



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**APPELLATE SIDE**  
**CIVIL APPEAL NO. 795 OF 2001**  
*(From the original Civil Suit No. 6400 of 2001 of RMCC at Milimani  
Commercial Court)*

**BLUE SHIELD INSURANCE CO. LTD. ....APPELLANT**

**VERSUS**

**CAROLINE ANDISA .....RESPONDENT**

**J U D G E M E N T**

On 5th September, 2001 the Plaintiff-respondent filed a civil suit against the defendant-respondent seeking a declaration that the later was bound to pay the former the decretal amount in SRMCC No. 3862 of 1999 in the sum of Kshs.232,145/= with interest thereon at 14% per annum from 23rd August 2001 until payment in full.

There was also a prayer for costs of the suit with interest thereon at court rates from the date of filing herein until the date of payment in full.

This suit arose from the appellant's failure to pay to the respondent the said sum awarded to her as above in S.R.M.C.C. No. 3862 of 1999 as a result of a road traffic accident along Juja Road in which the said respondent was injured by motor vehicle registration number KZA 563 owned by one Omar Mohamed Noor, which motor vehicle had been issued with Insurance Cover by the appellant to cover 3rd party liability.

A defence filed to this suit on 23rd September, 2001 denied being notified of the accident subject to the said case SRMCC No. 3862 of 1999 or being served with the statutory notice and/or that due to the Insured's breach of contractual agreement under the policy, the appellant was entitled to repudiate the claim (in SRMCC No. 3862 of 1999).

Thereafter the plaintiff-respondent filed an application on 3rd October 2001 in court seeking a court order to strike out or dismiss the defendant-appellant's defence dated 20th September 2001 on the grounds that:

- (a) It was scandalous, frivolous or vexatious;
- (b) It may embarrass, prejudice or delay the fair trial of the action, or
- (c) Was otherwise an abuse of the court process.

The application was based on the grounds set out on the body thereof and the facts deposed to in the supporting affidavit by counsel for the plaintiff.

The one ground on the body of the application was that it (the claim) being of a declaratory suit and judgment having been entered against the insured in SRMCC No. 3862 of 1999 and the defendant having been served with a statutory notice under Section 10 of Cap 405 the defendant could have no defence to this suit.

The supporting affidavit denied paragraphs 2, 3 and 4 of the defence and paragraph 5 thereof repeated the ground on the body of the application as already referred to above. The supporting affidavit also averred that the defence was a sham and prayed that the same be struck out.

The replying affidavit had two answers to the application, namely that the insurance policy cover was not issued to the defendant in RMCC No. 3862 of 1999 but to one Hassan I. Duale hence the appellant was not obligated to pay the judgment in that case as it was not against its insured at the time of the alleged accident – that such defendant was a stranger to the appellant.

The application was heard by the Senior Resident Magistrate (Mrs N.A. Owino) on 29th/10/2001 when counsel for the parties appeared and submitted on it.

Counsel for the applicant referred to the statutory notice to the appellant as well as notice of intended suit against one Omar Mohammed Noor while for the respondent her counsel replied that the letter of intended suit was not addressed to the insured who was Hassan Duale and not Omar Mohamed Noor and that this was not a good case where summary judgment should be entered.

The ruling was written and delivered by the learned magistrate on 8th November, 2001 who decided and struck out the defence and then proceeded to enter judgment for the respondent as prayed in the plaint urging that the defence did not raise any triable issue.

In coming to this decision the learned magistrate stated that there was a judgment in SRMCC No. 3862 of 1999 in favour of the plaintiff – respondent and that the insured was the defendant in that case.

That the defendant had been served with the statutory notice under Section 10 of Cap 405 and that the defendant had filed an application as required by Section 104 of Cap 405 denying liability and was therefore estopped from denying liability at that stage.

And that the abstract report showed that the defendant were the insurer of motor vehicle registration number KZA 563 which belonged to the defendant in RMCC No. 3862 of 1999.

This decision gave rise to the appeal before this court dated and filed on 16th November, 2001.

Six grounds of appeal were listed to complain that the learned magistrate erred in both law and fact in finding that the defence filed raised no triable issues, that she erred in failing to appreciate the contents of the replying affidavit that the defendant was never an insurer of the person whom the initial judgment in Nairobi RMCCC No. 3862/99 was entered; that she erred in failing to find that the defendant was not bound to satisfy the judgment in Nairobi RMCC No. 3862 of 1999 under the Provisions of Insurance (Third Party Liability Act) Cap 405 Laws of Kenya, that she erred in entering judgment for a sum which was different from the sum claimed in the plaint, that she erred in entering judgment against the defendant while the same was not prayed for in the application and that she erred in entering judgment against the defendant whereas the plaint only prayed for a declaration and without formal proof being done.

The appeal was fixed for hearing on 7th October, 2002 when counsel for the parties appeared in this court to submit thereon either for or against it. Counsel for the appellant submitted that the insurer of the policy was not a party against whom the judgment had been entered.

According to counsel, the magistrate did not consider the issues of non service of summons in the initial

suit and the statutory notice upon the appellant and that this was not the type of case where summary judgment should have been entered or strike out defence. That the case should have gone to full trial by way of formal proof. He prayed that the appeal be allowed with costs and the suit to be heard inter parties.

Counsel for the respondent, on the other hand, opposed the appeal and said the replying affidavit had admitted that the appellant was the insurer of the motor vehicle registration No. KZA 563 hence this was not an issue to be decided by the magistrate.

That the court had found that the appellant had been served with the statutory notice – hence the two points raised in the defence collapsed and nothing was left of it.

Counsel submitted that the appellant was not required to be served with summons and that only the insured was to be so served.

That the principal suit stood since judgment had not been set aside and the appellant was bound to satisfy that judgment.

That the defence was a mere sham and was properly struck out. Counsel submitted that this appeal had no merit and should be dismissed with costs.

The suit was intended for a declaratory order whether the appellant was bound to pay the plaintiff the decretal amount (Kshs.207,290/= in SRMCC No. 3862 of 1999. The amount was not Kshs.232,145/=.

Section 10 of Cap 405 provides for the insurer to pay to persons entitled to the benefit of the judgment any sum payable under the policy in respect of the liability.

The marginal note of the above Section talks of “*Duty of insurer to satisfy against persons insured.*”

The person insured by the appellant was Hassan I. Duale but from the record herein the capacity of Omar Mohamed Noor who was the defendant in SRMCCC No. 3862 of 99 was not made clear, vis a vis motor vehicle No. KZA 563. Parties to this contract of insurance did not include Omar Mohamed Noor or the respondent, for that matter.

This is what paragraph 3 of the defence was talking about and one cannot say this was so plain and obvious a case on the face of it to say this defence was simply filed to embarrass, prejudice or delay the fair trial of the action or that it was otherwise an abuse of the process of the court.

Striking out a defence of this nature was tantamount to depriving a defendant of his right to defend the suit as a triable issue had been raised whether, in view of the fact the appellant had not insured Omar Mohamed Noor and/or that the respondent was not a party to this contract of Insurance.

The defence was not a sham as counsel for the respondent alleged in the lower court and in view of the reliefs sought an application under Order VI Rule 13(b) (c) & (d) of the Civil Procedure Rules was not appropriate.

This was a case which should have been allowed to go to a full trial in order to determine the issues at stake.

In the court’s view it was against the rules of natural justice to deprive the appellant of his right to be heard on his defence when a triable issue had been raised therein.

I allow this appeal and direct that the case be remitted back to the lower court for hearing on its merit. This was not a liquidated demand and even if defence had been properly struck out, formal proof should have been conducted before the entry of judgment. Costs of appeal to be born by the respondent.

Delivered and dated this 18th day of October, 2002.

D.K.S. AGANYANYA

JUDGE