



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Appeal 478 of 2000**

**BLUE SHIELDS INSURANCE CO. LTD. ....  
APPELLANT**

**VERSUS**

**ROMA SCRAP METAL DEALERS LTD ..... RESPONDENT**

**(Being an appeal against the ruling delivered by the Honourable Mr. Kanyangi Senior**

**Principal Magistrate on 15<sup>th</sup> September 2000 in Nairobi CMCC No.1138 of 2000 at Nairobi)**

**BETWEEN**

**ROMA SCRAP METAL DEALERS LIMITED .....  
PLAINTIFF**

**VERSUS**

**BLUE SHIELD INSURANCE CO. LTD ..... DEFENDANT**

**JUDGMENT**

**I: BACKGROUND OF APPEAL**

1. The original suit in the lower court was that of “declaratory suit.”. The respondent insured his vehicle with the appellant/original defendant. At all times he alleges to have informed the said original defendants of the accident and expected to be defended in a court case.

2. A suit was filed against the original plaintiff in another lower court case for damages in tort. Judgment was entered against him.

3. The original plaintiff/respondent then served the original defendant by way of a declaratory suit on grounds that they were to indemnify the original plaintiffs/respondent for not defending them.

4. A defence was filed in which the original plaintiff applied that it be struck off. The defence stated that the original defendant were never informed of the accident nor was there any claim forms held with the insurance company of the accident.

5. An application for summary judgment was heard before the trial magistrate on grounds that the defence was a mere denial and as such should be struck out.

6. The trial magistrate duly struck out the defence. The original defendant appealed.

## II Appeal

7. The original defendant and now appellant in this appeal argued that their defence did indeed raise triable issues. The existence of the policy issue and that the appellant was notified of the accident was an issue. The summons to enter appearance in the earlier subordinate suit was actually never sent to the appellant. An issue therefore arises of whether the appellants were notified of the accident and the suit.

8. Even if the striking out of the defence was thereafter made the parties are required to proceed to formal proof.

1. The advocate relied on the case of:

Achkay Holding Ltd V

V

N.M. Shah Trading as Braidwood Colledge

CA 187/94

Gachui, Akiwumi & Tunoi JJA

Which case states that:-

“Summary procedure under order 6 r 13 Civil Procedure Rules can only be adopted when it can be clearly seen that a cause of action or defence is on the face of it obviously unsustainable and should be applied only in plain and obvious case.”

10. In reply, the respondent original plaintiff advocate argued that the trial magistrate was correct in reaching his decision. The defence filed did not have any triable issues.

## II: Finding

11. In this appeal, the court finds that the trial magistrate evoked order 6 r 13 Civil Procedure Rules on summarily striking out the defence whilst there were triable issues on the face of the record. In an insurance claim when an accident is reported excess is to be paid and claim forms filled. This is alleged to have not been done and amounts to a clear triable issue.

12. I would agree that the case law reflecting the finding that summary judgment must only be adopted is obvious and unsustainable case (Achkay holding Ltd (supra)) would apply in this matter.

13. I hereby find that this appeal be and is hereby allowed the judgment (summary) of the subordinate courts be set aside. The defence is hereby reinstated. Parties to proceed to full trial.

14. The cost of this appeal will be in the cause and to await finalization of original suit.

Dated this 18<sup>th</sup> day of May 2006 at Nairobi.

M.A. ANGA'WA

JUDGE

Mbigi Njuguna & Co. Advocates for the appellant

E.N. Motii & Co. Advocates for the respondent