Case Number:	civ app 164 of 02
Date Delivered:	24 Feb 2004
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Judgment
Judge:	Alnashir Ramazanali Magan Visram
Citation:	CO. KENYA LTD vs JUSTUS ONGERA[2004] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	-
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI

CIVIL APPEAL NO. 164 OF 2002

MADISON INSURANCE CO. KENYA LTD :::::::::::::::::::::::: APPELLANT

VERSUS

JUSTUS ONGERA :: RESPONDENT

JUDGMENT

On October 31, 2000 the Respondent filed a suit against the Appellant in the lower Court seeking Judgment as follows:

"(a) A declaration that the …….(Appellant) …….is bound to pay the (Respondent) the decretal amount in S.M.C.C. No.1532 of 1999…….

(b) (Costs)"

On December 6, 2000 the Respondent filed an application under Order VI Rule 13 (1) (c) and (d) of the Civil Procedure Rules seeking to have the Appellant's defence struck out. The Magistrate in the Court below agreed with the Respondent and struck out the Appellant's defence and entered Judgment for the Respondent as sought in his Plaint. The Magistrate was brief and direct in his Ruling. He said as follows:

"The Plaintiff (Respondent) has annexed all documents relating to the earlier suit …… which was decided against the Defendant's (Appellant's) insured. That judgment has not been appealed against and the Defendant (Appellant) having been served with a statu tory notice never filed a suit seeking exemption from liability to pay the claimed sum. The Court finds that the Defendant (Appellant) cannot have a defence herein in the declaratory suit."

The Appellant was aggrieved by that decision and appealed to this Court. It set forth the following as its Grounds of Appeal in its Memorandum of Appeal:

"1. The Learned Magistrate erred in law and in dismissing the Appellant's application in total disregard of the issues of law and of fact raised therein.

2. The Learned Magistrate erred in law and in fact in failing to review his order dismissing the Appellant's application when the said application was meritorious and raised substantive issues of law.

3. The Learned Magistrate erred in law and in fact in granting orders in total disregard of the provisions of Section 5(b) and Section 10 (1) of the Insurance (Motor Vehicle Third Party Risks) Act Cap 405 ……. (hereinafter referred to as "the Act") in stating that the Appellant has no defence to the declaratory su it and declaring that the Appellant was bound to satisfy the decree in Civil

Suit No.1532 of 1999 ."

At the hearing of the appeal, Mrs Kiema for the Appellant did not argue those grounds in any sequence. She made a general submission. As I understood her she argued that the Learned Magistrate of the lower Court was not entitled to strike out the Appellant's defence as the same raised issues which should have been sent for trial. What were those issues"

In its defence dated November 13, 2000 the Appellant denied the following:

(a) That it had insured the motor vehicle in question;

(b) That the Respondent was a "lawful fare paying passenger" in the motor vehicle in question.

(c) That the motor vehicle was owned by Kennedy Asimba Oruru as claimed in the Pla int.

(d) That an accident occurred as claimed.

(e) That the relevant statutory notice had been issued to the Appellant as claimed.

(f) It was denied that summons to enter appearance had been served upon the Appellant's insurance in the primary suit.

(g) It was stated in the defence that the Respondent had no right to claim from the Appellant under the insurance policy issued by the Appellant to its insured .

I have set out the issues raised in the defence to enable one to consider whether those issues were fit to be sent for trial. I say so since all authorities on striking out of pleadings are clear that a defence which raises triable issues ought not to be rejected summarily (See the general principle in **D.T. Dobie & Co.(K) Ltd V. Muchina & Another** Civil Appeal No.37 of 1978 (cited in the Law Reporter, June 1996).

To decide whether the issues raised in the defence were reasonable, one has to look at the statutory provisions of the Act which imposes duty on Insurance Companies to discharge certain Judgments entered against their insured. Section 10 (1) of the Act 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, 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 t o 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."

As was pointed out by the Judges of Appeal in *Blueshield Insurance Co. Ltd V. Raymond B. M'Rimberia* (Civil Appeal No.107 of 1997), once statutory liability under Section 5(b) of the Act is covered by the terms of the policy, the insurer is bound under Section l0(1) of the Act to satisfy the judgment obtained against its insured and pay to the person entitled to the benefit of that judgment all sums payable thereunder with costs and interest, notwithstanding that the insurer may be entitled to avoid or cancel the policy vis a vis the insured or may have even avoided or cancelled it.

A replying affidavit sworn on March 15, 2001 by Mr. Samuel Kinuthia Advocate was filed in

opposition to the application for striking out of the Defence. It reiterated the matters raised in the defence.

I have considered all the matters raised in this appeal and I do not think that there is any good ground upon which this Court should interfere with the findings of the lower Court. This case stands on all fours with the Blueshield Insurance case supra. All the defences raised by the Appellant could not withstand a trial in view of Section l0 (l) of the Act. The Respondent annexed to the affidavit in support of his application a police abstract showing that the Appellant was the insurer of the offending motor vehicle. Once the Respondent obtained judgment against the Appellant's insured, the Appellant was bound under the Act to settle that Judgment notwithstanding that it may be entitled to avoid or cancel the Policy with its insured.

Whether the Respondent was a fare paying passenger or not may be a matter which would entitle the Appellant to avoid or cancel the policy but could not entitle him to avoid the Judgment obtained against his insured. Once that Judgment was in place, any challenge to its legality or finding could only be done by way of appeal, applying to set it aside or to review but could not be raised in the declaratory suit. Therefore, questions as to whether the Respondent was a "lawful fare paying passenger" or not; whether the offending motor vehicle was owned by the Appellant's insured or not; whether the accident occurred or not, could only be resolved in the primary suit. Also whether the Appellant's insured had been served with summons to enter appearance was an issue to be canvassed in the primary suit. The Respondent 's only obligation was to comply with the statutory conditions of the Act. This he did Ms Kiema did not pretend that the relevant statutory notice had not been given but argued that it had not been given properly. However, she did not show to this court whether that notice had to be given in any particular manner or form. Order VI Rule 2(b) of the Civil Procedure Rules referred to by her deals with service of summons and other documents under the Civil Procedure Act (Cap.2l). Ms Kiema conceded herself that the Act was silent on the service of the statutory notice under consideration. There was evidence in this case that one had been given and I agree with the Magistrate in the lower Court that there was proper service.

In fairness to Counsel, and for the conclusiveness of record, I would like to state that I have read all the authorities cited by them and I do not see the need to reproduce them here as they do not affect the decision I have come to in any material way.

I, therefore, dismiss the Appellant's appeal with costs to the Respondent and affirm the decision of the lower Court appealed from.

Dated and Delivered at Nairobi this 24th day of February, 2004.

ALNASHIR VISRAM

JUDGE