



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)  
MISC APPLI 33 OF 2004**

**LABAN MACHARIA.....PLAINTIFF**

**VERSUS**

**THE COMMISSIONER OF INSURANCE & ANOTHER.....DEFENDANT**

**RULING**

My brother Hon. Mr. Justice Lenaola Ag. (as he then was), granted the Applicant herein leave to bring an application in the nature of Mandamus to compel the 1<sup>st</sup> Respondent, (the Commissioner of Insurance), to direct the 2<sup>nd</sup> Respondent, United Insurance Co Ltd to pay to the Interested Parties the decretal sums awarded to them in the several cases enumerated in the application dated 13.02.2004. By his orders also dated 13.02.2004, the learned Judge also directed that leave to file the application in the nature of mandamus do operate as a stay. It is these orders that the 1<sup>st</sup> Interested Party, and seeks to be vacated and dismissed, by an application dated 4.03.2005.

This application was urged by Mr. Kamunge, learned Counsel for the 1<sup>st</sup> Respondents. The application was supported by the Affidavit of Kamau Mwangi sworn on 31.05.2005, and in which the 1<sup>st</sup> Interested Party depones inter alia, that the application was made to delay and deny the 1<sup>st</sup> Interested Party the fruits of a lawful judgment. That was the first application.

The second Application was that of the 2<sup>nd</sup> Interested Party dated 5.11.2004 filed by Mrs L.K. Waweru, learned Counsel for the 2<sup>nd</sup> Interested Party. The 2<sup>nd</sup> Interested Party also seeks Orders that the order of stay granted on 13.02.2004 be vacated, and the application upon which it was founded be dismissed. In the alternative the 2<sup>nd</sup> Respondent sought orders that the Applicant, Laban Macharia do deposit in court the entire decretal sum in RMCCC No. 1064 of 2001, at Thika in the sum of Kshs 628,906/= until further orders of court. This application has urged by Mrs. Waweru, relying upon the Replying Affidavit of Peter Mbugua Gathogo sworn on 5.11.2004.

The third application is the Notice of Motion dated 5.02,2004 filed by S.W. Ndegwa, Advocate for the Respondent (Laban Macharia) and which application was urged by Mr. Ngala, in place of S. W. Ndegwa. This is in fact the Notice of Motion filed pursuant to the leave granted by Hon. Justice Lenaola. This application sought orders of Mandamus to issue against the 1<sup>st</sup> Respondent to compel him to direct 2<sup>nd</sup> Respondent to pay the decretal sums enumerated in the application.

The Applicant also sought orders of prohibition to issue to various subordinate courts in Nairobi, Thika and Gatundu to prohibit such courts from issuing warrants to execute in respect of the various decrees made by those courts and in respect of which leave to bring an application in nature of mandamus was to operate as a stay.

This Court does of course enjoy the jurisdiction invested in it by the Law Reform Act (Cap 26, Laws of Kenya), and Order LIII rule 1 to grant the Orders of Mandamus prayed for in the application of 5.02.2004. This was in essence the case urged by Mr. Ngala, learned Counsel for the Applicant.

In opposition to this argument, were the arguments strongly urged by Mrs. Waweru for the 2<sup>nd</sup> Interested party, and Mr. Kamunge learned Counsel for the 1<sup>st</sup> Interested Party. Mrs. Waweru, learned Counsel for the (2<sup>nd</sup> Interested Party) urged that judgment in RMCC No. 10634 of 2001 was made on the 18<sup>th</sup> August 2003, and the application for leave was brought after expiry of six months from the said date, and that it had not yet been served upon the Second Interested Party.

Counsel further urged that the claim by the 2<sup>nd</sup>, Interested Party was for the costs and losses incurred by the 2<sup>nd</sup> Interest Party, namely towing charges, loss of earnings, value of the vehicle and loss of insurance premiums occasioned by the accident, with the Applicant's Motor vehicle. Section 10 of the Motor vehicle Insurance (Third Party Risks) Act (Chapter 405, Laws of Kenya) only covers loss arising from death or other physical injury arising from a motor vehicle accident and it has nothing to do with the 2<sup>nd</sup> Interested Party's claim. The doctrine of subrogation does not apply in this instance.

Mr. Kamunge learned counsel for the 1<sup>st</sup> Respondent was of the same vein. Despite their being in court, the 1<sup>st</sup> Respondent has in fact not been served with the application of 5<sup>th</sup> March, 2004. Failure to serve the process upon Counsel on record is an abuse of the process of court.

Those again were the parties' respective counsel's arguments. The first issue is whether the application for leave was brought within the time prescribed by Section 9(2) of the Law Reform Act which requires that an application for an order of mandamus, prohibition or certiorari shall be made within 6 months of the judgment order to be stayed. Order 53 rule is even more emphatic, leave shall not be granted unless the application is made within 6 months of the judgment, Order decree, conviction order proceedings for the purpose of being quashed.

With regard to the 1<sup>st</sup> Interested Party, Judgment was entered on 11.02.2003 but the decree was not extracted until 8.09.2003. For the Applicant to fall within the prescribed time, he ought to have filed his application for leave to bring an application for orders of Mandamus by 10.08.2003 at the very latest. The Chamber Summons for leave to file an application for Mandamus was made on 13.02.2004, literally 12 months after the prescribed period.

With respect to the 2<sup>nd</sup> Interested party, judgment was entered on 18.08.2003, application for leave to bring an application for orders of Mandamus ought to have been brought by 7.02.2003 when the statutory period of 6 months expired. The Application for leave to file a Mandamus application was not brought until the 5.05.2004 nearly seven (7) months after the date of the judgment.

On this basis alone, the Applicant ought not to have been granted leave to bring an application in the nature of Mandamus.

There is another reason why the Applicant's application of 5.03.2004 ought to fail. Section 5 of the Insurance Motor Vehicle Third Party Risks) Act, (Cap 405, Laws of Kenya), does not require to be covered, the losses and damages suffered by the 2<sup>nd</sup> Interested Party. The said Section provides:-

***“Section 5. In order to comply with the requirements of Section 4 the policy of Insurance must be a policy which –***

***(a) is issued by a company which is required under the Insurance Ac 1984 to carry on motor vehicle insurance business, and***

***(b) insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of, or bodily injury to,***

***any person caused by or arising out of the use of the vehicle on a road.”***

The Second Interested Party's losses not being either risks of death or bodily injury required to be covered under Section 5 of the Insurance (Motor Vehicle Third Party Risks) Act, are not liabilities in respect of which the 2<sup>nd</sup> Respondent is bound to satisfy judgment under Section 10 of the Act. This being so there is no legal basis for issue of orders of prohibition against the subordinate courts in question from issuing warrants for enforcement of the decrees obtained by the Interested Parties, and in this case, in particular, the 2<sup>nd</sup> Interested Party, against the Applicant.

In the result therefore I must declare, firstly, that the Applicant's Chamber Summons of 13.02.2004, having been filed outside the prescribed time of 6 months was incompetent, and secondly, its consequent progeny, the Notice of Motion of 5.03.2004 was for the same reason equally incompetent. The said Notice of Motion is therefore struck out with costs, and the 2<sup>nd</sup> Interested Party is at liberty to enforce his decree against the Applicant, and as for the other Interested Parties, they may well have to come with their decrees at the door-steps of the Statutory Manager of the 2<sup>nd</sup> Respondent United Insurance Company Ltd (under Statutory Management). There shall orders accordingly.

Dated and delivered at Nairobi this 19<sup>th</sup> day of July 2005.

**ANYARA EMUKULE**

**JUDGE**