IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GICHERU, AKIWUMI & PALL JJ.A)

CIVIL APPEAL NO. 107 OF 1997

BETWEEN

BLUESHIELD INSURANCE CO. LTD..... APPELLANT

AND

RAYMOND BUURI M'RIMBERIA..... RESPONDENT

(Appeal from the Ruling and Decree of the High Court of Kenya at Nairobi
(Mr. Justice Moijo Ole Keiwua) dated 20th July, 1995
in
H.C.C.C. NO. 2118 OF 1994)
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JUDGMENT OF THE COURT

This is an appeal from the judgment and decree of the superior court (OleKeiwua J.) delivered on 20th July, 1995 in civil suit No.211 of 1994.

On or about 11th January, 1986, the respondent Raymond Buurim'Rimberia's wife Jennifer (thedeceased)wastravelling as a passenger in amatatu registration No. KRY 56 belongingtoSalessioMajau(theinsured).Thevehicle was involved in an accident whereby the deceased sustainedfatal injuries.

The respondent sued the insured under the Law Reform Act and the Fatal Accidents Act on behalf of the estate of the deceased and on behalf of himself and her 7 children for special and general damages in thesuperior court's Civil Case No. 1136 of 1987 (the accident suit).At the time of that accident the insured's said vehicle was insured inaccordance with S.4 of the Insurance (Motor Vehicles) Third Party Risks Act (Cap.405) (the Act) with the appellant in respect of death of, or bodily injury to, anyperson caused by or arising out of the use of the said vehicle on a road.

Statutory notice of the bringing of the proceedings under S.10(2)(a) of theAct was duly given to the appellant and this has not been denied by the appellant.

On 20 August, 1986, the appellant sued the insured in High Court Civil Case No. 2976 of 1986 (the declaratory suit) seeking a declaration that it is and has at all material times been entitled to avoid the policy of insurance issued by it on theground that the said policy was obtained by the insured by non disclosure ofmaterial facts and or by representation of facts which were false in materialparticular. The appellant also sought a further declaration that it is not liable tosatisfy any third party claims in respect of or arising out of the said insurance policy. On 4th March, 1988 the insured filed his defence denying that any circumstances existed which would enable the appellant to avoid its liability under the said insurance policy. We understand from the appellant that the declaratory suit is still pending in the superior court.

On 24th June, 1993 judgment (the judgment) was entered in the accident suit against the insured in favour of the respondent for shs.469,040/= with costs and interest. The respondent requestedthe appellant to satisfy the judgment which the appellant refused to do.

Consequently the respondent sued the appellant in the superior court'sCivil Case No. 2118 of 1994 (the enforcement suit) for a

declaration that theappellant was bound to honour or satisfy the judgment and also prayed for ajudgment against the appellant for Shs.571,324/80 with costs and interest inpursuance of the judgment. By its defence filed on 14th July, 1994 through itsadvocates m/s A.G.N. Kamau & Kimani, the appellant denied liability to satisfy the judgment. We herein set out paragraphs 4 and 5 of the defence which are the only material paragraphs of the defence apart from the said general denial of liability:

> "4 In answer to paragraph 6 of the plaint the defendant states that thepolicy of insurance covering the insured's motor vehicle was a motor commercial policy which excluded liability to passengers in the motorvehicle. The defendant further states that the risk insured was not athird party risk within the meaning of the Insurance Motor Vehicle (3rd Party Risks) Act and that the liability for the same is excluded under s.5(b)(ii) of the said Act
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> 5.In answer to paragraph 8 of the plaint, the defendant denies that theplaintiff is entitled to a sum of Shs.469,040/= or costs and interest on the same for the reason stated hereinabove."

On 26th October, 1994, the respondent brought a chamber summons underOrder VI r 13(1)(b)(c) and (d) and Order XXXV r.1 of the Civil procedure Rules fororders to strike out the said defence as being vexatious frivolous and an abuse ofthe process of the court and for a judgment for the plaintiff in terms of the plaint.Alternatively the respondent sought an order for summary judgment forShs.469,040/= together with costs and interest

.By her supporting affidavit filed on 26.10.1994, Ms. Alice Muthoni Wahomean advocate having conduct of the enforcement suit for the respondent deponedthat the appellant had instructed a firm of advocates to defend the accident suitand also applied, albeit unsuccessfully, to set aside the judgment, on behalf of theinsured. She further deponed that the appellant was therefore not a stranger tothe allegations made in the accident suit. Mrs. Mary Kiarie for the appellant by her replying affidavit filed on 16.11.1994, did not dispute the above mentionedallegations and the circumstances giving rise to the enforcement suit. Also by hersaid replying affidavit, Mrs Kiarie deponed that whereas it had never been deniedby the appellant that the vehicle in question was insured by it, what had been 2disputed was whether the type of the policy covering the said vehicle was the onethat would bind the appellant to satisfy the judgment under the provisions ofs.10(1) of the Act. She had also deponed that the appellant had filed thedeclaratory suit for a declaration that the appellant was entitled to avoid the policyand that the said suit was still pending as it had not been lucky so far to have beenheard.By his judgment (wrongly mentioned as aruling) the learned Judge (Ole Keiwua J) held:-

> "I am satisfied that there are no triable issues to go to trial in the defence. Iam also satisfied that the Plaintiff herein was suing in respect of thethird party involved and irrespective of what becomes of the insured and the insurer, the claim of this third party has to be met by thedefendant. I accordingly strike out the defence and enter judgmentas prayed in the plaint with costs of the suit and the application."

The appellant being aggrieved by the said judgment appeals to this court.

The grounds of appeal may be summedup as follows:-

1.The learned Judge erred in striking out the defence and entering judgment for the respondent, as he did and

2.He erred in finding that the respondent was suing as a third party as envisaged by s.5(b) of the Act.

S.5(b) of the Act reads as follows:-

> "In order to comply with the requirements of s.4, the policy of insurancemust be a policy which insures such person, persons or class ofpersons as may be specified in the policy in respect of any liabilitywhich may be incurred by him or them in respect of death of or bodilyinjury to, any person caused by or arising out of the use of the vehicleon a road."

The crux of the appellant's defence as already mentioned was that the policy inquestion was issued by it relying upon the insured's representation that thevehicle in question was "for private use or pleasure purpose" which representation was false in a material particular as the insured had been using andor intended to use the said vehicle as a public service vehicle namely as a "matatu" and as such the risk covered by the policy was not athird party risk within the meaning of the Act. Under s.5(b)(ii) of the Act an insurance policy is not compulsorily required to cover a vehicle in which passengers are carried for hire. Does that defence then as it stands disclose a triable issue?

Section 10(1) of the Act reads as follows:-

> "If after a policy of insurance has been effected, judgment in respect of anysuch 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) isobtained against any person insured by the policy, thennotwithstanding that the insurer may be entitled to avoid or cancel, or3may have avoided or cancelled, the policy, the insurer shall, subjectto the provisions of this section pay to the person entitled to thebenefit of

the judgment any sum payable thereunder in respect of the liability including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments."

Thus once statutory liability under s.5(b) is covered by the terms of the policy,which in the instant case was, and is not denied by the appellant, the insurer isobliged under s.10(1) of the Act to satisfy the judgment obtained against theinsured and pay to the person entitled to the benefit of that judgment all sumspayable thereunder with costs and interest, notwithstanding that the insurer may be entitled to avoid or cancel the policy vis a vis theinsured or may have even avoided or cancelled it. But then the liability under s.10(1) is subject to the followingprovisions of s.10(4) of the Act which reads:-

" (4) No sum shall be payable by an insurer under the foregoingprovisions of this section if, in an action commenced before, or withinthree months after, the commencement of the proceedings in whichthe judgment was given, he has obtained a declaration that, apartfrom 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 was 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:

Provided that an insurer who has obtained such a declaration as aforesaidin an action shall not thereby become entitled to the benefit of thissubsection as respects any judgment obtained in proceedings commenced before the commencement of that action, unless beforeor within fourteen days after the commencement of that action he hasgiven notice thereof to the person who is the plaintiff in the said proceedings specifying the non-disclosure or false representation onwhich he proposes to rely, and any person to whom notice of suchaction is so given shall be entitled, if he thinks fit, to be made a party thereto."

Although the appellant did not plead in its defence in the enforcement suit, that ithad already sued the insured in H.C.C.C. No.2976 of 1986 for a declaration that itwas entitled to avoid the policy and that the said suit was still pending, Mrs. Kiariedid say that in her replying affidavit hereinabove mentioned. Can that allegation initself be a triable issue? We think not: Under s.10(4) the liability of the insurer tosatisfy the judgment under s.10(1) is excluded only if, not only that the insurer hadcommenced an action within the time scale prescribed thereunder, but also that ithas obtained a declaration that it is entitled to avoid its liability under theinsurance policy.

No declaration has been so far obtained although the declaratory suit wasfiled some 12 years ago by the appellant. Mrs. Kiarie's vague explanation for this delay"although the suit has been fixed for hearing a few times it has never takenoff" smacks of gross lack of diligence on the part of the appellant in prosecutingthe declaratory suit. Moreover, there is no evidence that a mandatory notice asenvisaged by the proviso to s.10(4) had been ever given. The effect of that omission is that even if the appellant has obtained the said declaration which ithas not so far, it may still not be entitled to the benefit of that declaration asagainst the respondent.

For these reasons we hold that the trial Judge was fully justified in striking out the appellant's defence and entering judgment against it, as he did. We do not find any merit in the appeal and hereby dismiss it with costs. Dated and delivered at Nairobi this 27th day of May, 1998

J.E. GICHERU

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JUDGE OF APPEAL
A.M AKIWUMI

JUDGE OF APPEAL
G.S. PALL

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR