



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI**

**CIVIL CASE NO. 19 OF 2003**

**1. JAMES MUHORO NDUNG’U ..... 1ST PLAINTIFF**

**2. RUTH WANGECI NDUNG’U ..... 2ND PLAINTIFF**

**VERSUS**

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

**RULING**

This is an application to strike out the Defendants’ defence dated 4th March 2003 and for Judgment against the Defendant as prayed in the Plaint dated 7th January 2003. the same is brought by way of a Chamber Summons dated 28th April 2003 under Order VI Rule 13 (b) and (d) of the Civil Procedure Rules. The main ground is that the defence is not only frivolous and vexatious but that it is also an abuse of the process of the court.

The plaintiffs in this suit are seeking, inter alia, a declaration that the Respondent is bound to satisfy a Judgment entered in H.C.C.C. No. 995/2001 in respect of compensation for the motor accident death of one Susan Wambui Ndungu whose estate the Plaintiffs are administering. The Defendant, according to the Applicants were the insurers of the motor vehicle which knocked down the said Susan thereby causing her death. In their defence the Defendants have denied having insured the motor vehicle in question. They also aver in the alternative that the judgment under execution is the subject of an appeal they intend to file and further that a notice of intention to sue was never issued before the said suit H.C.C.C. No.995 of 2001 was filed.

In support of this application the Applicants have referred the court to a police abstract report issued in respect of the subject fatal accident in which the Respondents are named the insurers of motor vehicle registration number KRJ 294 owned by the Defendant in the previous suit, Wilson Nzioka Mutiso. The suit in which the decree was issued relates to that accident. The Plaintiff/Applicants have also relied on the decree in issued against the said Wilson Nzioka Mutiso on 9th August 2002. Copies of these documents are annexed to the Applicant’s Supporting Affidavit together with a copy of a letter dated 28th November 2002 notifying the Respondents of the judgment. A response to that letter by the Respondents is dated 19th December 2002. a copy of the same is also annexed and reads as follows:

**“RE: H.C.C.C. NO. 995 OF 2001**

**JAMES MUHORO NDUNGU &**

**ANOTHER –VS- WILSON NZIOKA MUTISO**

***We refer to your letter of 28 th November 2002. We have instructed our advocates to lodge an***

***appeal as we consider the award made by the court to be excessive.”***

The letter is signed by K. Moseti, Acting Claims Manager.

In reply to this application the Respondent in an affidavit sworn by their advocate raises various points some of which I find irrelevant and impossible to follow. I shall therefore deal with the points I consider relevant in challenging an application to strike out a defence. These are

**1) That the defence raises triable issues**

**2) That the application is bad in law**

**3) That there is a pending appeal**

**4) That the application lacks merit.**

I note that the legal defect as relates to the application has not been explained so I will automatically rule against that ground. As regards the triable issues, the Respondents' Counsel relies firstly on the contention that the Defendant/Respondents did not issue the insurance cover on the basis of which this suit has been brought and secondly on the contention that there was no statutory notice issued prior to filing the original suit. The Respondent's letter of 19th December 2002 is a clear indication that they have no quarrel with the original suit and their only bone of contention was the quantum of damages awarded. In his submission Counsel for the Respondents sought to rely on the authority of H.C.C.C. No. 606 of 1998 which held that leave to defend should be given even where there is only one triable issue. He submitted that he had shown two triable issues in the case of the defence under attack. My response to that submission is that he has shown none and the authority does not help him.

The Defendants contention that there is a pending appeal is not quite correct as all that there is is a notice of intention to appeal. That in itself does not constitute an appeal. The same does not constitute a stay of proceedings either. As I am not dealing with an application for stay pending appeal I will not go into the merits or demerits of the intended appeal.

In view of the foregoing, I find that this application is meritorious and ought to succeed. I therefore allow the same and grant the orders sought.

Although the applicants have sought to have costs being ordered in the cause I find that the defence is not only frivolous and vexatious but also an abuse of the process of this court. For that reason I order specifically that the Respondents pay costs of the application. The temporary stay granted herein on 23rd July 2003 is hereby lifted.

**Delivered, Dated and Signed this 27th day of February 2004**

**M.G. Mugo**

**Ag. Judge**