



**IN THE COURT OF APPEAL
AT NAIROBI**

CORAM: KWACH, SHAH & O'KUBASU, JJA

CIVIL APPLICATION NO. NAI. 199 OF 2001 (105/2001 UR)

BETWEEN

GATEWAY INSURANCE COMPANY LIMITED.....APPLICANT

AND

CATHERINE NDINDA MUNYAO.....RESPONDENT

(Application for a stay of execution pending the hearing and determination of an Appeal against the judgment and decree of the High Court of Kenya at Nairobi (K.H. Rawal J) delivered on 6th February, 2001,

in

H.C.C.C. NO.5806 OF 1993)

RULING OF THE COURT

The Respondent, *Catherine Ndinda Munyao* , had filed in the superior court, a declaratory suit (*H.C.C.C. NO. 5806 of 1993*) by which suit she was seeking orders to the effect that a judgment entered against one Joshua Akeyo in *H.C.C.C. No 1678 of 1990* in her favour be enforced against the applicant, *Gateway Insurance Company Limited* , being the insurer of Joshua Akeyo's vehicle registration number *KAA 277 E*. Although not clear from the record of the application before us it is obvious that the declaratory suit was brought pursuant to provision in Section 10(1) of The Insurance (*Motor Vehicles Third Party Risks*) Act, *Cap. 405 Laws of Kenya* (the Act) which section mandates the insurer of a vehicle to pay to the person entitled to the benefit of a judgment the sum payable thereunder provided that the liability of the insurer is such as is required to be covered by the terms of the policy issued by the insurer. Such liability is one covered under paragraph (b) of section 5 of the Act.

Section 5 of the Act where relevant reads: "5.In order to comply with the requirements of Section 4, the policy of insurance must be a policy which---

(a)-----

(b)insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of death of, or bodily injury to, any person caused by or arising out of the use of the vehicle on a road:

Provided that a policy in terms of this section shall not be required to cover.

(i)-----

(ii) Except in case of a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, liability in respect of the death of or bodily injury to persons being carried in or upon or entering or getting on or alighting from the vehicle at the time of the occurrence of the event out of which the claim arose; or

(iii)----- "

Reading of Sections 5 and 10(1) of **the Act** shows that a voluntary passenger in a private car may not be a party entitled to sue an insurer of a tort-feasor. At least that was the issue before the learned Judge and we were told from the bar that the respondent's deceased husband was a passenger in the said motor vehicle registration number KAA 277 E at the time the same was involved in an accident and which vehicle was insured by the applicant. The applicant in its intended appeal intends to argue this issue and we are unable to say that the issue is frivolous. It is certainly an arguable one.

Would the success in the intended appeal be rendered nugatory if the appeal succeeds? The amount decreed to be paid to the respondent is in excess of Shs.2,000,000/=. Mr. Mureithi, Counsel for the respondent did say in the superior court, in an affidavit sworn by him on 17th May, 2001 that the respondent is not a woman of means. However sympathetic we may feel at the plight of the respondent we have to do justice according to law.

In these circumstances the application succeeds and we grant a stay of execution of the decree in H.C.C.C. NO. 5806 OF 1993 dated 6th February, 2001 pending the hearing and determination of the intended appeal or further orders. The costs of this application will be costs in the intended appeal.

Dated and delivered at Nairobi this 6th day of July, 2001.

R. O. KWACH

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JUDGE OF APPEAL

A. B. SHAH

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JUDGE OF APPEAL

E. O. O'KUBASU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.