



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CIVIL CASE NUMBER 426 OF 2009**

**ALEC ASUTSA .....PLAINTIFF/APPLICANT**

**VERSUS**

**GATEWAY INSURANCE COMPANY LIMITED.....DEFENDANT/RESPONDENT**

**RULING**

The application for determination by the court is the Notice of Motion dated the 14<sup>th</sup> day of June, 2011 brought under section 3, 3A and 63 (e) of the Civil Procedure Act and order 36 rule 1 of the Civil Procedure Rules.

The application seeks for orders;

- (1) That summary judgment be entered against the Defendant herein for the sums prayed for in the Plaintiff being Kshs.5,000,000 plus costs taxed at Ksh.236,709 and interest on the said sums from the 27<sup>th</sup> November 2006 being the date of judgment until payment in full.
- (2) That the costs of this suit and application be awarded to the plaintiff.

It is premised on the grounds set out on the body of the application and its supported by the affidavit of ALEC ASUTSA sworn on the 14<sup>th</sup> day of June 2011.

The facts in support of the application are that the applicant herein filed HCCC No.1251/2006 (ALEC ASUTSA Vs SAMMY MAINA NDEI) in which he had sought general and special damages arising from injuries that he sustained in a road traffic accident while he was travelling as a fare paying passenger in a public motor vehicle registration number KAT 870G.

That judgment was on 27<sup>th</sup> March 2009 entered in the aforesaid matter in his favour for a sum of Ksh.5,000,000 plus costs and interests. That the vehicle was insured by Gate Insurance Company Limited (the defendant herein). He further avers that, on the 26<sup>th</sup> February 2016, pursuant to Section 10 of the Insurance (Motor Vehicle Third Party Risks) Act, Cap 405, he served a statutory Notice upon the defendant.

He has sought summary judgment against the defendant plus the costs of the suit.

The defendant has opposed the application by way of a replying affidavit sworn by Lilian Munyiri on the 13<sup>th</sup> November, 2012 wherein she has deponed that the plaintiff has not established any cause of action

against the defendant for the reasons that; first, the application is an abuse of the court process in that the defendant filed its defence long time and issues have already been agreed upon and therefore the application does not lie under the provisions of order 36 Rule (1) of the Civil Procedure Rules.

That the defence as filed raises triable issues that can only be determined through a full trial and which cannot be summarily dismissed and has listed down the following issues.

- (a) Whether the defendant was the Insurer of the motor vehicle registration number KAT 870G.
- (b) Whether or not the defendant was given a valid statutory notice by the plaintiff.
- (c) Whether the provisions of Cap 405 as far as they relate to declaration against the Insurer are applicable in the circumstances of this case.

The defendant has further denied that it was served with a statutory notice and have taken issues with annexures AAI and AA5 which they contend contains two different motor vehicles and it's hard to determine which motor vehicle the plaintiff alleges to have been insured by the defendant.

That once there is a defence on record, the applicant is deprived of the remedy of summary judgment and that the application falls short of the requisite standard for the prayers sought.

The Court has considered the application and the submissions by the parties.

The respondent has raised a very fundamental point of law and has contended that the application is an abuse of the court process in that the remedy of summary judgment not available to the applicant under order 36 rule 1 of the Civil procedure Rules. The rule provides;

***(1) In all suits where a plaintiff seeks judgment for;***

***(a) A liquidated demand with or without interest; or***

***(b) .....***

***where the defendant has appeared but not filed a defence, the plaintiff may apply for judgment for the amount claimed, or part thereof and interest, or for recovery of the land and rent or mesne profits.***

A perusal of the court record reveals that, the defendant filed a statement of defence on the 7<sup>th</sup> day of September 2009 while the application herein was filed on 28<sup>th</sup> June 2011. It is clear that by the time the application herein was filed, the defendant had already filed a defence and issues had been agreed upon.

In the premises aforesaid, the remedy of summary judgment is not available to the plaintiff/applicant as by the time the application was filed the defendant had already filed a defence. The application ought to have been filed before the defendant filed a defence. Consequently, the application dated 14<sup>th</sup> June 2011 is hereby struck out with costs to the Defendant/Respondent.

Dated, signed and delivered at Nairobi this 19<sup>th</sup> Day of January, 2017.

.....

**LUCY NJUGUNA**

**JUDGE**

**In the Presence of**

..... for the Plaintiff

..... for the Defendant