



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL CASE NO. 2154 OF 2001**

**JACOB MARIANUS KIRIANA ..... PLAINTIFF**

**VERSUS**

**KENINDIA ASSURANCE COMPANY LTD. .... DEFENDANT**

**R U L I N G**

M/s Kenindia Assurance Co. Ltd (**the Insurer**) who are the defendants in the main suit, seek to have the entire suit struck out under Order VI Rule 13 1(a) of the Civil Procedure Rules for the reason that it discloses no reasonable cause of action against the Insurer. The remedy sought is of course rarely and reluctantly granted for the simple reason that it is draconian and seeks to drive out the plaintiff from the seat of judgment before he reaches there. But the law recognises that there will be cases filed purely for no reason or through misguided advice and so they ought not to waste the court's time and that of the party affected. It is a useful tool in that regard.

Various authorities have set out the guiding principles for considering an application under that Rule. I summarized some in Mombasa HCC 711/94 Gidmorah Mrunde vs. Kenya Ferry Services & 2 others (UR), thus:

***“Firstly no evidence is admissible. That is the clear wording of sub -rule 2. Secondly only the plaint is to be looked at – Nyagah vs Nyamu [1976] KLR 75. Thirdly the power is only exercisable in plain and obvious cases – Drummond – Jackson vs British Medical Association dots [1970] 1 All ER”***

As for what amounts to reasonable cause of action, I referred to the definition in the Supreme Court Practice taken from Republic of Peru vs Peruvian Guano as:

***“a cause of action with some chance of success when only the allegations in the pleading are considered. ”.... Some meaning must be assigned to the term reasonable ..... A pleading will not be struck out unless it is demurrable and something worse than demurrable ”.***

What is the pleading in the plaint in this matter? The cause of action is all contained in 4 paragraphs of the plaint that is :

- i) The plaintiff was in the employment of the defendant's Insured KENYA CO-OPERATIVE CREAMERIES LTD when risk attached resulting in a suit being filed by the plaintiff against the said Kenya Co-operative Creameries Ltd in Civil suit No. 1262 of 1997 for damages. (ii)

In accordance with the doctrine of subrogation, the defendant undertook the defence of the said Kenya Co-operative Creameries Ltd., instructed the firm of Mbugua & Mbugua Advocates in the said defence. ii) On 15th July 1999 the High Court found for the plaintiff and awarded him Kshs. 10,135,331.00/= as revised by the Court of Appeal in Civil Suit Number 338 of 2000 together with costs and interest.

iv) By undertaking the defence as aforesaid and by operation of doctrine of subrogation and or stoppel, the defendant undertook to meet any judgment that would be passed against the said Kenya Co-operative Creameries Ltd.

The contention made by the defendant in view of those pleadings is that:

- (a) there being no contractual relationship between the plaintiff and the defendant upon which a cause of action can be founded, the suit is not maintainable.
- (b) The doctrine of subrogation cannot form the basis of the suit and is inapplicable to this case.
- (c) The claim for which damages were awarded is not covered under Cap. 405 Laws of Kenya and it cannot therefore be enforced against an insurer.
- (d) The plaint was incurably defective and raises no triable issues

It is indeed so that the only legal basis relied on in this matter is the doctrine of subrogation, the argument being that the Insurer provided legal services to the plaintiff's employer (KCC) and therefore must have taken over the liabilities of KCC.

Learned counsel for the Insurer, Mr. Mbugua referred to the definition of subrogation in **"A Dictionary of Law"** by Elizabeth Martin as:

***" The substitution of one person for another so that the person substituted succeeds to the rights of the other. Thus an Insurer who indemnifies his Insured against the loss of goods may be subrogated to the Insured persons against a third party whose negligence caused the loss "***

He further referred to **"the General Principles of Insurance Law"** Ivamy where it is explained that the doctrine applies only in contracts of indemnity, but "does not apply to Life Insurance not to Personal Accident Insurance for these are not contracts of indemnity"

The plaintiff here does not disclosed the risk which connected KCC and the Insurer or how he can benefit from a contract between KCC and the Insurer as a third party to that Contract. Subrogation is only between an underwriter and the Insured, not third parties. In response learned counsel for the plaintiff, Mr. Mariaria submitted that the Insurer had notice of the case before the High Court and the judgment against its Insured. It represented the Insured in that court and had gone on Appeal to challenged the decision. For all intents and purposes, the Insurer had taken over the litigation in subrogation and may be called upon to satisfy the judgment soon. He did not dispute the exposition of the doctrine of subrogation in the authority cited.

I think it is plain beyond peradventure that there was no privity of contract between the plaintiff and the Insurer. The cause of action here is based on a legal doctrine which clearly does not avail the plaintiff. Subrogation is available to the Insurer upon indemnifying the Insured. There is bi statutory provision as in Section 10 (1) of the Insurance (motor vehicle) Third Party risks Act (Cap. 405) to force a settlement of a decree obtained against an Insured in risks covered under that Act. The risk covered is not disclosed in this suit but it is not stated as one that arises under Cap. 405. that the Insurer provided legal services to the Insured in court proceedings, is no licence to saddle the Insurer with liability that does not lie either in contract or in tort.

I agree with Mr. Mbugua that the suit is misconceived and does not disclose a reasonable cause of action worth sanctioning for trial. It is for striking out.

The application is granted with costs to the defendant. Costs of the main suit to the defendant also.

Dated this 4th day of April, 2003.

**P. N. WAKI**

**JUDGE**

04.04.03

Waki, J.

Mbugua for defendant/applicant

No appearance for defendant/respondent (served)

Court clerk – Ndungu

Ruling delivered, dated and signed in Chambers.

**P. N. WAKI**

**JUDGE**