REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 342 OF 2011

GATEWAY INSURANCE CO. LTD.....PLAINTIFF

- **VERSUS -**

THOMAS NJENGA GITAU.....DEFENDANT

ELIZABETH WANJIRU NJOROGE…….. APPLICANT

RULING

1. The application before me has been brought by **ELIZABETH WANJIRU NJOROGE**, who described herself as an "Aggrieved Party". She was asking the court to review the Judgment it entered on 11th October 2012.
2. The applicant was asking the court to set aside the Judgment which had been entered in favour of the plaintiff, **GATEWAY INSURANCE COMPANY LIMITED.**
3. The second prayer of the applicant was that the Civil Case No. 781 (B) of 2011 be reinstated at the Chief Magistrate's Court, Thika. That case had been struck out on the strength of the Judgment in the case now before this court.
4. The grounds upon which the application are founded were set out by the applicant, as follows;

> *"1. **THAT** the filing of the suit and its entire process breached provisions of section 10 of the Insurance (Motor Vehicle Third Party Risks) Act, Cap 405 of the Laws of Kenya, and the suit was therefore null and void ab initio.*
>
> *2. **THAT** the said judgment of the court has aggrieved the Applicant herein, in that it has been used to strike out a Declaratory suit by the Applicant against the Respondent herein, being Civil Case No. 781 (B) of 2011 at Thika Chief Magistrate's Court.*
>
> *3. **THAT** the suit was brought by the Plaintiff/Respondent in total disregard of the Statutory Provisions of Section 10 of the Insurance (Motor Vehicle Third Party Risks) Act, Cap. 405 of the Laws of Kenya with the sole aim of unlawfully avoiding obligations bestowed on the Respondent by the said Act and therefore the justice of the case demands that it be set aside at all costs".*

5. When urging the application for review, the applicant pointed out that she is the widow to **PETER NJOROGE MWANGI.** Her late husband died on 2nd July 2009, after he was involved in a road traffic accident between him and a motor cycle registration No. KBG 017 W (KMCC 585

D). The said motor cycle was owned by the defendant, **THOMAS NJENGA GITAU.**

6. At the time of the accident the motor cycle was insured by the plaintiff, **GATEWAY INSURANCE COMPANY LIMITED.**

7. The applicant (Elizabeth) filed suit at the Chief Magistrate's Court, Thika, seeking compensation against the defendant (Thomas); that case was **CMCC No. 422 of 2010.**

8. The court awarded to Elizabeth the sum of Kshs. 453,683. The said judgment in which Elizabeth was awarded that sum is dated 12th June 2011.

9. Notwithstanding the favourable judgment, Elizabeth failed to trace any attachable assets belonging to Thomas. She was therefore compelled to file a declaratory suit against the plaintiff (Gateway Insurance), with a view to executing the said judgment against them. That case was CMCC No. 781 (B) of 2011, at the Chief Magistrate's Court, Thika.

10. Gateway Insurance had become aware that a judgment had been entered against their insured (Thomas), in CMCC No. 422 of 2010. That judgment had been entered on 12th June 2011.

11. Shortly thereafter, Gateway Insurance filed this suit against Thomas: this was on 4th August 2011.

12. It is the case of Elizabeth that Gateway Insurance employed delaying tactics in the declaratory suit which Elizabeth had filed against them. Therefore, that declaratory suit had not been determined yet by the time this court determined the case which Gateway Insurance had filed against Thomas.

13. In his judgment Havelock J. held as follows;

> *"I am satisfied that the Defendant has breached the motor vehicle insurance policy conditions by allowing the deceased, Peter Njoroge Mwangi, to drive the insured motor cycle. Accordingly, I grant prayer (i) and (ii) of the Plaint. Further, the plaintiff will have the costs of the suit".*

14. The said reliefs which were granted by the court were worded as follows, in the plaint;

> *"(i) A declaration that it is and has at all material times been entitled to avoid the said Policy of Insurance No. 022/071/147201/9/1 and any provision contained therein on the ground that the terms of the policy had been breached by the Defendant.*
>
> *(ii) A declaration that the plaintiff is not liable to make any payment under the aforesaid Policy Insurance No. 022/071/147201/9/1 in respect to any claim against the Defendant herein arising out of the accident on the 2/7/2009 involving the motor cycle registration number KMCC 585 D (formerly KBG 017 W)".*

15. Having procured those orders from the High Court, Gateway Insurance filed an application at the Chief Magistrate's Court, Thika, seeking the striking out of the declaratory suit of Elizabeth.

16. Hon. S. Telewa RM handled the application filed by Gateway Insurance. It was her considered view that Gateway Insurance was in breach of Section 10 (4) of the Insurance (Motor Vehicle Third Party Risks) Act, by failing to commence this case within three (3) months after Elizabeth had sued them. The suit was filed after the lapse of 18 months.

17. Secondly, Gateway Insurance was said to have failed to give notice to Elizabeth, within 14 days of commencement of these proceedings, that Gateway Insurance intended to avoid the judgment.

18. In the light of those considerations, Hon. Telewa RM expressed the view that the decision of Havelock J. may well be null and void.

19. However, because the decision was from the High Court, the learned magistrate concluded that she had no option but to be bound by it. She proceeded to strike out the declaratory suit of Elizabeth, but added that Elizabeth was at liberty to either appeal or to seek review of the decision made by the High Court.

20. The learned magistrate delivered her Ruling on 11th October 2013.

21. Two (2) months later, on 17th December 2013, Elizabeth came back to this court, seeking review.

22. In her supporting affidavit, Elizabeth has said; inter alia;

> *"9. **THAT** this suit was heard ex-parte and one cannot rule out collusion between the Respondent Insurance Company herein and its insured, **MR. GITAU** to circumvent justice, and judgment was obviously granted to the Respondent for the uncontested suit".*

23. It is true that Thomas Gitau did not contest the suit filed by Gateway Insurance. However, in my considered view the theory of collusion is somewhat far-fetched. Elizabeth has not given any facts on reasons to warrant her said contention.

24. This court is unable to see any reason that would have led Thomas to collude with Gateway Insurance, to deprive Elizabeth of the fruits of the judgment. If the Gateway Insurance escaped liability, through the declarations made by the High Court, that would mean that Thomas Gitau remained liable to satisfy the Decree in favour of Elizabeth.

25. Pursuant to the provisions of Section 10 (1) of the Insurance (Motor Vehicle Third Party Risks) Act;

> *"If, after a policy of insurance has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of Section 5 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect to the liability, including any amount payable in respect of any costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments".*

26. On the basis of that provision, Elizabeth submitted that Gateway Insurance was obliged to settle the Decree issued in favour of Elizabeth, by the Chief Magistrate's Court, Thika: that obligation is said to remain intact whether or not the motor cycle had been driven by an un-authorised driver.

27. According to Mr. J.K.M Gichachi, the learned advocate for Elizabeth, the only way that Gateway Insurance could have avoided liability to Elizabeth would have been through the application of Section 10 (4) of the Insurance (Motor Vehicle Third Party Risks) Act: that provision

stipulates as follows;

> *"No sum shall be payable by an insurer under the foregoing provisions of this section if in an action commenced before, or within three months after the commencement of the proceedings in which the judgment was given, he has obtained a declaration that, apart from any provision contained in the policy he is entitled to avoid it on the ground that it was obtained by the non-disclosure of a material fact, or by a representation of fact which is false in some material particular, or, if he has avoided the policy on that ground, that he was entitled so to do apart from any provision contained in it".*

28. In my understanding of that provision, an insurer would be entitled to avoid its obligation to make payment under a contract of insurance if it had commenced proceedings either before a case had been filed against its insured or within 3 months of the case being instituted against its insured. The claim by the insurer would need to be one in which the insurer sought and obtained a declaration that it was entitled to avoid its obligations under the contract of insurance. And the grounds upon which the insurer obtained that declaration would need to have been of material non-disclosure or of false representation of material particulars.

29. Obviously if an insurer did not know of the incident which could given rise to a claim by its insured, the insurer cannot commence action to seek a declaration that the insurer was entitled to avoid the obligations under the contract of insurance.

30. In **TECHERA VS. UNITED INSURANCE COMPANY LIMITED** [2005] 1 KLR 216, G.B.M. Kariuki J. (as he then was) said;

> *"At this time of the institution of the suit, the plaintiff had given the defendant notice dated 8/8/97. Was it valid and in conformity with section 10 (2) of the Insurance (Motor Vehicles Third Party Risks) Act? The Act requires the insurer to have had notice of the institution of the suit. Section 10 (2) (supra) focuses on receipt of the Notice by the insurer".*

31. In the case before me, there is no information as to whether or not Gateway Insurance received Notice of the suit which Elizabeth had filed against Thomas.

32. Therefore, it would be unfair to have expected the insurer to have filed suit within 3 months of the institution of a suit which the insurer may not have been aware of.

33. On the other hand, it is possible that the insurer was given Notice by the claimant or any other person. If that were the position, then the failure by the insurer to commence the declaratory suit within 3 months of the institution of the case by Elizabeth against Thomas, would render the insurer liable to pay the decretal amount.

34. This court does not have sufficient factual information to enable it determine the question as to whether or not the insurer was aware of the case filed by Elizabeth against Thomas within such time as could have enabled the insurer to commence the declaratory suit within 3 months after Elizabeth sued Thomas.

35. The declaratory judgment herein was obtained after Elizabeth had already got judgment against Thomas. Therefore, the proviso to section 10 (4) of the Insurance (Motor Vehicle Third Party Risks) Act, were inapplicable to this case. That proviso reads as follows;

> *"Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not thereby become entitled to the benefit of this subsection as respects any judgment obtained in proceedings*

commenced before the commencement of that action, unless before or within fourteen days after the commencement of that action he has given notice thereof to the person who is the plaintiff in the said proceedings, specifying the non-disclosure or false representation on which he proposes to rely, and any person to whom notice of such action is given shall be entitled, if he thinks fit, to be made a party thereto".

36. In this case the applicant has submitted thus;

> *"A suit which has been filed and/or proceeded contrary to the provisions of statute is null and void ab initio. It does not exist and even a judgment obtained in such a case has no effect, it is superfluous and does not lie".*

37. For those reasons, the applicant believes that there was no need for her to lodge an appeal to challenge a judgment which did not have any basis of existence. She was of the view that the only way of dealing with such a decision was through review.

38. But the insurer emphasized that review cannot lie because the applicant had failed to comply with the provisions of Order 45 Rule 1 of the Civil Procedure Rules.

39. It is instructive that the application was premised on Order 45 Rule 1. That rule provides thus;

"1 (1) Any person considering himself aggrieved –

a. *By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or*
b. *By a decree or order from which no appeal is hereby allowed,*

and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay".

40. In this case the applicant is not alleging that she has discovered any new and important matter or evidence. She is saying that the suit was filed in contravention of the law.

41. To my understanding, the applicant is saying that the court got it wrong, when it granted judgment in favour of the insurer. Mr. Gichachi advocate expressed the view that if the court had been told that the insurer had failed to adhere to the provisions of Section 10 of Cap 405, the court would have definitely dismissed the suit.

42. If I were to accept that contention, I would then proceed to make a finding that a Judge of concurrent jurisdiction made an error of law, when he determined the suit. Such a finding would constitute an evaluation of the correctness of the decision made by another Judge, whose jurisdiction is similar to mine.

43. I do not have the legal authority to, effectively, sit in an appeal over the decision of another Judge of concurrent jurisdiction.

44. In **NATIONAL BANK OF KENYA VS NDUNGU NJAU, CIVIL APPEAL** No. 211 of 1996, the Court of Appeal said;

> *"It will not be a sufficient ground for review that another Judge could have taken a different view of the matter nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground of review".*

45. In the circumstances, I find that the applicant has not made out any case for review.

46. The application is therefore dismissed. The costs are awarded to the plaintiff.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this **7th day** of **October** 2014.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Juma for the Plaintiff.

…….for the Defendant.

Gichache for the Applicant.

Mr. C. Odhiambo, Court clerk.