is stayed pending an appeal, or

(c) in connexion with any liability if, before the happening of the event which was the cause of the death or bodily injury giving rise to the liability, the policy was cancelled by mutual consent or by virtue of any provision contained herein, and either-

(i) before the happening of the event the certificate was surrendered to the insurer, or the person to whom the certificate was issued made a statutory declaration stating that the certificate had been lost or destroyed or

(ii) after the happening of the event, but before the expiration of fourteen days from the taking effect of the cancellation of policy, the certificate was surrendered to the insurer, or the person to whom the certificate was issued made such a statutory declaration as aforesaid, or

(iii) either before or after the happening of the event but within a period of twenty-eight days from the taking effect of the cancellation of the policy, the insurer has notified the Registrar of Motor Vehicles and the Commissioner of Police in writing of the failure to surrender the certificate;

3. It shall be the duty of a person who makes statutory declaration, as provided in subparagraphs (i) and (ii) of paragraph (c) of Subsection (2) to cause such statutory declaration to be delivered to the insurer;

4. If the policy was obtained by non-disclosure of material facts as defined in subsection (6) of the section.

5. If the amount in the judgment exceeds the amount of liability in the policy and for which the insurer can recover the excess from the insured.

In its defence to this suit, the insurer or defendant claims that it is not liable to satisfy the judgment in Meru HCCC No. 4 of 1997 because of breaches by their insured as outlined in the introductory paragraphs of this judgment. In law, the only grounds for an insurer to refuse to honour a judgment against its insured are those set out in Section 10(2) which may be summarized as follows:-

(a) A notice was not given to the insurer by the third party either before or within 14 days after

the commencement of the proceedings in which the judgment was given.

(b) Execution of the judgment is stayed because of a pending appeal.

(c) The policy had been cancelled by mutual consent before the accident (the event giving rise to the liability, and that the certificate of insurance had been surrendered to the insuree or the Registrar of Motor Vehicles and the Commission of Police had been informed of such cancellation or surrender of the policy and certificate of Insurance.

For the Defendant insurance company to claim that it is not obligated, statutorily or otherwise to pay to the plaintiff the sum of money claimed in the plaint or any sum at all, it must bring itself within the exemptions prescribed under section 10(2) of the Act. The Defendant cannot rely on the lapses or breaches of its insured as pleaded in paragraphs 4 and 6 of the Defence aforesaid. So the court of Appeal held in *Blue Shied Insurance Co. Ltd. Vs Raymond Buuri M'Ringeria* (Supra).

Similarly it cannot claim, as it does in paragraph 9 of the Defence that it had no notice or demand. It is clear from extensive correspondence between the insurer and the Plaintiff/Applicant's counsel's letter of 11th August 1995 which the Defendant replied on 11th September 1995, through to the Defendant's operation's Manager's letter of 9th August 1996, (asking the Plaintiff/Applicants counsel. (let us know what you are claiming supported by authorities), and the fact that the Defendant insurer instructed the firm of Kamau Kinga & Co. Advocates to defend the insured in Meru HCCC No. 49/1997 and later instructed the firm of WARUHIU K'OWADE & NG'ANG'A Advocates to take over from the former firm of Advocates clearly shows that the Defendant insurer had the necessary demand and notice both before and after commencement of suit.

If there was any doubt about such demand and notice, it is completely dispelled and put to rest by the Affidavit of Solomon M. Mwangi sworn on 16th May 2002 in support of the Motion by the firm of WARUHIU K'OWADE NG'ANG'A and Co. Advocates for leave to take over the brief from M/S KAMAU KINGA & CO ADVOCATES. Solomon M. Mwangi depones as the Defendant's Senior Claims Manager in paragraph 2 – 5 inclusive as follows:-

2. That I am fully conversant with facts of this case and have authority of my employer and the Defendants to swear this Affidavit on their behalf.
3. That M/s Intra Africa Insurance Company Ltd had instructed M/s Kamau Kinga & Co. Advocates to defend those suits for our insured and they duly entered appearance and filed defence.
4. That upto the time the judgment herein was delivered, the said firm was acting for the Defendant.
5. That subsequent to the Judgment, my said employers withdrew instructions from the said Advocates and retained the services of M/S Waruhiu K'Owade & Ng'ang'a Advocates, in place thereof.

It is not open for the Defendant insurer, after all the foregoing, to claim that it had either no demand or notice of suit, or that its insured did not co-operate with it. It would perhaps be more accurate to say, the Defendant insurer did not co-operate fully with the insured despite engaging and paying counsel to defend him in Meru HCCC 49 of 1997.

For all those reasons the Plaintiff/Applicant has invoked the provisions of Order VI rule 13 (1) (b) (c) and (d) of the Civil Procedure Rules that the Defence is scandalous frivolous or vexatious [(rule 13(I) (b)], it may prejudice embarrass or delay the fair trial of the action [(rule 13(1) (c)], or it is otherwise an abuse of the process of the court (Rule 13 (1) (d), and if all or any of those ingredients are established, the court may order the suit to be stayed or dismissed or judgment to be entered accordingly as the case may be.

Reversing the order of the said rules Abuse of Process of court means the improper and tortuous use of a legitimately issued court process to obtain a result that is either unlawful or beyond the process scope.” “Prejudice” is a conclusion which is created for the sole purpose of delaying and therefore defeating the Plaintiff’s legitimate claim, and by so doing vex the Plaintiff/Applicant, that is to say disquiet and annoy the Plaintiff/Applicant without any good cause - Blacks Law Dictionary 8th Ed (2004).

By raising the kind of Defence referred to herein the Defendant insurer is engaging in disgraceful, harmful and scandalous and vexatious proceedings, and the said defence is therefore a sham and a shell, a defence that is fictitious, untrue defense made in bad faith.

The proper response to such a sham defence is that which is prescribed by Order VI Rule 13(1) to strike it out, and having struck it out, the court, may either dismiss the suit or as in this case enter Judgment for the Plaintiff/Applicant.

Having arrived at the above conclusion, I do not think it necessary to consider the Plaintiff/Applicant’s alternative strategy, the invocation of Order XXXV of the Civil Procedure Rules, which in my opinion was inappropriate to invoke where the provisions of Order VI rule 13(1) are invoked. The results may end up the same in the sense of a Judgment for the Plaintiff/Applicant, but the considerations are wholly different. Such a jumble of pleadings may lead to a dismissal of an application. In this instance however, I will not consider Order XXXV Rule 1, it is unnecessary, and in any event, it is inapplicable in the circumstances of an enforcement suit against an insurer.

However, for the reasons that the defendant insurer’s defence is both vexatious, frivolous and scandalous and was in my judgment filed purely to prejudice and embarrass the Plaintiff/Applicant in its quest for payment of the decretal sum in Meru HCCC No. 49 of 1997, and is otherwise an abuse of the court process, the Defendant’s Defence dated 14th February 2008 and filed on 15th February 2008 is struck out and judgment entered for the Plaintiff/Applicant in the sum of Ksh.1,168,052/- with interest thereon at court rates from 30th July 2002 till payment in full.

There shall be orders accordingly.

Dated, delivered and signed at Meru this 30th day of June...2008

M. J. ANYARA EMUKULE

JUDGE.