



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**CIVIL SUIT NUMBER 5 OF 2018**  
**MADISON INSURANCE COMPANY LIMITED.....PLAINTIFF**  
**VERSUS**  
**MAGHARIBI INVESTMENT MACHINERIES LIMITED....DEFENDANT**

**R U L I N G**

1. On 3<sup>rd</sup> July 2020 I delivered a judgment in this suit in which the plaintiff sought the following orders;

- a. A Declaration that it is not bound to pay/or satisfy the judgment in Molo CMCC No. 243 of 2016 and/or indemnify the Defendant against any claim in respect of death, bodily injury to any person, damage to property of any person travelling at the time as an employee of the Defendant whatsoever arising out of the accident which allegedly occurred on 30<sup>th</sup> September, 2015 along Eldoret Nakuru road at Salgaa area involving the Defendant's motor vehicle registration number KBH 030L Mercedes Benz.
- b. Costs of this suit.
- c. Interest on (b) above at Court rates.
- d. Any other or further relief that this Honorable Court may deem just, expedient and fit to grant.

2. After considering the issues, I found that the issue as to whether the claimant was an employee of the insured was an issue of fact that ought to be determined in the suit **Chief Magistrate's Civil Case Number 243 of 2016**. On that ground alone, I found that the application was premature, as this court was not the place to determine that fact.

3. On 25<sup>th</sup> March 2021 the plaintiff file a Notice of Motion brought under **Article 159 (2) (d) of the Constitution of Kenya 2010, Order 12 rule 7, Order 45 rule 1 and Order 51 rule 1 of the Civil Procedure Rules 2010. Sections 3A and 80 of the Civil Procedure Act** seeking orders;

1. THAT Honorable Court be pleased to review its Judgment in Nakuru HCCC No. 5 of 2018 delivered on 3<sup>rd</sup> July 2020 and allow the Plaintiffs case as prayed for in the Plaint.
2. THAT the costs of this application be in the cause.

4. The grounds for the application were that;

1. THAT a copy of the judgment in Molo Chief Magistrate's Civil Case Number 243 of 2016 confirms that indeed the Plaintiff therein was a turn man in motor vehicle registration number KBH 030L Mercedes Benz.
2. THAT the plaintiff could not obtain a copy of the lower court judgment in Molo CMCC No 243 of 2016 as at the time of the High Court trial.
3. THAT the lower court judgment being clear that indeed the Plaintiff therein John Nyongesa Mayende was the Defendant turn boy/employee there is now sufficient material for the court to make a final conclusion.
4. THAT it is only appropriate that the court reviews its judgment and allows the Plaintiff's claim prayed for in the Plaint.

5. THAT there is sufficient cause or reason therefore for this Honorable Court to vary/view the judgment and allow the Plaintiff's case as prayed for in the Plaint.

4. The plaintiff/applicant annexed the judgment in **Molo Chief Magistrate's Civil Case Number 246 of 2016 in which** the plaintiff John Nyongesa Mayende sought orders for general damages, special damages of Kshs. 10,200/= and costs of the suit and interest.

5. The learned trial magistrate found as a fact that the plaintiff was travelling both as a turn boy for Magharibi Investments Machineries Limited and a passenger in motor vehicle registration number KBH 030N, which rammed into motor vehicle registration number KBH 518T which was being repaired.

6. The trial magistrate found for the plaintiff as against both defendants on liability at 100% and awarded both special and general damages

7. The plaintiff/applicant argues that by dint of paragraph **MOTO15 & MOTO49** of the policy document which provides *inter alia*;

MOTO49 THIRD PARTY PASSENGER LIABILITY Limit amount of the company's liability:-In respect of any person (other than a passenger being carried by reason of or in pursuance of a contract of employment) being carried in or upon entering or getting onto or alighting from Motor Vehicle and **section 5(b) of the Insurance (Motor Vehicle Third Party Risks) Act**, John Nyongesa Mayende was not covered under the policy issued. That under **section 5(b) of the above Act** it was not liable for the insured's employees.

8. The plaintiff/applicant relied on the case of **Kenya Orient Insurance Co Ltd vs Benjamin Ochina (2013) eKLR** where the court cited the case of **Gateway Insurance Company Ltd vs Sudan Mathews (2000) eKLR** where the court stated as follows;

**"... the Statutory third party cover is not required to extend to the risks of death or bodily injury to employees of the insured arising out of or in the course of their employment; or to the death or injury to passengers except in the case of motor vehicle in which such persons are carried for reward or hire or by reason or in pursuance of a contract of employment; or to any contractual liability."**

9. The finding by the learned trial magistrate in **Chief Magistrate's Civil Case Number 243 of 2016** that John Nyongesa Mayende was a turn boy for the 2<sup>nd</sup> defendant (defendant herein) places him within the exception clause of the insurance policy contract.

10. To that end the plaintiff's application for review of the judgment is tenable on account that had this fact been placed before me when I made my judgment I would have granted the orders sought.

11. The application is allowed in the following terms:

A Declaration be and is hereby issued that the plaintiff/ applicant is not bound to pay/or satisfy the judgment in Molo Chief Magistrate's Civil Case Number 243 of 2016 and/or indemnify the Defendant against any claim in respect of death, bodily injury to any person, damage to property of any person travelling at the time as an employee of the Defendant whatsoever arising out of the accident which allegedly occurred on 30<sup>th</sup> September, 2015 along Eldoret Nakuru road at Salgaa area involving the Defendant's motor vehicle registration number KBH 030L Mercedes Benz.

12. No order as to costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 9<sup>TH</sup> DAY OF DECEMBER, 2021**

**MUMBUA T. MATHEKA,**

**JUDGE**

**In the presence of:-**

C/A Edna

For Plaintiff/ Applicant: Ms Chelule holding brief for Murimi Ndumia Mbago and Muchela Advocates

Magharibi Investments Machineries Limited