



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL CASE NO. 4772 OF 1990**

**ESTHER NYARUAI ..... PLAINTIFF**

**VERSUS**

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

**JUDGMENT**

The plaintiff, Esther Nyaruai sued the defendant, seeking

- (a) “a declaration that the plaintiff is entitled to be indemnified by the defendant for the total sum insured under the policy of insurance ,and judgment in the sum aforesaid together with costs”
- (b) “an order the defendant do compensate the plaintiff the total insured, value of the said motor vehicle at the time of the theft”.
- (c) “The plaintiff prayed in the alternative that the plaintiff is entitled to be indemnified by the defendant for the pre-theft value of the said motor vehicle’.
- (d) “General damages”.
- (e) “Damages for loss of user from the date of the theft until payment in full”.
- (f) “Costs of this suit”.

The defendant admitted that it “issued a policy of insurance as set out in para 3 of the plaint but denies that it is liable to indemnify the plaintiff as set out in para 3© of the plaint, and puts the plaintiff to strict proof”.

The defendant also stated that there was no valid claim in under the said policy since the vehicle in question plus all accessories was not stolen as alleged.....

The defendant alleged fraud and gave particulars of such fraud in para 5 of the defence. The defendant denied that the plaintiff had suffered any loss and damage.

In court during the hearing, the plaintiff recalled the period she was residing in Nairobi Dam estate and on the 2nd of March 1990, she got up in the morning and opened the window, but was surprised that her car, Reg. No. KYW 784 a Nissan 200 SX. She went downstairs and called her sister who was in the same house with her, to ask if she had seen the car, but she had not. The plaintiff called Langata police station and reported the loss of the car. The police came to the house and questioned the security guard who was on duty at night.

The plaintiff’s vehicle which was insured by the defendant, was never recovered. The vehicle was

insured under policy No. 3MP7301, a comprehensive cover. The value insured was Kshs.537,000/=. There was another insurance cover of Kshs.10,000/= for the music system and windscreen. The plaintiff explained that the log book was given to the defendant when it offered to settle the claim.

She produced a letter dated 8th April 1997 written by R.A Rebello advocate. The letter was produced as an exhibit. It was written to the defendant's lawyers Messrs K Mwaura & Co. Advocates. It forwarded 5 items – i.e.

1. 3 copies of consent order
2. Original log book
3. duplicate key for the car
4. Original copies of the certificate of insurance.
5. A set of complete transfer for forms completed by the client. The plaintiff produced the letter as an exhibit, and said that these documents were forwarded for payment of the claim.

The defendant's lawyers, K. Mwaura & Co. Advocates wrote to the Deputy Registrar, High Court of Kenya, dated 20th January, 1997. This letter was produced as Ex.2.

In fact, from the dates of the two letters, Ex. 1 and 2, Ex. 2 was written first, as it is the consent which the 2 advocates entered into before the letter, Ex.1 was written, forwarding the documents as agreed in Ex.1. The consent, Ex.2 signed by both advocates reads,

1. "The plaintiff does furnish the defendants with the following items in respect of motor vehicle Reg. No. KYW 784.
  - (a) A set of duly completed motor transfer forms.
  - (b) The original log book
  - (c) Duplicate set of keys.
  - (d) The duplicate certificate of insurance
2. Upon the plaintiff's compliance with order 1 hereinabove, judgment be entered for the plaintiff against the defendant in the sum on Kshs.559,100/= all inclusive"
3. There shall be a stay of execution for 30 days from the date of judgment".

The plaintiff said that she was not paid the money as agreed in the consent order. She denied that her claim is fraudulent.

The document, Ex.1 had some remarks on it said to have been made by a Mr. Waweru, advocate, who was however, not produced at the trial to deny or confirm whether he in fact made the comments. Further, the defendant did not adduce any evidence at that trial.

The two advocates consented to file written submissions as opposed to addressing the court orally. I accepted their submissions which now form part of the court proceedings.

In her submissions, the plaintiff claimed the value of the stolen motor vehicle, put at Kshs.636,000/= general damages put at one million shillings.

Most of the submissions by the plaintiff's counsel were based on the pleadings and the exhibits

produced at the trial.

The defendant, on the other hand did not call any evidence, as I have already stated, but in the submissions, the counsel referred to the list of agreed issues filed by the parties and submitted that the policy of insurance was not produced as evidence, and further, that its terms and conditions were not produced either.

The counsel submitted further that there was no evidence to show the loss of the vehicle and in the circumstances the plaintiff had not proved that she suffered any loss and damage to warrant the defendant to indemnify her.

I considered the pleadings and the plaintiff's oral evidence in court, the detailed account of how she found her vehicle missing from the parking bay, and reported the matter to the police. This evidence was not challenged though the advocate submitted that no evidence of such loss was produced. Further, there was the evidence by way of production of Exhibits 1 and 2 by the plaintiff.

As is evidence, the two advocates entered into a consent for judgment to be entered for the plaintiff against the defendant. The things requested for as per the consent judgment were forwarded by the plaintiff's counsel to the defendant's counsel. They included the original copy of the Certificate of Insurance. This would have the terms of insurance. There was no evidence adduced at the trial to refute this. I am therefore satisfied from that evidence that the defendant's lawyers received the items listed in the letter produced as Ex.1, which items were to assist them to settle the plaintiff's claim.

Further, I find that the parties entered into a consent judgment because the defendant must have been satisfied that the plaintiff's claim was genuine and therefore due and payable. The defendant cannot now turn to the list of issues and submit on them and rely on that as evidence to refute the plaintiff's claim.

The plaintiff claimed general damages in the plaint and in the submissions. However, during the hearing in court, she did not explain what it is that she suffered as a result of the loss of her vehicle. She just gave a figure of Kshs. one million as the damages suffered without an explanation as to how this sum was arrived at.

The net result of all this is that I find judgment for the plaintiff against the defendant in the sum of Kshs.559,100/=, all inclusive. This is the sum which was agreed by consent, as appears in Exh.2. Further, I award the plaintiff the costs of the suit.

**Dated at Nairobi this 9th day of October 2003.**

**JOYCE ALUOCH**

**JUDGE**