



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ELDORET.**

**CIVIL CASE NO. 168 OF 2002**

**HELLEN ARINATA KOKANI(suing as legal Representative of**  
**ANTONY MUKANZI MAKUMBA**

**(DECEASED).....PLAINTIFF**

**VERSUS**

**UNITED INSURANCE CO. LTD.....DEFENDANT**

**RULING**

On 2/4/2002, Helen Arinata Kokani, obtained judgment against Tawfique Bus Service, following the death of her husband in a road traffic accident in which a bus registration number KAK, 949 W, then owned by Tawfique Bus Services was involved.

She then filed this suit on 5.11.2002 seeking declaratory orders to compel United Insurance Company, which it is averred had insured the subject vehicle, to honour the aforesaid judgment.

Interlocutory judgment was entered on 28.1.2003, after which execution process commenced, but it was however stayed when objection proceedings were filed by Leverage Co. Ltd. on 22.8.2003. Those proceedings have yet to be heard and determined.

United Insurance Company Ltd has now instituted these proceedings, taken out under Orders IXA rules 10 and 11, XXI rules 22(1) and 91 of the Civil Procedure Rules. I shall refer to United Insurance Co. Ltd. as 'the applicant'.

The applicant prays for the setting aside the interlocutory judgment and decree and all consequential orders and that it be granted leave to enter appearance and file a defence.

It is based on the grounds inter alia, that it has never served with the summons to enter appearance, that it has a good defence to the plaintiff's claim and also that it stands to suffer irreparable loss and damage unless the reliefs sought herein, are granted.

The application is however opposed on the grounds inter alia that not only were the plaint and summons to enter appearance served but that the applicant was well aware of the judgment in the earlier matter and was notified of the entry of judgment herein on 28/5/2003, and there being no response, execution followed. It is also the plaintiff's contention that the applicants have no valid defence to her case.

The initial issues arising from this application then are two fold, namely, whether the applicant was served with the plaint and summons to enter appearance and secondly, whether it was notified of the entry of judgment. Should I find in its favour, the other issue for my determination will be whether it has a prima facie defence on the merits and in which case, should I allow it to enter appearance and file its defence.

I proceed armed with the knowledge that in an application of this nature, the courts powers are purely discretionary.

The application is supported by an affidavit of David Mwangi, sworn in Eldoret, on 19.11.2003, which I shall readily disregard as it is incompetent in that it contradicts the requirements of sections 34 and 35 of the advocates Act, as it is not shown by whom it was prepared. Such an affidavit should not have been accepted by the Registrar and I do in these circumstances order it struck out, which leaves the application unsupported.

I would at this point wish to add that, though the point was not urged before me, an application of this nature cannot be made under order XXI rule 22 of the Civil Procedure Rules; for under the said order and rule, one can only move the court for a stay where the execution is being levied by a court other than the one which passed the decree, which is not the situation here. The correct procedure would have been for this applicant to move the court under section 3A of the Civil Procedure Act.

Be that as it may, I have perused the pleadings in this matter and I note that the plaint and summons to enter appearance was actually served upon the applicants on 28.11.2002. This is evidenced by the process server's affidavit of service and the stamps and signature that was affixed to a copy of the said summons. The applicant who disputes the service had a right to call the process server and to cross-examine him but having chosen not to, leaves one with only one conclusion, that the service was effected.

I also note that notice of entry of judgment was forwarded to the applicant on 28/5/03 to their address in Nairobi. I find that this information was not controverted by the applicant and I do also in the circumstances find that the notice was issued, and on those two accounts this application is bound to fail. But I could be wrong in the above finding and in which case, I would be bound to establish whether the defence has raised any triable issues.

It need not at this stage show that it will be successful in its defence for if it shows that its defence raises even one triable issue, it should be given a chance to defend the suit.

It must be emphasized at this point that this suit is a declaratory suit and that the issue of liability in the accident was determined in H.C.C.C (Eld) R.68 of 2000, and that not only was this applicant made aware of the fact that judgment had been entered against Tawfique Bus Service, but that it was placed on notice that this suit would be instituted if they did not settle the decretal sum.

The relevant correspondence between the plaintiff's advocates and the applicant was annexed to the replying affidavit. This evidence was not controverted. The fact that it was not controverted means that the applicant cannot now seek to deny, in its proposed defence, that it was the insurer of the subject vehicle, or that the deceased was a fare paying passenger in the same vehicle; or that the aforementioned case had been heard and determined in the plaintiff's favour, or, that it is liable for the claim.

I find that the plaintiff did all she could in the circumstances and that she complied with the requirements of section 10 of the Insurance (Motor Vehicle Third Party Risks) Act Cap 405 of the Laws of Kenya, when her advocate sent the relevant notice on 11/9/2002, whose receipt has not been controverted either.

All in all I find that what the defence raises mere denials. The applicant has not convinced me that there are valid reasons to grant it the orders that it seeks.

I do in the circumstances dismiss this application with costs.

**JEANNE GACHECHE**

**JUDGE**

Dated and delivered at Eldoret this 2nd day of March 2004

**GEORGE DULU**

**JUDGE**

Delivered in presence of;