REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA

Civil Suit 105 of 1997

MORGAN MWTTA ..... PLAINTIFF

- Versus -

CO-OPERATIVE INSURANCE SERVICES LTD ..... DEFENDANT

RULING

The Notice of Motion dated 24.2.98 was taken out by thePlaintiff in the main suit seeking summary Judgement under 035 r1(1)(A) of the Civil Procedure Rules.

The background to the application is this:Morgan Mwita (Morgan) sued one Charles Ouru Opiyo (Charles) andSusan Mwita (Susan) before the Chief Magistrate's Court, Mombasa*CC* 142/94. He sought to recover special and general damages forinjuries sustained by him when he was travelling in Motor VehicleReg. KWF 254. The registered owner of that vehicle was Susan andit was driven by Charles. It was insured against Third Party Risksby M/s Co-operative Insurance Services Ltd (CIS) at the time of theaccident on 9.10.93. As the vehicle was being driven alongMtongwe/Likoni Road near Corner Mbaya, it overturned and Morgansustained injuries. He said he was a fare-paying passenger in thatvehicle.

Before the filing of the suit, there was a demand Notice dated 9.5.94 served on Susan with a copy to CIS. Upon institution of thatsuit on 7.10.94, summons to enter Appearance was served on Susan,the Insured, on 6.2.1995. The insurer, CIS, was also served witha Statutory Notice.

When Susan failed to enter appearance, Morgan applied forinterlocatory judgement on 22.2.95. It is not clear whattranspired thereafter but eventually Morgan obtained finaljudgement against Susan and Charles for Shs.468,960/-. Inclusiveof costs the Decretal amount came to a total of Shs.540,943/-.Again it is not clear whether there was any attempt to execute theDecree against Susan and Charles, but there is a copy of anapplication for execution and warrants of attachment and sale someof which are not signed and have no apparent court stamp. They aredated 27.3.96.

Morgan then came to court on 28.11.97 and filed this suitagainst CIS. He sought to enforce the judgement against CISciting, the ownership of the Motor vehicle, the fact of insurance,the suit filed against the insured and the judgement obtainedtherein.

CIS filed defence on 24.12.97 stating that the suit wasincompetent and disclosed no cause of action. They admitted thatthe Motor Vehicle KWF 254 was indeed insured by them at thematerial time and that Susan was the Policy Holder.

They averred however that Morgan was not only Susan's husbandbut. was at the time of the accident the owner and/or Manager of the Motor Vehicle and was not travelling in the vehicle as a farepaying passenger. They pleaded S. 5(b) (i) and 5(b) (ii) of Cap405 and avered that Morgan was precluded from

making any claimagainst them.' Although they received both the Demand Notice andthe Statutory Notice, they contended that they were not under anyobligation to respond thereto and the matter was not covered underthe Policy of Insurance held by Susan. They denied any judgementwas entered in favour of Morgan and even if it was, they deniedliability therefore.

Morgan did not think the defence was tenable. That is why hecame to court on 6.3.98 and sought summary judgement.

In her submissions on behalf of Morgan, Ms. ShariffAdvocate cited Kavindu & Anor V Mbaya & Anor [19761 KLR 164 wherethe court observed that an Insurance Company which has a Statutoryduty to satisfy a judgement is entitled to apply to the Court toset aside the judgement in appropriate case. She submitted thatCo-operate Insurance Services did nothing in this particular caseuntil this suit was filed only for them to come up with a shamdefence. There was no defence to the averment that Morgan was afare-paying passenger and such defence cannot be raised now.

In Counsel's view, S.10(l) of Cap 405 squarely brings theplaintiff's suit within the section and the Insurance company istruly liable to pay up. S. 5(b) Cap 405 also covers the situationas Morgan fits into the exception.

In such event the defendant should have shown cause why leave to defend should be granted. There is no affidavit in reply butonly grounds of opposition which are not one of the meansenvisaged for showing cause. This is a clear case where the mainsuit is not resisted nor the application and summary judgementshould ensue She cited General Accident Insurance Co(K) Ltd VJOHN MUTUMA CA 196/95 (UR) and submitted that theplaintiff/applicant in this case fell within the same situation.

Opposing the application Mr. Kiogora for Co-operate InsuranceServices submitted that the case of Kavindu V Mbaya applies in asfar as the Insurance Company is liable, No liability lies in thiscase and therefore the authority is not applicable. Liability canonly arise under S.10 (1) if the terms of S.5(b) are fulfilled.The contention is therefore that the plaintiff falls under theexceptions and the Insurance company is not liable. That was atriable issue as stated in Zolla & Anor Vs Ralli Brothers Ltd &Anor [19691 EA 691. There is a defence on record which raisestriable issues and it was not necessary therefore to fileaffidavits. That satisfied 035 r 2 CPR. As far as CIS isconcerned there was no nexus between the Lower Court Case and thiscase.

At any rate, Mr. Kiogora submitted, the Court of Appealauthority cited, The General Accident Insurance Co. Ltd. Case wasin the Respondent's favour. There must be liability to start withand also the person claiming is not entitled.

As the defence is not a sham this is not. a matter for summary judgement. The Applicant is not without a remedy since he has adecree which he can execute against his wife, CIS is not concernedwith that matter. The application should be dismissed.

Winding up her submissions Ms. Shariff contended thatfare-paying passengers are covered and it matters not that thepassenger is a husband of the owner of the vehicle. So long as itis established that he paid fare for travelling therein. TheInsurance company should have raised its objections at the Lowercourt. Judgement was obtained and the successful party need notproceed against the Judgement Debtor if it can be enforced againstthe Insurance company.;

I have anxiously considered the application and the submissions of Counsel. There is no quarrel on the principles applicable when considering applications made under 035 r 1&2 Civil Procedure Rules. The difficulty is in applying those principles.

As Gicheru J.A. stated in CA 270/96 Corporate Insurance Company Ltd. V Nvali Beach Hotel Ltd. (UR)

"the purpose of an application for summaryjudgement is to enable a plaintiff to obtain aquick judgement where there is plainlyno defence to the claim. If the defendant'sonly suggested defence is a point of law

andthe court can- see at once that the point ismisconceived, the plaintiff is entitled tojudgement. If at first sight the pointappears to be plainly unsustainable theplaintiff is also entitled to judgement". Butproceedings for; summary judgement "shall not be allowed to become a means of obtaining,in effect an immediate trial of an actionwhich will be the case if the court lendsitself to determining on such applicationspoints of law which may take hours or evendays and the citation of many authoritiesbefore the court is in a position to arriveat a final decision. It is only if anarguable question of law or constructionis short and depends on few documentsthat summary procedure is apposite. See Balli Trading V Afalona Shipping "The Coral"(1931) 1 LLRep 1"And pall J.A. in the same case:

"..... the purpose of 035 is to enable a plaintiff to obtain summary judgementwithout trial if he can prove his claimclearly and if the defendant is unableto set. up a bona fide defence or raisean issue against the claim which ought to betried. The defendant is bound to show that hehas "some reasonable or fairly arguable groundof defence to the action. The defendant'saffidavit must condescend upon particularsand must clearly state and concisely statewhat the defence is and what facts are relied on supporting it. In all cases sufficient facts and particulars must be givento show that there is a bona fide defence andof course once a bona fide defence has beenidentified, the court should refrain fromresolving it on affidavit evidence. So far asa point of law is concerned, Leave should be'given where a difficult point of law is raised (see Electric Corporation Vs- Thomson Houston Co.10.Tr.R103. Nevertheless if the point isclear and the court is satisfied thatit is really unarguable leave to defend will be refused (Cow Vs. CaseyE19491 1 KB 4811" Underlining supplied.

I must therefore investigate the facts and the law to see if the principles set out above obtain. The defendant chose to show cause why leave to defend should be granted by relying on the defence on record only. There is no affidavit filed .in response to the factual matters stated by the plaintiff. Material facts as stated by the plaintiff are therefore uncontroverted and include: That

1) The Motor Vehicle Reg. No. KWF 254 was owned by Susan.

2) The Motor Vehicle was insured against Third Party Risksthrough Co-operative Insurance Services.

3) The Motor Vehicle was involved in an accident during thecurrency of the Insurance Policy.

4) The Plaintiff/Applicant, Morgan was a fare-payingpassenger in that vehicle and sustained injuries.

5) Demand Notices were served on Susan and Co-operateInsurance Services relating to the accident and seeking reparations.

6) The Statutory Notice was served on Co-operate InsuranceServices.

7) A suit was filed against the insured and the driver of theMotor vehicle by Morgan and he obtained judgement againstthe two.

8) No attempt has been made to challenge the judgement anddecree of the Cower Court on Appeal or at all.

9) Satisfaction of the decree has not been made.

There has been an attempt to deny some of those facts while admitting others in the defence filed. But 1 ask myself whether the Insurers are at liberty to question the facts before the Lower Court at this stage when they had the opportunity to do so in that court. For I find, on authority, that if the Insurers were so minded, they could have applied to the Lower Court to set aside the judgement and decree entered, and would then have challenged the suit on merits. It was so stated in Windsor V Chalcraft [19381 1KB 279 which Muli J (as he then was) applied in Kavindu V. Mbaya. Per Mackinnon L.J.

"It seems to me that by virtue of theProvisions of the Road Traffic Act , . . theUnderwriters, the strangers to the litigation,have an interest in the action with aconsequent right to set aside the judgmentwhich is

greater than that arising by reasonof the liability imposed on them and thenominal defendant. They have an interest byreason of the liability imposed on them bystatute to make good to the plaintiff theamount of the judgement and for that reason itseems to me that they, of all people, are thesort, of strangers interested in judgment asbeing injuriously affected by it who have aright within the principle laid down by BowenL.J to intervene and ask to have the judgement by default set aside."The insurers here cannot be said to have been unaware of the suit in the Lower Court. The facts show otherwise. It is presumed that they were aware of their rights to intervene in that suit if they felt it was injurious to them. They have not and no one else has. The judgement obtained in that suit is therefore presumed to be a regular and enforceable judgement. It seems to me therefore that matters of fact finalised in that Lower Court which are sought to be challenged in this court cannot be properly so challenged.

There are no triable issues in respect thereto. All I can consider therefore is whether there is a point of law which raises a bona fide triable issue.

The issues of law are raised in two paragraphs of the defence.

"5. The defendant with regard to paragraph 3of the plaint admits having insured oneSusan Mwita in respect of Motor VehicleKWF 254 but denies that the plaintiffqualified into any class of persons coveredunder the said Insurance Cover and puts him tostrict proof thereof.7, That further and in the alternative toparagraph 6 herein above, the defendantwill aver that the plaintiff is precluded frommaking any claim against the defendant inpursuance to the policy of Insurance issued toSusan Mwita by virtue of S. 5(b) (i) and5 (b) (ii) of Cap. 405."3.4 of Cap.405 states:

" ...It shall not be lawful for any person touse or to cause to permit any other person touse a Motor Vehicle on a road unless there isforce in relation to the user of the vehicle by that person or that other person, as thecase may be, such Policy of Insurance ....inrespect of Third Party Risks as complieswith the requirements of this Act." And S.5provides: " In order to comply with therequirements S.4' of this, Act the Policy ofInsurance must be a policy which

(a).....

(b) Insures such person, persons or classes ofpersons as may be specialised in thePolicy in respect of liability which may be incurred by him or them in respectof the death of or bodily injury to anyperson caused by or arising out of theuse of the vehicle on a road."

These two sections do no more than provide for minimum required cover in respect of a Policy of Insurance in the circumstances envisaged. As was held in The New Great Insurance Co. of India Ltd. V. LILIAN EVELYN CROSS & AMOR T19661 EA 90

(i) "the effect of S.4 and S.5 was that aStatutory duty was imposed upon,inter alia, the owner of the vehicle tocover by insurance liability whichthe owner might incur in respectof injury to Third Parties arising fromthe use of the vehicle on the road bysuch person, persons, or classes ofpersons as may be specified in the policy,

(ii) S. 8 made ineffective a condition providingthat no liability shall arise under thepolicy in so far as it related to suchliabilities as were required to be covered under S. 5(b) and in so far as anysuch condition was prayed in aid to avoidliability to a third party,(iii) It is the user not the driver that isrequired to be covered by the policy."

In this case the Insurance company did not produce a copy of the insurance Policy between it and Susan but the admission that there was such a policy presupposes compliance with S.4 and 5 of the Act. The only plea is that the Insurance company can take refuge under the exceptions in S.5 (b) (i) and (ii).

Those subsections state:

"Provided that a policy in terms of thissection shall not be required to cover.

(i) liability in respect of death arising out ofand in the course of his employment of aperson in the employment of a personinsured by the policy or of bodily injurysustained by such person arising out of andin the course of his employment or

(ii) except in the case of a vehicle which passengers are carried for hire or rewardor by reason or in pursuance of a contractof employment, liability in respect of deathof or bodily injury to persons being carriedin or upon or entering or getting on to oralighting from the vehicle at the time ofthe occurence of the event out of which the claims arose."The proviso in perhaps unhappily worded particularly (ii)which employs doable negatives. But to my mind all it means to provide for is exemption from compulsory insurance of

(i) employees, in respect of the death or bodilyinjury sustained by them during the course oftheir employment,(ii) Gratuitous passengers

As I have stated above, there is already a judgement which hasnot been sot aside, which was obtained on the basis that theplaintiff was a fare-paying passenger. The matter is one thereforethat falls under S.5 (b). No issue has been raised whether onceStatutory liability under Sec,5(b) is covered by the terms of thepolicy, the insurer is obliged under S.10 (1) of the Act to satisfythe judgement notwithstanding that the insurer may be entitled tocancel or avoid the policy vis-à-vis the insured. There is noquestion that the Insurer is liable.

Indeed the situation here is analogous to that obtaining in*C.A* 107/97 Blue shield Insurance Go. Ltd V RAYMOND M'RIMBERIA (UR)decided in May, 1998. The defence pleaded similar exclusion underS,5(b) (ii) but it was struck out and summary judgement was enteredfor a matatu passenger who had obtained judgement against theinsured and driver in a separate case.

I am satisfied that the only issue raised in this matter worth considering in detail was one of law and I find it plainlyunsustainable on the basis of the uncontroverted facts before me.In the event I grant the application as prayed with costs to considering in detail was one of law and I find it plainlyunsustainable on the basis of the uncontroverted facts before me.In the event I grant the application as prayed with costs to The applicant, The Applicant shall also have costs of the main Suit.

Dated at Mombasa this 19th. day of August , 1998.

P.N. WAKI

JUDGE