IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Gicheru, Muli & Tunoi JJ A)

CIVIL APPEAL NO 33 OF 1993

GATEWAY INSURANCE COMPANY LIMITED ……..……APPELLANT

VERSUS

PAUL KAMAU WAITHAKA ……..……RESPONDENT

(Appeal from the Ruling and Decree of the High Court of Kenya at Nairobi

of the Honourable Mr Justice Tank dated 29th April, 1992 in

High Court Civil Case No 670 of 1992)

JUDGMENT

The issue for determination in this appeal is whether or not the appellant had notice of the bringing of the proceedings in terms of section 10 (2) (a) of the Insurance (Motor Vehicles Third Party Risks) Act, Chapter 405 of the Laws of Kenya, the Act. That section is in the following terms:

> "10. (2) No sum shall be payable by an insurer under the foregoing provisions of this section –
>
> (a) in respect of any judgment, unless before or within fourteen days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings".

The previous provisions of that section are as follows:

> "10 (1) 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 provision of this section pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments."

By an amended plaint dated 20th February, 1992 and filed in the High Court of Kenya at Nairobi on 21st February, 1992 the respondent alleged that the appellant was at all the material time the insurer of motor vehicle registration No KZV 889 belonging to one Pauline W Kimuyu under policy No 14/04512. That

insurance cover was in respect of any liability which may have been incurred by the insured's agent in respect of death or bodily injury to any person caused by or arising out of the use on the road of the motor vehicle aforementioned. Thus, the policy of insurance mentioned above insured Pauline W Kimuyu or her agent in respect of any such liability as is required to be covered by section 5 (b) of the Act.

On 23rd March, 1990 at about 8.20 p.m along the Mombasa road within Nairobi, motor vehicle registration No KZV 889 while being driven by the agent and/or servant of the insured, Pauline W Kimuyu, violently crushed into the rear of motor vehicle registration No KUJ 314 with the result that the respondent sustained severe personal injuries and therefore suffered loss and damage. According to him, the accident in question was solely due to the negligent manner in which the agent and / or servant of the insured, Pauline W Kimuyu, drove and managed the motor vehicle registration No KZV 889 at the material time and place. Because of this, he brought an action against Pauline W Kimuyu in the High Court of Kenya at Nairobi being that court's Civil Case No 1663 of 1991 wherein he sought damages in respect of his personal injuries and consequential loss. On 14th August, 1991 an interlocutory judgment was entered in that case for the respondent and on 17th January, 1992 damages were assessed as follows:-

(a) General damages for pain, suffering and loss of amenities: Kshs 600,000/=

(b) Further operation costs : Kshs 190,000/=

(c) Loss of earning to that date: Kshs 475,000/=

(d) Loss of diminished earning capacity: Kshs 1,500,000/=

(e) Special damages: Kshs 132,008/70

Total: Kshs 2,897,008/70

On 23rd January, 1992 a decree for a sum of Kshs 2,908,889/15 was issued in favour of the respondent. This sum was inclusive of interest at the rate of 12% per annum on the decretal sum with effect from 18th January, 1992. That interest was to continue accruing until payment in full. By the date of the original plaint in the suit out of which this appeal arises – 6th February, 1992 – interest in the sum of Kshs 19,392/60 had accrued. The respondent had also been awarded costs of the action against Pauline W Kimuyu which were certified by the superior court at Kshs 20,882/40. According to the respondent, by virtue of section 10 (1) of the Act, the appellant became liable to pay to him the amounts of the judgment, costs and interest thereon as are set out above which on the date of the original plaint as in mentioned above amounted to Kshs 2,949, 164/15.To him, he had complied with the relevant provisions of the Act and had given the necessary statutory notice before instituting the proceedings in Civil Case No 1663 of 1991. In his suit against the appellant he asked the superior court to enter judgment in his favour and against the appellant for Kshs 2,949,164/15, to award him costs of the suit and interest on the decretal sum and on costs.

The appellant admitted being the insurer of motor vehicle registration No KZV 889 in the name of Pauline Kimuyu and that it was duly notified by the insured of the accident involving the aforesaid motor vehicle and motor vehicle registration No KUJ 314 on 23rd March, 1990. However, upon examination and investigation, the appellant repudiated liability under the insurance policy for reasons which were communicated to the insured. According to the appellant, it was not notified of the institution of the proceedings in the Nairobi High Court Civil Case No 1663 of 1991 in accordance with the provisions of section 10 (2) (a) of the Act with the result that the respondent was not entitled to enforce the judgment obtained by him in that suit against it (the appellant).

By a Notice of Motion dated 10th March, 1992 and made under order XXXV rules 1 and 2 of the Civil Procedure Rules, the respondent applied to the superior court for summary judgment against the appellant in the sum of Kshs 2,949,164/15 together with interest and costs of the suit as prayed for in the plaint referred to above. According to him, the appellant's defence was a mere denial and from the correspondence and civil process documents concerning his claim against the appellant, it was evident

that by a copy of a letter addressed to the insured, Pauline W Kimuyu, and dated 10th May, 1990 Messrs Wanjira & Company, Advocates acting on his behalf and in execution of his instructions duly notified the appellant of his intention to file a suit for damages against the insured. That letter where relevant was in the following terms:

"Re: Accident on 23.3.90 at about 8.20 pm along Mombasa Road to m/vs KZV 889 & KUJ 314 Insured: Pauline W Kimuyu (KZV 889) Claimant: Paul Kamau Waithaka (KUJ 314)

> We act for the above named client who has instructed us to write to you as hereunder:-
>
> That on the above place and time, our client was lawfully driving his motor vehicle KUJ 314 along Mombasa road when you/your driver/servant/agent so negligently drove, managed and controlled motor vehicle KZV 889 thereby causing it to hit motor vehicle KUJ 314 from behind. As a result thereof, our client sustained serious injuries for which he holds you liable.
>
> Please let us have your admission of liability so that the issue of quantum of damages may then be gone into. We are copying this letter to your insurers who may respondent on your behalf.
>
> Take notice therefore that unless we receive your admission of liability within fourteen (14) days of the date hereof, we shall institute legal proceedings at your risk as to costs and consequences ensuing therefrom without further reference to you."

Clearly this letter sought admission of liability by the insured, Pauline W Kimuyu, and was only copied to the appellant just in case the latter elected to respond on her behalf. As it turned out, at the expiry of fourteen (14) days, no response to this letter had been received by the respondent. A further letter was therefore written to the appellant on 24th May, 1990 by counsel then acting for the respondent requesting a reply to the copy of the letter set out above. On the same day, the appellant acknowledged receipt of a copy of the said letter and requested for more time to investigate. On 26th June, 1990 the then counsel for the respondent wrote to the appellant seeking to hear from it substantively on liability as there were instructions to filed suit. There was no response to this letter. Meanwhile, the respondent instructed Messrs Ameka & Company Advocates to act on his behalf in place of Messrs Wanjira & Company, Advocates. On 11th October, 1990 therefore, Messrs Ameka & Company, Advocates wrote to the appellant in these terms:

> "Dear Sirs,
>
> Re: Accident on 23-3-1990 along Mombasa Road involving m/vs KZV 889 and KUJ 314
>
> Your insured: - Pauline W Kimuyu
>
> Your Policy No 14/04512
>
> Our client:- Paul Kamau Waithaka
>
> We have been instructed by our above-named client to write to you as hereunder:-
>
> The above-mentioned accident occurred entirely due to the negligent driving of a motor vehicle insured with you. We have written to your insured in connection with damages suffered by our client.
>
> Take notice that unless we receive a satisfactory reply from your insured or yourselves within ten (10) days from the date hereof proceedings will be taken against you without further reference.
>
> Treat this letter as a third party notice issued pursuant to the provisions of the Insurance (Motor Vehicles Third Party Risks) Act,"

This letter was forwarded to the appellant under a delivery note whereon is indicated that it was signed for by the appellant. A Photostat copy of that delivery note was annexed to the respondent's affidavit in support of his application for summary judgment dated 10th March, 1992. In its replying affidavit in opposition to the respondent's application for summary judgment dated 18th March, 1992 the appellant denied having received this letter claiming that the initials on the delivery note did not resemble those of any member of its staff. It was therefore unable to decipher to whom amongst its members of staff the said letter was delivered. At any rate, according to the appellant, it received many demand letters in respect of accidents involving motor vehicles insured by it, at times on behalf of the same claimants, from a multitude of advocates and was therefore not always able to respond to letters such as the one in question as they often lacked sufficient details to facilitate any further action to enable it protect its position. Nevertheless, subsequent to the foregoing letter, proceedings were commenced against the insured, Pauline W Kimuyu.

Counsel's submissions before the superior court rivetted around the letter date 10th May, 1990 the contents of which are set out above. To counsel for the respondent, this letter constituted sufficient notice to the appellant under section 10(2) (a) of the Act while to counsel for the appellant it did not. The trial judge adjudicated on the two rival submissions by holding that the copy of the letter aforementioned to the appellant constituted a notice as is required by law and that the appellant in responding to it on 24th May, 1990 had treated it as such. He then concluded that apart from the issue of notice there was nothing else for determination by the court: and since he had held that the requisite notice had been given to the appellant, he granted the respondent's application for summary judgment against the appellant.

Against that decision the appellant appeals to this Court and has put forward ten grounds of appeal whose grievance is the trial judge's error in holding that the appellant had notice in terms of section 10 (2) (a) of the Act.

At the hearing of this appeal on 27th October, 1993 counsel's submissions like in the superior court gravitated upon whether or not the letter of 10th May, 1990 constituted sufficient notice under the section mentioned above.

Section 10 (2) (a) of the Act does not indicate what kind of notice is required in compliance thereof. However, as is indicated in paragraph 2075 of the 8th Edition of *MacGillivary and Parkington on Insurance Law* at page 932, such notice should be formal. A letter seeking clarification as to whether or not liability is declined is not good notice even if it is inferred that proceedings would be brought if liability was declined. Indeed, as Birkett, J said in *Weldrick v Essex & Suffolk Equitable Insurance Society Ltd* (1950) 83 L1 L Rep 91 at page 102, where there is a statutory requirement of notice, that requirement must be strictly fulfilled. An intimation that in certain circumstances proceedings might be brought, but not necessarily that they will be brought would not do. Although this may elsewhere be said to be a technical point, we think that upon its determination lies the decision whether or not the requirements of section 10 (2) (a) of the Act have been fulfilled.

The letter of 10th May, 1990 sought admission of liability by the insured, Pauline W Kimuyu. It was copied to the appellant in case the latter chose to respond to it on behalf of the insured. From what we have said above, this letter was certainly not a notification to the appellant of the bringing of proceedings in terms of section 10 (2) (a) of the Act. The appellant's disputation that the said letter did not constitute a notice under the foregoing section is therefore not without merit. However, the letter to the appellant dated 11th October, 1990 which we have set out above and which spelt out the name of the insured, the insurance policy and the claimant's name, clearly stipulated that the appellant was to treat it as a third party notice issued under the provisions of the Act. That letter had notified the appellant that unless the insured or itself responded satisfactorily to it within (10) days from 11th October, 1990 proceedings affecting its interest would be taken without further reference.

As we have pointed out earlier, the letter of 11th October, 1990 referred to above was delivered to the appellant on the same day under a delivery note whereon the same was signed for and not initialled for as was contended by the appellant in its replying affidavit mentioned above. Although the appellant denied having received this letter and alleged in its replying affidavit having it had examined the initials on the

delivery note annexed to the respondent's supporting affidavit above mentioned but was unable to decipher to whom amongst its members of staff the letter was delivered, we think that on balance of probabilities the said letter was delivered to and received by the appellant on 11th October, 1990 with the result that the appellant had the requisite notice in terms of section 10 (2) (a) of the Act. Having had such notice, as the trial judge quite properly pointed out in his ruling, there was no other triable issue left before the superior court. The respondent was rightly entitled to summary judgment. We are therefore unable to disturb the trial judge's ruling in this regard. Accordingly, we dismiss the appellant's appeal with costs to the respondent.

Dated and Delivered at Nairobi this 20th day of December, 1993

J.E. GICHERU

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JUDGE OF APPEAL

M.G. MULI

…….

JUDGE OF APPEAL

P.K.TUNOI

…….

JUDGE OF APPEAL