REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL SUIT NO. 2091 OF 1974

RUTH KAVINDU

RAEL SYOVONZA ……..……. PLAINTIFFS

VERSUS

JOSIAH MBAYA MANTU

VB MBAYA…….... DEFENDANTS

JUDGMENT

This application by way of chamber summons is brought under the provisions of order IXA, rules 10 and 11, of the Civil Procedure (Amendment) Rules 1975 and under section 3A of the Civil Procedure Act. The applicants are the Oriental Fire and General Insurance Co Ltd for, and on behalf of, and in the name of, the second defendant, Mrs VB Mbaya for orders that: (1) the *ex parte* judgment and decree passed against the second defendant be set aside; (2) the applicants be at liberty to file a defence to the plaintiff's claim for, and on behalf of, and in the name of, the second defendant within such period as the Court directs; (3) such other further or alternative order or orders as the Court may consider just and expedient to maee; and (4) the costs of the application be provided by the plaintiffs in any event. I will refer to the applicants as "the insurance company".

Dealing first with costs of this application, I see no justification for the plaintiffs to provide costs in any event. If the insurance company were to succeed in this application I think that they would be the proper party to pay the plaintiffs' costs incidental to and occasioned by this application. I will say no more about this until the final outcome of this application. Before I consider the application on merit, there are procedural matters which were raised at the commencement of the hearing of this application. These were not specifically specified in the chamber summons or alleged in the affidavits in support of the chamber summons. Mr Clive Salter, who appeared with Mr Bakrania for the insurance company submitted, at the commencement of the hearing of this application, that the judgment against the second defendant which the insurance company sought to have set aside was irregularly obtained. I allowed him to argue this ground although it was not specifically specified in the chamber summons. Whether or not this point was overlooked or it came to light after filing of the chamber summons, I considered it essential that it be argued notwithstanding the fact that no application was made to amend the chamber summons. If an application had been made, I would have granted it so that the insurance company might argue all the aspects of its case.

By way of future practice, I am of the opinion that where any applicant applies to set aside a judgment on the ground of irregularity, the irregularity should be specified in the summons and the affidavit in support

should also state the circumstances under which the default has arisen and should disclose the nature of the defence. This appears to me to be the proper way to challenge the judgment as having been obtained irregularly so that the parties may know in advance the allegations to meet without being caught by surprise or being an embarrassment to the Court or to any interested party. Although our rules do not provide for this specifically, I think that it is the only logical practice, which should be encouraged and followed in the future.

This application is also brought under the inherent jurisdiction of the court. I think that I can take cognizance of the point or irregularity which has been raised outside the summons, for, if the judgment was irregularly obtained, the Court on its own motion can set it aside as being null and void. In these circumstances it would be *ex debito justitiae* to have the judgment set aside. If the judgment is irregularly obtained it is prudent that it be set aside *ex debito justitiae* for the court's discretion to set aside an irregular judgment cannot properly be invoked. But if the irregularity was due to an error arising from an accidental slip or omission, such error or omission may be corrected. The result would be that the judgment was otherwise regularly obtained and the Court would set aside that judgment in exercise of its discretion should it appear to the Court that it is just that the judgments should be set aside.

In this application, Mr Salter submitted that the irregularity went to the root of the matter and thereby rendered the judgment null and void with the result that the Court has no discretion but to set aside *ex debito justitiae*. He based his submissions under the provisions of orders IXA, and IXB of the Civil Procedure Rules, as amended.

The insurance company was at the material time the insurer of the vehicle owned by the second defendant. Under the policy of insurance covering that vehicle, the insurance company agreed thereunder, for a period of twelve months from 18th December 1971 to 17th December 1972, to indemnify the second defendant against liability to third parties in the event of an accident caused by, or through, or in connection with the second defendant's insured vehicle against all sums, including law costs to which the second defendant should become legally liable in respect of death or bodily injury to any person, being the liability required under section 5 of the Insurance (Motor Vehicles Third Party Risks) Act. The vehicle was involved in an accident with the plaintiffs' vehicle. The plaintiffs suffered injuries. They then sued both the defendants and obtained interlocutory judgment against the second defendant in default of defence. The insurance company now applies to set aside that judgment on behalf and in the name of the second defendant. The procedural issue at this stage is whether they are entitled to bring this application. Mr Vohra, who appeared for the plaintiffs, properly conceded that the insurance company was entitled to bring the application for, and on behalf of, and in the name of, the second defendant to have the interlocutory judgment set aside. I agree.

In *Windsor v Chalcraft* [1938] 1 KB 279 where the facts were similar to those in the present case, it was held that:

Inasmuch as the underwriters, although not parties to the action, were liable under the provisions of the Road Traffic Acts … to pay the amount of the judgment to the plaintiff and under the policy to pay it to the defendant, they were persons aggrieved by the judgment, and as such they were entitled to an order setting aside the judgment and giving them leave to enter an appearance in the action in the name of the defendants or in their own name and to deliver a defence.

On the principle of this authority, it is clear that the insurance company was the body liable to satisfy the judgment, that it is the party aggrieved by the judgment. Whether or not the application will succeed is another matter. Mackinnon LJ in the *Windsor* case had this to say:

It seems to me that by virtue of the provisions of the Road Traffic Act … the underwriters, the strangers to the litigation, have an interest in the action with a consequent right to set aside the judgment which is greater than that arising by reason of the contract between them and the nominal defendant. They have an interest by reason of the liability imposed on them by statute to make good to the plaintiff the amount of the judgment and for that reason it seems to me that they, of all people, are the sort of strangers interested in the judgment as being injuriously affected by it who have a right within the principle laid down by

Bowen LJ to intervene and ask to have judgment by default set aside.

The principle laid down by Bowen L J was in *Jacques v Harrison* (1884) 12 QBD 165. This principle was also followed by Harris J in *Shah v Mbogo* [1967] EA 116 and I respectfully agree. And so the principle must apply in the instant case.

The other procedural point was highlighted by Mr Vohra on behalf of the plaintiffs. He submitted that the second defendant's memorandum of appearance was defective and should not have been accepted by the court registry. If this is so, then the second defendant would be deemed to have entered no appearance to this action.

The second defendant was served with a summons on 15th January 1975 having been pointed out by the first plaintiff. An affidavit of service was duly filed. A memorandum of appearance in person in Form Civil A was then lodged with Court and was duly stamped with the court stamp. The signature cannot be deciphered but it is clear that it was not that of the second defendant, because under the signature "for VB Mbaya, Box 30197, Nairobi" is written. Under the rules it is requisite that any defendant wishing to enter appearance in person must do so by signing the memorandum of appearance and giving his physical address as well as his postal address. The memorandum may also be signed by an authorized agent or by an advocate. On the face of it the memorandum of appearance filed on behalf of the second defendant was not signed by the second defendant or by a disclosed, authorized agent or by an advocate. It does not contain the physical address. It lacks all the requirements of the rules (see order IX (Legal Notice 66 of 1973) which was in force at the time when the memorandum of appearance was filed). I have also examined the memorandum of appearance filed by, or on behalf of, the first defendant. It is also defective for the same reasons. However, it was followed by the delivery of a defence and, in my view, any defect in form was thus cured.

The Court should not have accepted the document as a valid memorandum of appearance for the second defendant. I do not think that by such acceptance the document was rendered valid. However, the plaintiffs acted all along as though the second defendant had duly entered a valid appearance. I will proceed with the application on that basis. I do not think that treating the memorandum of appearance, as an invalid appearance will make any difference in this case. The plaintiffs did not apply to have it struck off for want of form, and I will treat the defect in form of appearance as having been cured.

With regard to Mr Salter's contention that the interlocutory judgment obtained in default was irregularly obtained under the rules, it becomes necessary to consider the present rules applicable in this case. Before the present rules came into force on 1st October 1975, there existed only one order IX dealing with appearance, and the consequence of non-appearance. The former order IX was deleted and substituted by three separate orders IX, IXA and IXB, which came into force on 1st October 1975. The interlocutory judgment sought to be set aside was obtained and signed under OIXA of the Civil Procedure Rules, as amended.

Order IX of the present rules consists of six rules and is entitled "Appearance of Parties" giving "Time for appearance", "Mode of appearance," "Defendant's address for service," Memorandum irregular, address fictitious", and "Defendants appearing by same advocate". Rule

6 provides for the procedure for setting aside the memorandum of appearance whose address is fictitious or illusory. It would appear that order IX is a comprehensive code which deals exclusively with appearances of parties and matters appertaining to such appearances.

Then follows present OIXA entitled "Consequence of Non-appearance and Default of defence". Except for suits against infants and persons of unsound mind, where a defendant fails to appear rules 2 to 11 of order IXA provide the procedure to be followed in special actions and circumstances.

Rule 3(1) deals with actions of liquidated demand only. The defendant or defendants failing to appear, the Court shall, on request in Form 26 in Appendix C, enter judgment against the defendant or defendants for the sum of the liquidated demand with interest and costs. There is no provision for giving notice to the

defendant or defendants failing to appear. This appears to me to be logical because the defendant or defendants failed to appear having been duly served with the summons, and an affidavit of service by a court process-server has been filed.

Rule 3(2) provides as above, the liquidated demand having with it some other claim the defendant or defendants failing to appear, the Court shall enter judgment for the liquidated demand and interest; but the award of costs shall await judgment on such other claim or claims. Here again, there is no requirement for giving notice to the defendants failing to appear.

It is illogical, again, that those failing to appear (having been duly served with the summons) should be notified of the request. For those failing to appear there is a final judgment except for the award of costs, which awaits judgment upon the other claims. With regard to these other claims, judgment may be obtained in default of delivery of defence either by way of hearing *ex parte* or by way of a formal proof. Then the award of costs to avoid duplicity.

Rule 4 of order IXA provides for an action for a liquidated demand with or without some other claim where there are several defendants, some of whom appear and others fail to appear. The Court on request enters judgment against any defendant failing to appear. Execution may issue upon such judgment, without prejudice to the plaintiff's right to proceed with his action against those who have appeared. This latter case may be by way of setting the action down for hearing where the defendants have filed their defence, or by applying for judgment in default of defence where no defence has been filed, as the case may be.

Judgments entered and signed under rules 3 and 4 of order IXA are final judgments and execution may issue on those judgments. There is no provision for challenging them on the ground that no notice was given to the defendants failing to appear. However, under rule 10 the aggrieved party may apply to set aside any judgment on the usual grounds that service of the summons was not proper or for any just cause which the Court, in its discretion, shall deem expedient in the interest of justice. The crucial rules in this case are rules 5 and 6 and I reproduce them hereunder:

5. Where the plaint is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages, and any defendant fails to appear, the Court shall, on request in Form 26 in Appendix C, enter interlocutory judgment against such defendant, and the plaintiff shall set down the suit for assessment by the Court of the damages or the value of the goods and damages as the case may be.

6. Where the plaint is drawn as mentioned in rule 5 and there are several defendants of whom one or more appear and any other fails to appear, the Court shall, on request in Form 26 in Appendix C, enter interlocutory judgment against the defendant failing to appear, and the damages or the value of the goods and the damages, as the case may be, shall be assessed at the same time as the hearing of the suit against the other defendants, unless the Court otherwise orders.

Rule 5 provides for claims for pecuniary damages only, or for the detention of goods with or without claim for pecuniary damages, and if any defendant fails to appear, the Court shall enter interlocutory judgment against the defendant failing to appear. The plaintiff then shall set down the case for assessment of damages or the value of goods and damages. It is mandatory upon the Court to enter interlocutory judgment and for the plaintiff to set down the suit for assessment of damages. Here again, there is no provision that the defendant failing to appear should be notified of the request for interlocutory judgment. It is equally clear that the plaintiff is mandatorily empowered to set the suit down for assessment of damages or the value of the goods and damages. It appears to me illogical that the defendant failing to appear (having been duly served with the summons) should be notified of the request for interlocutory judgment. The Court merely enters interlocutory judgment on the request, and no formal hearing takes place. I see no useful purpose for any notice in these circumstances.

Rule 6 provides for interlocutory judgment against any defendant failing to appear where there are several defendants, some of whom have appeared and others have not. In such cases interlocutory judgment is

entered against those failing to appear and the assessment of damages must abide the hearing of suit against the defendants who have appeared. Again, there is no provision that those defendants failing to appear should be notified of the request for the interlocutory judgment for the same reasons as before.

Rule 6 covers claims for pecuniary damages only or for the detention of goods where there are several defendants one or more of whom appear and others fail to appear. Interlocutory judgment is entered on request against the single defendant failing to appear and the assessment of damages is made at the hearing of the suit against the other defendants. Unlike under rule 5 (where assessment of damages is set down mandatorily) the assessment of damages under rule 6 must abide the hearing of the suit. The former require no notice to the defendant failing to appear, while in the case of the latter the provisions governing the hearing of suits must apply.

Rule 10 provides the procedure for setting aside a judgment entered under order IXA. Order IXA is, therefore, another comprehensive code exclusively devoted to the signing of final or interlocutory judgments against a defendant or defendants failing to appear and for the manner for disposal of suits against those defendants who have appeared.

Order IXB is entitled “Hearing and Consequence of Non-attendance”. It is also a comprehensive code, devoted exclusively to the hearing of suits and the consequence upon non-attendance by parties. This order deals only with suits which have reached the stage of hearing by virtue of the closing of pleadings or by the exclusion of the application of procedures of special cases and circumstances provided for under order IXA. While these three orders are each a set of rules or a code designed to cater for special circumstances and peculiar claims, I am of the opinion that they constitute a scheme whereby claims are processed progressively, disposing of claims falling within the ambit of each order and passing those other claims which manage to reach the hearing stage. They are, as it were, three consecutive reservoirs of water where the water has been sieved of larger particles of dirt; it passes from the first to the second reservoir for further sieving of finer particles, and then to the third reservoir for final purification before disposal.

Although, in the process, the orders cannot be read interchangeably backwards, the remains of claims disposed in one order are passed on to be dealt with in the next order. To that extent the three orders must be regarded as a scheme and looked at as such. I do not think that each code is a watertight code exclusively and exhaustively designed to operate as such. The orders provide for progressive stages in a suit where special claims are disposed of before hearing where the situation warrant it. Having said all this generally, I must revert to the instant case to determine whether the interlocutory judgment was irregularly obtained as the applicants say. Interlocutory judgment was obtained under rule 5 or rule 6 of order IXA.

Mr Salter urged the Court to find that, since the second defendant had entered an appearance, rules 5 and 6 of order IXA could not apply and, therefore, the interlocutory judgment signed against her was irregular. I have held that the memorandum of appearance purported to be filed on behalf of the second defendant was irregular and defective and should not have been accepted by the Court. However, since it was accepted by the Court and the plaintiffs acted on it as a valid appearance all along, I was not prepared to treat it as invalid. If it were invalid, then interlocutory judgment under rule 5 of order IXA would have been perfectly in order and unassailable. There would have been no need to notify the second defendant of the request for interlocutory judgment or of the date set down for the assessment of damages. The rule is mandatory: the Court shall enter interlocutory judgment and the plaintiff shall set down the suit for the assessment of damages. If notice to the defendant who has failed to appear was requisite, the rule would have said so specifically.

If the appearance by the second defendant is regarded as valid (for the reasons that I have given), the interlocutory judgment entered against the second defendant is not rendered irregular on the ground that there was an appearance. The second defendant did not file any defence. Rule 9 of order IXA provides: “The provisions of rules 3 to 8 inclusive apply with any necessary modification where any defendant has failed to file a defence”.

Reading rule 5 with the necessary modifications, the second defendant failed to file a defence; the Court on request entered interlocutory judgment; and the plaintiffs set down the suit for the assessment of damages. With this modification, the mandatory nature of the rule remains unimpaired. The second defendant was not entitled to notice of the request for interlocutory judgment, nor of the date set down for the assessment of the damages. As I have said, the second defendant having failed to file a defence, her appearance at the assessment of damages was of little value. In any case, there is no provision in the order or rule for giving any notice to the defendant failing to deliver a defence. I think that the interlocutory judgment entered under rule 5 of order IXA is unassailable on the grounds that because the second defendant had entered an appearance, then rule 5 was inapplicable. She failed to deliver her defence and rules 5 and 9 were properly invoked.

However, Mr Salter contended that the second defendant (or the insurance company for that matter) should have been given reasonable notice of the date set down for the assessment of damages. He based his contention on the provisions of order IXB, rule 1(2), which provides that:

At any time after the entry of interlocutory judgment, the plaintiff may, upon giving reasonable notice to every defendant who has appeared, set down the suit for assessment of damages or of the value of goods and damages as the case may be.

Order IXB entitled “Hearing and Consequence of Non-attendance”. It is a separate code dealing exclusively with the hearing and matters appertaining thereto. It is the order applicable to claims which have reached the hearing stage by virtue that the earlier orders could not apply. While under rule 5 of order IXA it is mandatory that “the plaintiff shall set down the suit for assessment” of damages, it is not so under order IXB rule 1(1) and (2). It is obvious that setting down the suit for the assessment of damages under rule 5 of order IXA cannot be the same thing as setting down the suit for the assessment of damages under order IXB, rule 1(2), which must refer only to cases falling under order IXA, rule 6, where there are several defendants some of whom have appeared and others have not. In such cases interlocutory judgment is entered against those failing to appear but the assessment of damages is made at the same time as the hearing against the other defendants who have appeared. It is even clear under rule 1(2) of order IXB that reasonable notice is requisite “to every defendant who has appeared”. This cannot be construed to refer to a single defendant against whom interlocutory judgment has been entered under order IXA, rule 5.

As I have said, claims falling under order IXA having been dealt with under the relevant rules, those made to abide hearing and judgment are passed on to be dealt with as provided under order IXB, for hearing and the consequence of non-attendance. It is only logical that those defendants who have appeared must be given reasonable notice.

I think that the phrase “assessment of damages” under rule 5 of order IXA is used differently from the context of the hearing. It is a separate subject from the hearing. It means no more than the determination of the appropriate damages, quite separate from the hearing of a suit in the normal way. How then can the assessment of damages called for under order IXA, rule 5, be subjected to the procedure for the hearing of suits and the assessment of damages made at the time of the hearing? Order IXB, rule 1(2), refers only to special cases reserved to abide the hearing, for instance under order IXA, rule 6 where there are several defendants some of whom have appeared. The reason is obvious: to avoid duplication in awarding damages where several defendants are involved. Even though the assessment of damages is done at the time of hearing, those defendants who have not appeared do not require notice. I see no logic in serving them with the notice of assessment of damages or of the hearing. It is clear, therefore, that lack of the notice of the hearing required under order IXB rule 1(2), for every defendant who has appeared cannot be used to nullify the assessment of damages done under rule 5 of order IXA. The assessment of damages under rule 5 did not call for prior notice to the defendant failing to appear or to file a defence as in the instant case. The assessment of damages following an interlocutory judgment in default of defence under order IXA, rule 5, was therefore regular: So I hold.

It follows therefore that in this case both the interlocutory judgment in default of defence and the assessment of damages done thereunder were regularly obtained under order IXA, rule 5 with the result

that the inherent jurisdiction of this Court is the only means for the Court to exercise its discretion in this application.

Mr Salter urged that, because there were two defendant in this suit, judgment was obtained under rule 6 of order IXA and, therefore, the assessment of damages called for prior reasonable notice to the defendants who had appeared. I would have agreed with Mr Salter if the first defendant had not died or the suit against him subsisted by way of substitution of the deceased's personal representatives. At the time of the request for interlocutory judgment, there was only one defendant, namely the second defendant, and judgment was requested and entered against the second defendant only. This was done under rule 5 of order IXA where notice for the assessment of damages was not provided for, as I have said. Even if it can be argued that it was entered under rule 6, no notice was required for the second defendant who did not deliver a defence. Such notice would logically be requisite for those defendants who have appeared and are contesting the suit. There were no such defendants in this case and the Court ordered that the assessment of damages be proceeded with forthwith, as against the second defendant. This was permissible by virtue of the last phrase of order IXB, rule 6.

The summons under which this application is brought does not disclose the nature of the defence. Nor is there anything in the affidavit in support of the summons to show a possible defence. This should have been done. There is no counterclaim suggested. All that the insurance company says is that it has been advised that it has a good defence of contributory negligence, without giving any particulars of such contributory negligence to establish at least a *prima facie* defence of contributory negligence.

The insurance company says that the award of general damages was inordinately high, without showing any wrong principle or error in the judgment. As I have found that the interlocutory judgment was regularly obtained there can never be any doubt that that judgment was final with regard to liability and interlocutory with regard to the quantum of damages. After the assessment of damages, the judgment became final. In absence of any accidental error the Court became *functus officio* with regard to the judgment and the assessment of damages. No accidental error or wrong principle was alleged. I cannot, therefore, recall the judgment or the assessment of damages. It is wrong; therefore, to challenge the award in this way; for to entertain such a ground would be tantamount to reconstituting this Court as an appellate court over its judgment. This would be very wrong indeed, and the practice should never be allowed. The proper place for challenging the award as being high, or that it was arrived at on a wrong principle, or that it was unreasonable, is the Court of Appeal. I cannot entertain this ground as a possible defence or a ground to recall the judgment by reason of arithmetical error or accidental slip of the tongue.

As to the alleged defence of contributory negligence, I am afraid that this is far-fetched. The liability of the second defendant is vicarious liability.

The first defendant, who was the driver of the vehicle at the material time, was convicted of an offence and, as such, he was bound to be found liable in some degree in negligence. He even wrote to say that the case should be settled out of Court, as he might be found liable. In the defence filed on his behalf, there is no allegation of contributory negligence. I fail to see any merit in these circumstances that contributory negligence at the instance of the second defendant, whose liability is vicarious liability, can be raise even at this belated stage. The first defendant is dead and buried with any valuable evidence to support allegations of contributory negligence. The second defendant was not there. The allegations of contributory negligence do not disclose a *prima facie* defence and I am of the opinion that this was put in this application as padding to give the bare bone some meat. I am not persuaded by allegations of a possible defence of contributory negligence so as to entitle me to exercise a discretion in favour of the defendant or the insurance company.

This suit was filed on 6th December 1974 and the summons was served on the first and second defendants on 21st January 1975 and 15th January 1975, respectively. The appearances were entered on 25th January 1975 and are both defective in form. However, the defence of the first defendant was filed on his behalf on 27th March 1975. This was by consent of parties, as it was out of time. Pleadings were closed and a chamber summons for directions was taken out. The suit was then fixed for hearing by consent of parties for 28th and 29th October 1975. It was then fixed for formal proof against the second

defendant in default of defence. This was taken out. It is clear that the plaintiffs intended to proceed against the second defendant separately. In the meantime the present orders came into force.

There was then the request for interlocutory judgment under order IXA, rules 5 and 6, of the Civil Procedure Rules. This was on 7th October 1975 and interlocutory judgment was signed on 23rd October 1975. It is as follows:

Order IXA Rules 5 and 6 The second defendant having entered appearance and having failed to file her defence within the prescribed period and on the application of the advocates for the plaintiffs, I enter interlocutory judgment against the second defendant. The Court to proceed with assessment of damages forthwith as against the second defendant on a date to be fixed.

The plaintiffs then set down the suit for the assessment of damages as 30th October 1975. Under both rules 5 and 6 of order IXA, the interlocutory judgment is unassailable for it was mandatory for the plaintiffs to set down the suit for assessment of damages under rule 5 and, if rule 6 was to be invoked, the Court ordered that "Court to proceed with assessment of damages forthwith".

The Court must have been aware that the first defendant was dead and that it was unnecessary to do otherwise than to order the assessment of damages "forthwith". The use of the word "forthwith" meant that the Court was prepared to do so without notice or requirement of the suit going for hearing.

The assessment of damages was made on 30th October 1975 and final judgment as to quantum of damages was delivered on 16th December 1975, in open Court. I do not agree with Mr Salter that the interlocutory judgment or the assessment of damages was irregularly obtained. There were no such irregularities under the rules.

Having disposed of the procedural points raised on behalf of the insurance company I will now proceed to deal with the application on its merits. The main ground, as I see it, revolves around the question of statutory notice and the inadequacy of a proper opportunity on the part of the insurance company to defend the suit.

The insurance company deponed through Mr Gambhir, the attorney of the insurance company, that there was a company known as Sterling General Insurance Co which had insured the second defendant's vehicle for twelve months from 18th December 1971 to 17th December 1972; and that the vehicle was involved in an accident on 26th December 1971, while it was driven by the first defendant with the consent and authority of the second defendant. The Sterling Insurance Co was merged with the applicant insurance company under an Act of India of 1973.The applicant insurance company thereby took over the assets and liabilities of Sterling general Insurance Co. These facts are not in dispute, with the result that the applicant insurance company took over the liabilities of the Sterling General Insurance Co in respect of the second defendant's vehicle, which had collided with the plaintiff's vehicle. It is also not in dispute that a claim was made on behalf of the second defendant on 28th December 1971, and that this was settled. The claim did not disclose that any person had been injured as a result of the accident.

The insurance company alleges that as a result of the merger and reorganisation, the entire office and insurance policy records were transferred to Regal Mansion. That, as a result of merger and transfer of the records of the Sterling General Insurance Co, the file on this accident was misplaced or mislaid and could not be traced. Hence the insurance company's reply of 2nd November 1974, which disclaimed that the second defendant vehicle had been insured by the Sterling General Insurance Co.

There was another letter of 19th November 1974, from the plaintiff's advocates in which it was confirmed that the second defendant's vehicle had been insured by the insurance company under policy K/PC/3607, as well as pointing out that the claim form in respect of the accident was duly lodged and the insurance company took action thereunder. The action had been filed after the original notice and the plaintiffs' advocate pointed this out to the insurance company. This was on 5th June 1975.

The insurance company did not respond to this letter. On 15th July 1975, the first defendant wrote a letter

to his advocates and copied it to the insurance company in which he requested that the summons be sent to the insurance company, with a plea that a settlement out of Court should be sought as he feared that, as he had been found guilty in the traffic case, he might be found liable in this action. Correspondence then ensued between the insurance company, the insured and their advocates. There is nothing on the record to indicate that the insurance company ever responded to the plaintiffs' advocate's letter of 5th June 1975. Indeed, it is clear from Mr Gambhir's affidavit that the insurance company never communicated with the plaintiffs' advocate and never reacted to his letter of 5th June 1975. What it did was to make internal investigations concerning the insured, the first defendant and his advocates. There is no indication that it even enquired from the plaintiffs' advocate the nature of the suit or tried to find out from the court record the nature of the action which it had been informed had been filed. It had discovered the insurance policy and its office record revealing that the accident had been reported. It was aware that it would be called upon to indemnify the insured, the second defendant, should she be found liable.

It is clear from the records that the first defendant's advocates were not acting for the second defendant. In her affidavit, the second defendant deponed that the Sterling General Insurance Co had insured her comprehensively in respect of the use of her car (registration KME 884); that while she was away in the United States her car had an accident while it was being driven by the first defendant, her husband; that she did not have personal knowledge of the accident, except what her husband told her on her return; that she was subsequently served with the summons in this suit; and that she gave the summons and the plaint to the first defendant who told her that he would hand them to Messrs Gautama and Kibuchi, Advocates, for any necessary action. She did not inform the Sterling General Insurance Co about this. She said that she did not instruct, or see, or visit, Messrs Gautama and Kibuchi regarding the suit and that she entrusted the matter to her husband, the first defendant, for the necessary action. She received the insurance company's letters of 19th July and 8th August 1975, but she did not reply as she had handed over the matter to her husband and the advocates. She did not receive any notice regarding the hearing of the suit or the date fixed for the assessment of damages.

The second defendant's affidavit confirms that she herself took no active part either to defend the suit or to instruct anyone (including the insurance company) with a view to having the suit defended. All that she did was to hand the whole matter to her husband, who was involved in the accident.

Unfortunately, the first defendant did not carry out her wishes and concealed the facts from the insurance company. The reason is obvious: he was not the insured and he wished to protect his wife if not to conceal the circumstances of the accident altogether.

The insurance company now complains (see Mr Gambhir's affidavit) that

(a) the defendants failed to notify the insurance company or the Sterling General Insurance of the true circumstances of the accident;

(b) the defendant falsely stated that the accident was a result of the negligence of the first plaintiff;

(c) the defendants lied when they stated in the claim form that no third person or person had been injured in the accident;

(d) the defendants completely failed to give notice to the insurance company of the plaintiffs' claim;

(e) the defendants created an impression that the plaintiffs' suit was being defended by Messrs Gautama and Kibuchi; and

(f) the defendants failed to give any notice to the insurance company of the defendants' intention not to file a defence and allow judgment to be entered against the second defendant in default of filing defence.

The insurance company seeks to have judgment set aside on the ground that (again, see Mr Gambhirs' affidavit) that (a) the insurance company did not have a proper opportunity to defend this suit; (b) that no notice was given in terms of section 10(2) of the Insurance (Motor Vehicles Third Party Risks) Act; (c)

that the defendants did not give notice, other than the letter of 15th July 1975, that this suit had been filed against them; and (d) that the insurance company was kept in ignorance by the defendants of steps taken in the proceedings and by the plaintiffs also.

Then the insurance company alleges a good defence of contributory negligence "against the first defendant". I have dealt with this aspect already. They then allege that the awards are inordinately high and will be reduced considerably on proof of contributory negligence. I do not see how the awards will be considerably reduced on proof of contributory negligence against "the first defendant". If by this phrase the insurance company means contributory negligence by the first plaintiff, then I have dealt with the matter as well in the context that, since the first defendant is now dead and since the second defendant admits to have had no personal knowledge of the circumstances of the accident, it becomes abundantly obvious that the defence of contributory negligence is meaningless, if not of no avail. The first defendant was convicted of a traffic offence. He went further to weaken any possible defence by not pleading contributory negligence in his defence, as well as seeking a settlement out of Court as he feared that he would be found liable. The second defendant's liability, being vicarious liability, advances no better claim of contributory negligence than that the deceased himself had. I think that the allegation of contributory negligence is a camouflage to enable the defendants to reopen the case so that they can attack the judgment or awards as being inordinately high. I think that this is the wrong way round; the proper way being to challenge the awards on appeal.

The insurance company's complaints as shown in paragraphs (a) to (f) are directed against the defendants and their advocates. There is no mention that the plaintiffs were at fault or were aware of what was happening between the insurance company and their insured, the second defendant, or for that matter the first defendant and his advocates. The insurance company never communicated with the plaintiffs' advocate after receiving the plaintiffs' advocate's letter of 5th June 1975. They, however, corresponded with the second defendant and the advocates for the first defendant, complaining about the latters' breaches of the conditions of the insurance policy. These were purely internal or domestic matters, which the plaintiffs were not supposed to know, or even engage themselves in. These breaches or complaints cannot be stretched to fix the plaintiffs with any blame whatsoever. Whether or not the faults and complaints justify setting aside the judgment will depend on whether the defendants' failure or breaches of the policy conditions amount to such grounds as would justify setting aside the judgment in the interest of justice. I will deal with this aspect of the matter presently.

Mr Salter conceded that the insurance company was validly served with a statutory notice within the meaning of section 10 of the Insurance (Motor Vehicles Third Party Risks) Act before the institution of this suit. He does not, however, concede that there was notice given to the insurance company within fourteen days after the commencement of the suit. Section 10 reads as follows:

(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 of this Act (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 person entitled to the benefit 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.

(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…. Dealing first, then, with the question of the statutory notice required under section 10 of the Act, as urged in Mr Gambhir's affidavit, it is obvious that before the insurance company pays the sum of judgment, the insurance company must have had notice of the bringing of the proceedings before the suit was filed. I do not think that in this case there can be any doubt that the requisite statutory notice was served on the insurance company before the commencement of this suit and that the insurance company had notice of the bringing of the proceedings. This is conceded on behalf of the insurance company.

The notice required under section 10(2) of the Act must be given before the institution of the suit or within fourteen days after the institution of such a suit. There is no limit as to what time the notice should be given before commencement of the suit in the case of the former, with the result that the insurance company must have had such notice of intended proceedings any time before the institution of the suit.

In the case of the latter, notice must be given within fourteen days after commencement of the proceedings. Once notice has been given before commencement of the suit, then it becomes unnecessary to serve another notice within fourteen days after commencement of the suit. The use of the conjunction "or"makes it clear that notice must be given either before the institution of the suit or within fourteen days after the suit has been instituted. Notice given one way or the other as aforesaid will suffice.

The section must be construed and read disjunctively but not conjunctively. Even with valid notice under section 10(1) and (2) of the Act the insurance company may avoid meeting the judgment obtained after it had the statutory notice where, in another action commenced before or within three months after the commencement of the proceedings yielding the judgment sought to be enforced, it has obtained declaration entitling it to avoid the judgment within the meaning of section 10(4) of the Act which reads 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 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 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 so given shall be entitled, if he thinks fit, to be made a party thereto.

I do not think that the insurance company in this case can avail itself of the provisions of section 10(4) as there is no allegation or evidence that there was such a declaration and that it had given notice to the plaintiffs of such declaration before or within fourteen days after the commencement of this action or of any non-disclosure or false representation on which it could rely. I am not satisfied that the allegations contained in the correspondence exchanged between the insurance company and the defendants or their advocates (as specifically alleged in Mr Gambhir's affidavit) satisfy the requirements of section 10(4) of the Act so as to entitle the insurance company to avoid the judgment in this suit on these grounds.

I hold therefore that the insurance company was validly notified by the statutory notice before the commencement of this suit within the meaning of section 10 of the Act and that that notice was sufficient notice under the Act. There was no need for another notice and none was called for under the Act after the commencement of this suit.

In *Shah v Mbogo* [1967] EA 116 where the insurance company sought to set aside judgment on the ground that no adequate notice of the proceedings in which the judgment was obtained had been given to the company, and where there had been correspondence between the plaintiffs' advocate and the company's office, it was held by Harris J that the company was well aware of the plaintiff's claim; that the notice was adequate to meet the requirements of section 10(2) (a) of the Insurance (Motor Vehicles Third party Risks) Act and that it had been effectively served. The decision was upheld on appeal.

In the instant case, not only was there a valid notice before the institution of the suit but there was also correspondence before, and after, the filing of the action between the plaintiffs' advocate and the insurance company in which particulars of the accident, the insurance policy, the pending suit, as well as

the allegation of serious injuries to the plaintiffs were given. The insurance company cannot now say that it had no notice.

The only remaining issue is whether the insurance company was accorded a proper opportunity to defend this suit. [His lordship then considered in detail the relevant correspondence and the conduct of the parties and continued:] I am of the opinion that the insurance company's ground of inadequate opportunity to defend the suit must fail. There is overwhelming evidence to support the view that the insurance company sat back and was indifferent in every respect. Had it taken some steps to investigate or co-operate with the plaintiffs' advocate as well as the first defendant's advocates, this matter would probably not have reached this stage. I do not think in these circumstances that the insurance company can be heard to say that it was denied the opportunity to defend the suit. It was the author of its own mischief.

I adopt the test in *Zirabamuzale v Corret* [1962] EA 694, 696, per Bennett Ag CJ:

There is another aspect of the matter to be considered. It appears from the judgment of chagla C J in *Sarupsing Mangatsing v Nikant Bhaskar* [1953] AIR Bom 109 that where the defendant's insurance company is under a statutory obligation to satisfy the judgment if given due notice of the institution of the suit, the Court will set aside the decree under its inherent powers if satisfied that the insurance company did not have a proper opportunity to defend the suit … that the first defendant himself had failed to give his advocates detailed instructions to enable them to defend the suit. The insurance company could have given the necessary instructions itself. Even after the insurance company had received a letter from the plaintiffs' advocates … the insurance company appears to have taken no action in the matter … I am satisfied that the insurance company had ample opportunity to defend the case on behalf of the first defendant and that it neglected that opportunity.

This case is similar to the present case and with *Shah v Mbogo* [1967] E A 116. I agree with Mr Satish Gautama that the circumstances of the present case are worse than those in *Mbogo's* case and *Simon v Andrew*.

The insurance company in this case not only sat back and neglected the opportunity to defend the suit for which the statutory notice was intended, but it went further and showed complete indifference and contempt of the plaintiffs' rights, even after it had been notified that judgment had been entered against the second defendant. One would have expected prompt action to set aside the judgment or, better still, to appeal against it, or even attempt to apply to appeal out of time. Even after it had been called upon to satisfy the judgment, the insurance company did nothing for months until 22nd March 1976, when this application was filed. This was clearly unpardonable indifference, neglect, evasion or obstruction, which this Court will find it very difficult to reconcile with the insurance company's request that this Court invoke its inherent jurisdiction and exercise its discretion in favour of the company. It would be tantamount to causing blameless plaintiffs injustice and hardship, which are contrary to the proper administration of justice. In these circumstances, this Court will not be used or called upon to aid the indolent to cause injustice and hardship to blameless plaintiffs who went to untold pains to discover the insurance company, which had insured the vehicle, caused them serious injuries.

I have considered this application with an open mind. Quite apart from the grounds advanced by Mr Salter with competence and clarity with regard to the regularity or otherwise of the nature in which the interlocutory judgment or the assessment of damages were obtained under the relevant orders and the rules, the application must also fail on both the grounds of notice and proper opportunity on the part of the insurance company to defend the suit. I have found that the interlocutory judgment and the assessment of damages were regularly obtained under the rules and that there occurred no irregularity as claimed on the part of the insurance company. I have also held that the insurance company had statutory notice under section 10 of the Insurance (Motor Vehicles Third Party Risks) Act of the intended action. This is conceded. I have also held that there was no need for another notice within fourteen days after the institution of the suit. The notice was adequate.

With regard to the main ground, that the insurance company did not have a proper opportunity to defend the suit, I have considered all the points raised on behalf of the insurance company as well as the

circumstances of this case. As will be seen from the records and the correspondence exchanged between the insurance company, the defendants and the plaintiffs, the insurance company acted indifferently (to put it mildly).

Their actions all along amount to culpable negligence. It had insured the second defendant's but, due to actions on its part to which the plaintiffs did not ascribe, the insurance file dealing with the second defendant's vehicle got mislaid or misplaced. This was during the merger or reorganization of the two insurance companies. The applicant insurance company having taken the files, records and liabilities of the former company should have kept the records and the files it assumed after the take-over or after the merger. Had it done so, it should have discovered that the defendant's vehicle had been insured by them. There is a statutory obligation that insurance companies must keep a record of all local policies (see section 22 of Insurance Companies Act).The applicant insurance company was clearly in breach of this statutory obligation.

Under the statutory notice served on the insurance company on 28th October 1974, the particulars of the second defendant's vehicle and her name were given. The date and nature of the accident were also given. The nature of the plaintiffs' injuries were also given. The statutory notice was in itself comprehensive to give the insurance company a warning and notice that claims for personal injuries were contemplated. The insurance company's attorney retorted that the vehicle had not been insured by the company and that the accident had not been reported. Now the attorney of the insurance company deponed that the relevant file was misplaced or mislaid. If this is so, then there is a serious contradiction because he could not have said that the accident was not reported if he had no access to the relevant file. Either the file was missing or there was no record kept for this local policy or he did not check his records carefully. The latter is more likely with the result that he was indifferent about the whole matter.

The plaintiffs' advocate followed the matter with his letter of 19th November 1974, which gave further particulars and pointed out that the action was being filed against the insured. The insurance company was not motivated by this letter, which accused it of "evasive denial".

There was yet another letter by the plaintiffs' advocate of 5th June 1975 which not only gave the particulars of the policy of insurance but also further particulars including notifying the insurance company that this action was then pending. The insurance company had two notices before the suit was filed and this letter, which also notified it of the pendency of the action. Yet the insurance company was not motivated to action, except to address the defendants on the consequences. The insurance company should at least have taken steps at this stage to find out about the accident, the nature of the suit and to take steps to safeguard its interests.

There is no mention as to when the file was finally traced and from where. The insurance as to when the file was finally traced and from where. The insurance company having been informed of the policy number, the suit and having traced the relevant file appears to have done nothing to protect its interests. What Mr Gambhir deponed in his affidavit cannot be considered as a sufficient explanation to justify its lack of action to safeguard its interest. The letters addressed to the defendants by the insurance company repudiated liability on the grounds based on the conditions of the policy to which the plaintiffs were unaware or were complete strangers.

The first defendant had written stating that he had been convicted in a traffic court and that he might be found liable in this suit. The insurance company was content that, in view of the breach of the policy conditions, it repudiated liability stating that if it was called upon to pay damages to a third party by virtue of the provisions of the Traffic Act, it would recover such amount from the insured. This makes it clear that the insurance company was not prepared to contest the suit or to protect its interests. The letter was not copied to the plaintiffs' advocate.

The insurance company's ground of repudiation of liability was confirmed in its letter of 8th August 1975 addressed to the second defendant. The insurance company did nothing thereafter until it was confronted with the plaintiffs' advocate's letter notifying it of the judgment and calling upon it to meet the judgment. This was confronted with another denial of liability based on the ground of lack of statutory notice of the

intended suit. This repudiation makes the insurance company to appear ridiculous in view of the clear history of the case.

Even at this late stage the insurance company should have taken steps to protect its interests by appealing against the judgment or attempting to appeal out of time if it was out of time. It did nothing, despite further correspondence from the plaintiffs' advocate to the effect that the insurance company should honour its statutory obligations. Even then nothing happened until 22nd March 1976 when this application was filed. In these circumstances I am of the opinion that the insurance company having decided not to defend the suit or to take steps to see that its interests were protected, brought this application as a thin end of the wedge.

The plaintiffs, on the other hand, did all that they could to investigate insurers of the vehicle, which collided with theirs. They worked against odds. The first defendant, realising the gravity of the case before he died, notified the insurance company of his feelings over the suit. The insurance company did not heed this notice. As I have said, the liability of the second defendant is vicarious liability and, as such, she stands no better chance than the deceased of defend the suit. I have found that there is no merit in the alleged defence of contributory negligence which was not pleaded even by the first defendant in his defence. In these circumstances, the insurance company had every opportunity to protect its interests but it ignored, neglected and took no steps to see to it that its interests were not prejudiced. It adopted an attitude of indifference, evasion and even obstruction to thwart the plaintiffs' statutory rights. This is exactly what the present application is aimed at.

I have in mind what was said in the Court of Appeal in *Mbogo v Shah* [1968] EA 93, 95, 96, by sir Charles Newbold P:

Now it is urged by counsel for the appellants in an able address that there is a distinction to be drawn between the refusal of the insurance company to accept service of a writ and the refusal of an insurance company to take any part in proceedings after it knows that a writ has been issued. The basis for that distinction is stated to be the case of *Groom v Crocker* [1939] 1 KB 194.

For myself I do not consider that that case draws any such distinction. All that that case decides on this point is that if an insurance company chooses to conduct a defence, whether or not it comes into the proceedings at an earlier or a later stage, in such a manner as to be contrary to the interests of the insured, then the insurance company has got no-one to blame but itself if it becomes liable on any ground, in that case on the ground of a tort, for the action which it has taken. I see nothing in that case which leads me to draw any such distinction as counsel for the appellants sought to draw; nor apart from that case do I see any good reason to draw such a distinction. In fact, it would seem to me that one of the obvious reasons for that contractual right, which appears in most insurance policies, is to enable the insurance company to come into the picture at the earliest possible moment. If it does not choose to take advantage of that right which it has so carefully acquired by contract with its assured, then it has no-one but itself to blame if it suffers thereby. This was the factor which I think above all others persuaded the trial judge that he should not exercise his discretion and re-open the case setting aside the *ex parte* judgment.

The judge also referred to other factors. Delay and its possible effect in relation to witnesses are, of course, factors to be borne in mind in determining whether, looked at as a whole, the justice to the case requires that the case be re-opened so as to try it on its merits.

But I think, by and large, the main factor which decided the judge not to reopen the case was this act of the insurance company in refusing to accept service of the proceedings, which act was the direct reason why this case came to judgment *ex parte* and not after consideration of contested facts. One must not forget that justice looks both ways and very often a judge has to draw a line between two rather conflicting cases, each of which has some justice on its side. Now that is what the judge did in this case. As the Vice-President has said, it may be another judge would not have decided the matter in the same way; but this judge, in the exercise of his discretion, without taking into account any factor which I think was an improper factor to take into account, and without failing to take into account any matter which he should have into account, arrived at this decision. It is now sought to set aside this decision, which was

made under the exercise of discretion.

I have looked at the facts of this case from both points of view. The vital witness for the defence is dead. There may be complete stalemate if I were to have the case re-opened on its merits. But this is a minor point although I see no merit on the application to justify this. The major point upon which I have come to the decision that I cannot exercise my discretion in favour of the insurance company is the sole ground that it chose not to do anything to defend the suit or to protect its interests in the matter. It sat on its rights when it was fully informed and aware of the accident and of the suit as required under the Act. The statutory notice coupled with the correspondence I have referred to lead to one conclusion, and one only: that the insurance company's inactivity in the whole history of the suit amounts to gross negligence, indifference and contempt on its part. It can only blame itself for what happened.

I see no justification in these circumstances to exercise this court's discretion in favour of the insurance company. I dismiss this application with costs for two advocates. I may add here that Mr Salter argued this application with admirable ability and clarity. Indeed counsel for the insurance company and for the plaintiffs assisted the court in every respect and I than them all.

Summons dismissed with costs.

Dated at Nairobi this 29th day of June 1976

M.G. MULI

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JUDGE