

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS

Civil Case 96 of 2003

GERALD LAMBA PLAINTIFF

VERSUS

UNITED INSURANCE CO. LTD. DEFENDANT

RULING

The Notice of Motion dated 16.8.2004 is brought pursuant to Order 35 Rule 1 (1) (a) of the Civil Procedure Rules, Section 3A Civil Procedure Act in which the Plaintiff/Applicant seeks summary judgement against the Defendant/Respondent in terms of decrees in P.M.C.C. 334/1999; 335/2000; 346/1999; 336/2000 which totals Kshs. 182,966/= and that the Respondent do indemnify the plaintiff in the sum of Ksh. 100,000/= which was paid by the applicant in partial settlement of the execution of the claims and execution costs. Secondly, that the respondent do bear the costs of the application. The grounds upon which the application is brought are that the claim is a liquidated one and that it will be a waste of this court's time if the defendants are to defend the suit as there is a pending warrant of arrest for the applicant and defending the suit would be prejudicial to the applicant.

In support of the application was an affidavit sworn by Gerald Lamba who is the registered owner of motor vehicle KAG 970 W a Nissan Matatu. It was insured by the Defendants in 1998. He was issued with an insurance certificate No. 817074 which was to expire on 22.8.98. On 3.8.98 however, the said vehicle was involved in an accident along Machakos – Kitui Road and several people were injured. He made a report to the defendant company and he was asked to pay the excess of 30,000/- which he did. He was issued with a receipt. Several suits were then filed against the applicant in Kitui Law Courts and upon service of summons on him, he passed them to the defendant. The suits were heard and determined and decrees drawn which he also forwarded to the defendants for purposes of the defendant settling the claims. On 8.12.2000 the defendant issued 2 cheques of 42,365/= and Ksh. 175,338/= (Total Ksh. 217,703) in respect of P.M.C.C. 334/1999 and left a balance of 20,605/-=. There leaves a balance of Ksh. 182,966/= in the other suits. He had earlier paid Ksh. 40,000/= in P.M.C.C. 334/1999 when he was arrested. Court brokers were sent to him and he also paid Kshs. 60,500/=. It is upon that background that he seeks summary judgement.

After summons and amended plaint were served on the defendants/Respondent they filed a memorandum of appearance on 18.6.2004 through S.M. Ndegwa Advocates. I have perused the file and see no defence filed. The defendants counsels though served with hearing notice, did not attend the court for the hearing of this application. It proceeded exparte. Despite the non attendance of the defence counsels, the court has to go ahead and consider the application on merit.

The applicant has annexed a certificate of insurance (GL5) and a receipt for Kshs. 30,000/= issued on 1.2.1999 in which he claims to have paid the excess so that the defendants could take up the matter and pay up the claims. There is also a letter from Commissioner of Insurance to the defendant asking them to pay up the claim following a complaint from the plaintiff/applicant. I however find that the said documents are not sufficient proof that a contract of insurance subsisted between the plaintiff and the defendants. Since the defendant have not appeared at least the applicants should have annexed the relevant document to enable the court know the terms of the contract.

It is also alleged by the applicant that infact the defendant acknowledged the claim, appointed an advocate to represent the applicant in the lower court and made part payment. I have seen a copy of cheque on record drawn by Kinyua Musyoki Advocate dated 12.10.2000 which is alleged to have been part payment. It is drawn in favour of R.M. Matata Advocate. It also indicates that it is part payment of the decretal amount but there is no evidence that it was in respect of the suits mentioned in this case. There is also no evidence that Kinyua Musyoki was counsel to the defendants.

Annexed to the application are receipts issued by Max Auctioneers and issued to the plaintiff in respect of the P.M.C.C. 346/99, 335/2000, 33/2000. The plaintiff has however not annexed any evidence of the judgement entered in the lower court. There are no decrees and the court has no idea how much is due to the plaintiff from the defendant. The court cannot just take the plaintiffs word as pleaded herein without the actual evidence from the suits in the lower court. In brief I find that the applicant has not placed sufficient material before this court to warrant the court to grant the orders sought. The court will normally enter judgement for a liquidated claim which is ascertainable or which can be ascertained by mere arithmetic. Even though this may have been a liquidated claim yet the applicant has not availed evidence in support thereof and this court is unable to grant the prayers sought. The application is hereby dismissed with applicant bearing their own costs.

Dated at Machakos this 14th day of April 2005.

Read and delivered in the presence of

R. V. WENDOH

JUDGE