

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL CASE NO.133 OF 2000

JENIPHER GUMBA OYOO PLAINTIFF

VERSUS

KENINDIA ASSURANCE CO. LTD DEFENDANT.

RULING

The applicant/plaintiff prays to court to review its ruling and subsequent order of 25th March 2004 dismissing the plaintiff's application dated 1/4/03. He then prays that judgment be entered in the terms of the amended plaint as was prayed in the dismissed application dated 1/4/03. He also prays for costs.

The plaintiff had sued H. P. MASHIRU CO. LTD in KISII HCCC.NO.203 of 1998 for damages arising from injuries suffered when he was traveling in the defendant's m/v. Reg. No.KSH 130 which was involved in an accident. Court found for the plaintiff and awarded shs.630, 000/= general damages, shs.2, 500/= special damages together with costs and interests. Costs were taxed at shs.157, 500/= and interest calculated. The said motor vehicle was then insured by the defendant Co. in this case. The plaintiff brought this declaratory suit against the defendant.

Defendant filed its defence and denied liability. One line of defence was that if they had insured the defendant's vehicle in the original suit, the policy did not cover the claim by the plaintiff.

The applicant/defendant filed application dated 1/4/2003 seeking court to strike out the defendant's defence and enter judgment as prayed in the plaint.

The court having listened to both sides dismissed the application and declined to strike out defence holding that the defence raises triable issues. It is that ruling the applicant want reviewed. One reason why the court declined to strike out defence was that there were doubts if the plaintiff served the defendant with the Statutory Notice as required by the Act. Ms. Obaga submitted that after the ruling there was discovery of new evidence in form of a letter from the Insurance Company acknowledging receipt of the Notice. This, she submitted was discovery of new evidence which if it had been presented to court during the hearing of the application the court will have found in favour of her client. She said the letter had been misfiled in her Office and that was why it was not discovered in time.

The defendant indicated that they had insured the vehicle in question but the policy was commercial and did not cover passengers. She submitted that in light of the case of SHAH VS. MBOGO (1967) E.A. 116 the defendant cannot escape paying the claim.

Application was opposed. Mr. Okongo submitted that there was no discovery of new evidence. The letter in question referred to other cases and not the present one. He further contended that the defendant having not insured claims by passengers, he cannot pay the plaintiff's claim. He referred the court to the case of GATEWAY INS. CO. Ltd VS. SUDAN MATHEWS HCCC.NO.1078 OF 2000 (Milimani).

Indeed the court holds that there was doubt as to whether the defendant was served. It now seems that they were served and acknowledged the said vide their letter dated 20th May 1998 though they denied liability. This letter according to counsel for the applicant was misfiled in her office. She has explained the mix up of the cases cited in the letters and the explanation is plausible.

It is therefore clear that the defendant was served with the Notice. However there is the issue of whether the type of insurance policy issued covered the type of claims such as that of the plaintiff who was a passenger in the vehicle. Indications were that the policy did not cover passengers but only covered

commercial goods. I was referred to Shah's case but then the respondent also referred to the case of GATEWAY INS. CO. LTD case which held differently. Both were decisions of the High Court. I feel that issue need to go for full trial. It is an issue which goes to the cause of this claim and need to be addressed at a full hearing. It would not be just to shut the defendant from being heard. His contention may succeed or not but it has been held severally that a triable issue is not one that will necessary succeed but one which can be canvassed. The issue whether the policy covered the plaintiff's claim is one which can and need to be canvassed.

Thus though I find that the statutory notice was served contrary to my judging in my earlier ruling, I still find that there are other triable issues. I therefore decline to review or set aside my earlier ruling. The application is dismissed with costs.

Dated at Kisii this 22nd day of October 2004

KABURU BAUNI

JUDGE.