REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 3288 OF 1987

BERNARD WAMAREMA KAIRU.....APPELLANT

VERSUS

LION OF KENYA INSURANCE CO LTD.....RESPONDENT

JUDGMENT

May 31, 1988 **Aluoch J** delivered the following Judgment.

The plaintiff, who is the applicant, moved the court by chamber summons grounded on Order VI Rule 13 of the Civil Procedure Rules, seeking orders that the defence filed herein be struck out, and costs of the application be awarded to the applicant.

The applicant contended that the defence

a) “discloses no defence”,

b) it is scandalous, frivolous and vexatious”

c) it prejudice, embarrass or delay the fair trial of this action,”

The application was supported by an eleven-paged affaidavit of Mr. Kiania Njau, advocate for the applicant. He adduced further reasons in support of the application during the hearing.

Mr. McVicker, who appeared for the respondent, the Lion of Kenya Co Ltd, opposed the application and filed statement of opposition containing six grounds of opposition. He too adduced further reasons at the hearing.

I have read the pleadings herein. Together with that I have the submissions of both learned counsel, given to me in great detail outlining “the history’ of this case as they called it.

If I understood Mr. Kiania Njau well and I believe I did, his point was that the respondent cannot have a defence to this suit, and he should be estopped from raising any because of its “conduct in the past on matters relevant to this one”, and again, it is excluded by provisions of Cap 405, from raising the defence he has raised in this case.

According to Mr. Kiania Njau, his client, one Bernard Kairu, filed a suit against Patrick Nyuttu and another claiming damages for negligence. This was HCCC No 1198/84. Patrick Nyuttu was sued as an

owner of a vehicle which was by then insured by the respondent, the Lion of Kenya Co Ltd. The respondent's advocates are Daly and Figgs, advocates. They instructed them to represent their insured Peter Nyuttu in that action, which they did as shown by annexure A. Consequently, a consent judgment was entered in favour of the applicant, and against the respondent, who were the insurers of Patrick Nyuttu's vehicle. That this consent judgment was entered in the presence of both advocates, and also a representative of the respondent company.

Subsequent to this, the respondent acting through its same advocates Daly and Figgs, filed a suit against their insured Patrick Nyuttu, seeking to avoid the policy of insurance relating to the vehicle against which the consent judgment talked of above had been entered. According to Mr. McVicker, when his firm filed that suit they gave Notice of it to Messrs Kiania Njau, who acted for Bernard Kairu in HCCC No 1198/84, the man in whose favour judgment was entered.

Mr. McVicker submitted further that this Notice was given in pursuance of section 10 (4) of Cap 405. That this being so, Bernard Kairu, has at all times been aware of the claim of Lion of Kenya Co Ltd, for a declaration it is seeking in the case it has filed against Patrick Nyuttu to avoid the insurance policy relating to the vehicle in HCCC No 1198/84, for which a consent judgment was entered.

Mr. McVicker submitted further that the applicant's claim in this suit for a declaration is "premature", because if the respondent obtains the declaration it is seeking in the suit No 1739/84 filed against Patrick Nyuttu, then no sum of money would be payable to Bernard Kairu, by the respondent.

Mr. McVicker conceded that judgment was obtained by Bernard Kairu in HCCC No 1198/84, before Lion of Kenya Insurance Co. Ltd, obtained a declaration to avoid the policy issued to Patrick Nyuttu, but, according to him, that notwithstanding, the declaration sought in this case should await the outcome of the HCCC No 1739/84.

Mr. Kiania Njau, disagreed with this submission, and submitted that according to the provisions of sub-section 4 of Section 10 of Cap 405, it is not enough for an insurer to say that he has filed a case against its insured to avoid a policy, it has to obtain a declaration to that effect. That in this situation, his client Bernard Kairu obtained a judgment in his favour, that judgment must be satisfied. That if there was a declaration, then the defence filed in this suit would have been credible, but as it is, it has no merit and should be struck out.

In their submissions both advocates referred to the provision of section 10 sub-section 4 of the Act (cap 405) in asking the court to strike out or not to strike out the defence, though the application is of course grounded on Order VI Rule 13. The applicant's claim is that he has obtained a judgment and in accordance with section 10, there cannot be any defence to his claim for a declaration that the respondent is liable to satisfy that judgment especially in view of the fact that the respondent has not obtained the declaration talked of in section 10.

The respondent on the other hand says that the provisions to the provison to sub-section 4 of Section 10 is in his favour, and if his defence is struck off, the case it has filed against Patrick Nyuttu, HCCC No 1739/84 will be rendered useless.

Section 10 (1) of Cap 405 provides as follows:

> "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 Act, pay to the person entitled to the benefit of the judgment any sum payable thereunder...."

It is on this section that the applicant is relying in seeking to have a declaration that the respondent is liable to satisfy the judgment obtained against it.

Sub-section 4 of section 10, on the other hand provides 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 3 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 has entitled to avoid it on that ground...."**

The 2 counsel's submissions show that the case HCCC no 1739/84, filed by the Insurance Company the Lion of Kenya, against its insured Patrick Nyuttu was filed on 26th June 1984, whereas the consent judgment entered in respect of the case, HCCC No 1198/84 filed by Bernard against Patrick, was so entered on 26th May 1987, the suit having been filed on 18/4/84.

Mr. McVicker, submitted that he was relying on the proviso to subsection 4 of section 10 of Cap 405, since his client the Insurance Company, had given Bernard 27/6/84 of the suit it had filed seeking to avoid th policy with its insured Patrick. That this notice had been given within 3 months of Bernard filing a suit against Patrick.

I have read the wording of the proviso carefully, and I find that it sets out the procedure for obtaining a declaration, and specifically the right of the plaintiffi in the original action to be given Notice by the Insurance Company of its intention to seek a declaration to avoid the policy and the plaintiff's right to be made a party to these proceedings.

The situation I have in this case is whereby a plaintiff Bernard filed a suit against Patrick Nyuttu on 18/4/84. Lion of Kenya Insurance Ltd, as Patrick's insurers entered appearance and filed a defence on his behalf, and so soon thereafter on 26/6/84, the said Insurance Company filed a suit under cap 405 to avoid the policy issued to Patrick. The Insurance duly gave Notice to the plaintiff under section 10 of Cap 405 of its intention to avoid the policy. Nevertheless, no declaration was obtained by the Insurance Company, and on 26th May 1987, a consent judgment was recorded in favour of the original plaintiff Bernard against Patrick Nyuttu. This judgment, I was told was recorded in the presence of Bernard and his lawyer Kiania Njau, Mr. McVicker for Lion of Kenya Insurance Co Ltd who had defended the suit on behalf of Patrick Nyuttu, and an official from the Lion of Kenya Insurance Company, up to the date this Judgment was recorded, the Lion of Kenya had not obtained a declaration in the case it filed against Patrick Nyuttu.

I have considered the circumstances of this case and I find that the Lion of Kenya Insurance Co Ltd the defendant herein does not have a valid defence to this suit. I say so because though it gave the plaintiff necessary notice within 3 months of the plaintiff filing its suit, it never obtained the declaration before the judgment in that suit. Secondly and most important, the insurance company freely entered into a consent judgment with the plaintiff Bernard, knowing fully well that it had not obtained a declaration. No conditions were attached to that judgment that the sums thereunder would not be satisfied until the suit for a declaration was heard and finalized. The conduct of the insurance company in entering into that consent judgment meant, in my considered opinion, that it was prepared to honour that judgment, so that the defence that it is entitled to avoid the policy with Patrick, and the suit for so doing is still pending in court, must be an after-thought. I see the Insurance Company wanting to have a bargain both with the original plaintiff Bernard and its insured Patrick. This is not justifiable, and I cannot allow it to do that.

From all the reasons I have considered, I am in agreement with Kiania Njau, for the applicant that the defence herein "discloses no defence", and I hereby proceed to strike it out, and award the costs of the application and the suit to the applicant.

Dated and delivered at Nairobi this 31st day of May , 1988

A. ALUOCH

JUDGE