REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MILIMANI COMMERCIAL COURTS, NAIROBI
HCCC 562 OF 2004

ANNE WAMBUI MAINA.....PLAINTIFF

V E R S U S

UNITED UNSURANCE CO. LTD.....DEFENDANT

R U L I N G

This application is brought by a chamber summons dated 15th February, 2005. It is expressed to be made under O.V1 rule 13 (1) (b) (i) (sic) and (d) and O.XII rule 6 of the Civil Procedure Rules, and seeks the following orders-

1. THAT the defendant's statement of defence filed on 11th November, 2004 be struck out with costs.

2. THAT in the result judgment be entered for the plaintiff against the defendant as prayed in the plaint.

3. THAT the Honourable court be pleased to grant such further or other orders and/or directions as it may deem fit and just.

4. THAT the costs of this application be borne by the defendant.

The application is supported by the annexed affidavit of ANNE WAMBUI MAINA and based on the grounds that

(a) The defence is a sham and merely intended to delay the fair and expeditious disposal of this suit.

(b) The defendant has no defence to the plaintiff's claim

(c) The defence is frivolous, vexatious and an abuse of the process of the court.

On 18th March, 2005, the defendant filed some seven grounds of opposition to the application. These are that-

(i) The application is bad in law, misconceived and incompetent

(ii) The application does not address any issues in the suit none of which is resolved by evidence offered in this application

(iii) There is no evidence of any judgment, policy of insurance, certificate of insurance

whereof declarations are sought of the court.

(iv) The application begs all issues raised in the suit.

(v) The burden to prove the plaintiff's claim was not a risk excepted from compulsory insurance lies on the plaintiff.

(vi) The plaintiff has failed to prove that she has a judgment or that such judgment if any was covered by the alleged policy of insurance or that the said judgment is a liability required to be covered by the provisions of any statute.

(viii) That the application does not lie.

The application was canvassed orally by Mr. Saenyi for the applicant while Mr. Wamalwa appeared for the respondent. Mr. Saenyi narrated to the court how the plaintiff travelled as a passenger in a bus which was insured by the defendant. Owing to the negligence of the driver, the bus got involved in an accident as a result of which the plaintiff sustained serious bodily injuries. She sued and obtained judgment against the owners of the bus as well as the driver. The bus was covered under an insurance policy issued by the defendant. The defendants have not paid the judgment debt to date.Instead, they deny the existence of the judgment and the jurisdiction of the Commercial Division of the High Court to hear this matter. They even deny that the plaintiff was a fare paying passenger in the bus. Counsel submitted that the defence does not raise any triable issues and that it should be struck out and judgment entered for the plaintiff.

Opposing the application, Mr. Wamalwa for the defendant submitted that the application is premised on serious misconceptions of the law. The applicant has not brought to court documents on which she seeks a declaration of rights. Even though she served the respondent a notice to produce while this application was already before the court, Mr. Wamalwa submitted that the production can only taken place at the trial and not through an interlocutory application. He also submitted that where a party calls upon the court to make declarations of rights, it is incumbent upon the applicant to produce all the relevant documents. In the instant matter, he further argued, the policy was not on record, nor was the certificate of insurance. The applicant does not even say that she was a fare paying passenger, and yet the Act covers only particular types of vehicles and passengers. He then submitted that as it stands, the claim cannot be said to be covered under Cap.405. Finally, Mr. Wamalwa submitted that the applicant cannot prove that the statutory notice was sent, or that a demand notice was copied and sent to the insurer. He therefore urged the court to dismiss the application with costs.

In his reply, Mr. Saenye submitted that the respondents had a chance to controvert the applicant's affidavit evidence but did not do so, and that which is not controverted is admitted. The respondent do not deny that it was the insurer of the motor vehicle, and it was upon them to deny that liability was covered by the policy. The issue of the applicant being a passenger was res judicata, and the court should therefore strike out the defence and enter judgment for the applicant.

After considering the pleadings, the application and the submissions of counsel, I note that my main task is to determine whether the defendant herein has a defence to the plaintiff's claims, or whether the defence is a sham and merely intended to delay the fair and expeditious disposal of this suit. Paragraph 2 of the defence states-

"The defendant contends that the claims hereof are not Commercial matters and the Commercial Division should decline jurisdiction to hear, determine or intervene in matters reserved for Divisions of the High Court dealing with general matters other than this Division."

I don't think that the defendant or anyone else putting forth such a statement in defence would be serious at all. There is only one High Court in Kenya as by the Constitution established, and that court is conferred unlimited jurisdiction in civil and criminal matters. The divisions in the High Court are created for administrative expedience, but are not meant to compartmentalize the jurisdiction of the respective

divisions in pigeon– hole fashion. This paragraph of the defence lacks seriousness and I can see no excuse for such levity.

Another paragraph which invokes a similar emotion is paragraph 4. It states-

> **"The defendant denies that judgment was on 25th June 2002 entered for the plaintiff in the sum of Ksh.1,802,490/= or that Sh.2,037,675 was on 26th June 2002 decreed therein as alleged or at all."**

To a supplementary affidavit sworn on 8th April, 2005 by Abida Ali-Aroni, an advocate practising with the firm of advocates which has the conduct of this suit on behalf of the applicant, a copy of the judgment in Machakos HCCC No.238 of 1996 is attached. The respondent did not react to that affidavit. The judgment shows explicitly that the court indeed awarded the sum of Ksh.1,802,490/= which is also spelt out in words. A denial of such a judgment is a denial of the obvious and clearly time wasting.

In paragraph 7 of the plaint, the plaintiff claims interest at the rate of 25% per annum from the 25th of July, 2002 until payment in full as laid down by section 10 of Cap.405 of the Laws of Kenya. This claim is repeated in prayer (b) of the plaint. The defendant/respondent's reaction to that is a swift statement in paragraph 7 of the defence which reads-

> **"The defendant denies the said judgment decreed interest at the rate of 25% per annum as alleged or at all."**

Whereas it is true that the judgment did not decree interest at the rate 25% per annum, it is also true that the court did decree interest without specifying a figure, and it is also further true that the figure of 25% is claimed by the plaintiff herself and she does not even pretend that the said figure is predicated upon the decree.

In paragraph 5 of its defence, the defendant denies that the judgment in Machakos HCCC No.238 of 1996 is a liability required to be covered by the provisions of Insurance (Motor Vehicle Third Party Risks) Act, or that the alleged policy of insurance in fact covered claims of the plaintiff. This point is echoed in grounds 5 and 6 of the defendant's grounds of opposition, and partly in ground 3. The applicant has clearly averred in paragraph 13 of her supporting affidavit.-

> **"THAT I am advised by my advocates on record which information I verily believe to be true that the said accident was a liability covered by the terms of Insurance Policy No.2NMCP11430 and the defendant/insurer herein is liable to indemnify the insured and to satisfy the aforesaid judgment…"**

To the defendant's reaction in paragraphs 3,5, and 6 of the grounds of opposition hereinabove set out, I think that it is unfortunate that the defendant has refused to produce a copy of the policy for scrutiny by the court. With profound respect, I find it sadistic to say the least, for defendant to require that a third party produce a copy of the policy or certificate of insurance. That was never intended to be the case. If it were, no third party would ever succeed in a claim under the Insurance (Motor Vehicles Third Party Risks) Act, Cap.405 of the Laws of Kenya. The truth of the matter is that it is the defendant and the insured who would be in possession of any policies of insurance. That much is stated in paragraph 3 of the supplementary affidavit sworn by Abida Ali-Aroni on 8th April, 2005. Production of the insurance policy by the respondent would have put to rest any doubts as to the cover provided by that policy. Section 4 of Cap.405 makes it compulsory for motor vehicles to be insured against third party risks. The applicant's exhibit "AWM 3" which is a copy of an abstract from police on a road accident shows that the vehicle was insured by the defendant/respondent, and that the policy number was 2NMCP11430. In my view, that is the most that a third party or claimant would be expected to do. If the third party's claim was a risk which was excepted from compulsory insurance, that would be for the insurer to prove, and not the third party as alleged in paragraph 5 of the grounds of opposition. The defendant in this matter has failed to prove it.

It has been suggested that the plaintiff has not pleaded that she was a fare paying passenger. At page 5 of the judgment in Machakos HCCC No.238 of 1996, the plaintiff/applicant is recorded as having "told the court that she booked herself on the defendant's bus and paid fare." It can't be clearer that she was a fare paying passenger.

Submitting from the bar, Mr. Wamalwa for the defendant/respondent said that the plaintiff/applicant cannot prove that her former advocates on record sent either the copy of the demand letter dated 18th July, 1996 and exhibited as AWM 1, or the statutory notice also dated 18th July, 1996 and exhibited as AWM 2, especially as the latter is not dated at the bottom. It may be, but only may be, that the plaintiff cant prove it. It may also be that she can't prove it. But it is noteworthy that this is the first time that the defendant is raising the issue. With the plaintiff having produced a copy of the statutory notice, and having stated on oath in paragraph 6 of her supporting affidavit, that the notice was duly served on the defendant, it was incumbent for the defendant to deny receipt of the same under Oath, but not by a denial from the bar. As this was not done, the plaintiff's statement under oath is uncontroverted. When I bear in mind that the defendant has denied even the existence of the judgment, I ask myself, if a party can deny that which is obvious, how about that which is not so obvious?

In total, I find that the defence filed in this case does not raise any triable issues, and the defendant is denying the obvious. The continued retention of this defence on record will serve no useful purpose save and except to delay the fair trial of the action which is prejudicial to the applicant. I accordingly strike out the defence filed herein and enter judgment for the plaintiff as follows:

1. The defendant is hereby declared liable to satisfy the decretal sum and costs in Machakos HCCC No.238 of 1996.

2. Judgment is accordingly entered for the plaintiff against the defendant for the sum of Ksh.2,021,407, with interest thereon at court rates from 25th July, 2002 until payment in full.

3. Costs of this suit.

Dated and delivered at Nairobi this 16th day of June 2005

L. NJAGI

JUDGE