IN THE COURT OF APPEAL

AT KAMPALA

(Coram: Lubogo, V-P., Nyamuchoncho J.A., Asthana, J.A.)

CIVIL APPEAL NO. 7 OF 1982

BETWEEN

D.S. MUBIRU ..... APPELLANT

AND

THE CO-OPERATIVE BANK LIMITED ..... RESPONDENT

(Appeal from a Ruling and Order of the High Court at Kampala - Before the (Hon. Mr. Justice E.A. Oteng) dated 14th June, 1982.)

IN

CIVIL SUIT NO. 335 OF 1981

JUDGMENT OF LUBOGO, V-P.

On 31st December 1980 there was an accident between the appellant's vehicle registration No. UVL 945 and another vehicle registration No. UWQ 175 apparently belonging to the respondent as the writing on it indicated. The appellant filed a suit at common law in the High Court as the cause of action arose within its jurisdiction for special damages and the usual costs of the action.

The respondent denied liability as the suit was misconceived and especially as it was bad in law as the mandatory provisions of the Motor Vehicle (Third Party Risks) Insurance Fund Decree No. 5 of 1978 were not complied with before the suit was instituted and therefore premature. This point was taken up by Dr. Byamugisha as a preliminary point of objection to the institution of the suit.

The learned trial judge agreed with Dr. Byamugisha counsel for the respondent in the following words:

> "Since the commencement of the Decree on 15/9/78, a claim such as the one now brought by the plaintiff is a claim which is governed by S.29 (i) of the Decree. It is there provided that every such claim, as this one, be filed in the first place before the Committee and, subject to certain conditions mentioned in S.29 (3), the claimant may then file proceedings before a court of competent jurisdiction such as this Court. By

this provision, any common law jurisdiction that was invested in the court to hear the case at common law has been taken away by statute".

The learned trial judge concluded:

> "Having regards to all these considerations I respectfully agree with Byamugisha that this action brought in contravention of the mandatory provisions of S.36 (i) of the Decree, as it has been, is premature, no claim has been filed with the Committee; no failure of a settlement between the Committee and the claimant has been achieved; and no certificate has been issued by the Committee to the claimant that there has been such a failure".

The plaint was struck out with costs to the defendant.

Mr. Kityo for the appellant attacked the learned judge's decision vehemently on five grounds of which three are more relevant to the issues in this appeal. He criticised the learned trial judge when he said that section 29 of the Decree No. 5 of 1978 eroded the common law jurisdiction of the court and that the suit was premature because of the mandatory character of Sect. 36(1) of the Decree and its creation of condition precedent before filing a suit in the court of law. Naturally Dr. Byamugisha supported the decision of the trial judge. He submitted that under section 21 of the Decree the owner of a motor vehicle etc, is supposed to pay a third party insurance premium to the licensing officer at the time when he is making an application for a licence of the motor vehicle, then that person is entitled to indemnity. He went on to say that third party is not prejudiced by Sect. 36 of the Decree because time will not start to run against him until the organs of the Decree are properly set up. He conceded that the Decree did not seek to remove the common law jurisdiction, but to lay down the procedure to be followed. It lays down a condition precedent to sue. I shall deal with the points raised in a package as they are interrelated.

Now let me refer to the Decree generally and to the sections

seems the purpose for the Decree is to establish a Fund to make provision for third party risks arising out of the use of a motor vehicle and to provide for matters connected therewith. It seems to me that, generally, the Decree purports to deal with third party risks and how to go about it if one wants to recover from the Fund. It lays down certain procedure to be followed for that purpose as Dr. Byamugisha rightly pointed out. It does not envisage to remove the common law jurisdiction as Dr. Byamugisha conceded probably because there is no express provision for that in the Decree. From section I to section 19 of the Decree, it establishes the Motor Vehicle (Third Party Risks) Insurance Fund and how it shall operate, its membership, functions, meetings, the appointment of the Registrar of the Fund and all related matters of administrative nature. From section 20 to section 27 of the Decree one finds provisions regarding payment of premium and other matters to that effect. Then from section 28 to 42 the Decree establishes the Committee and its function. It also establishes a tribunal and how it will function. The sections deal particularly with the lodging of the claim against the Fund and not against the common law tortfeason and the conditions to be fulfilled before action is filed in a court of competent jurisdiction.

Under section 45 of the Decree the minister is empowered to make regulations, by statutory order, for better carrying out of the provisions and principles of the Decree. I am not aware of any such regulations having been made by the minister concerned. Nor has the Board, Committee, Tribunal any members appointed to them, though the Decree provides for persons who will constitute them. The minister is only empowered to make regulations. Although the Board is empowered to appoint the Committee and the Registrar the Board Chairman has never been appointed because the insurance companies have never nominated

the provisions of the Decree is and will lie in abeyance indefinitely unless something is done about it.

Now having reviewed the Decree generally let us look at the relevant sections of the Decree. Section 29 provides:

> "Every claim other than a claim involving the nominal defendant under section 39 of this Decree shall, within sixty days of the accident out of which it arises, be filed before the Committee or Tribunal, with the Registrar of the Fund in such a manner as may be prescribed".

In the instant case the accident took place about two years ago and no such committee or Tribunal has ever been appointed or the Registrar for that matter. For that reason a certificate cannot be issued to the claimant under section 36(1) of the Decree, and, therefore, claimant has no immediate remedy. The statutory period of sixty days under sections 29 and 36 of the Decree envisages the expeditions settlement of the claim. That is the principle the minister is enjoined to carry out under section 45 of the Decree so that no justice is refused by the delay. The mandatory nature of section 29 of filing the claim with the Committee or Tribunal within sixty days of the occurrence of the accident can be regarded as a denial of justice for the reasons that organs of its implementation are absent. It has been argued that the time starts to run against the claimant from the time a certificate had been issued. I do not agree. I would say the time runs against the claimant if he does not file his claim with the Committee or the Tribunal within sixty days of the accident under section 29 of the Decree and if no settlement is reached time starts to run against him after the issue of a certificate under section 36(1). This means that now all claimants under the Decree time has run out against them under section 29 just because there is no Committee or Tribunal appointed. Those claimants have now no remedy under

The Decree has been on the statute book for well over four years and no machinery has been set up to put it into motion. I do not think that in the wisdom of the legi ature the Decree could have been left in abeyance without an alternative for the litigant who looks for a redress.

Now this brings me to the main ground of appeal namely whether the courts have been divested of their common law jurisdiction to hear cases under the Decree. The High Court decisions on this point has been that it has no juridiction. This was so in Matida Namatovu vs. Sarah Nansubuga H.C.C.S. No. 656 of 1981. Again in Yusufu Kigozi v Toro African Bus Co. H.C.C.S. No. 642 of 1980 and Bulafu v Kagwa H.C.C.S. No. 323 of 1980 to mention just a few. It was not until in Y. Ntungwerisho & 14 others v Mrs. Charity Kakuhikire H.C.C.S. No. 604 of 1980 that Manyindo J. made a radical departure from those decisions and vacated his own stand in Namatovu (supra) and came to the conclusion that the High Court had jurisdiction in cases under the Decree. I would agree that valid points were raised in Ntungwerisho (supra) by Manyindo J. I would go further to say that in the provisions of the Decree there is no express and clear words which would oust the common law jurisdiction from the High Court or courts below. There are several English and East African authorities on this point, but a few will suffice.

National Assistance Board v Wilkinson (1952) Vol.2 Q B D p 255. In that case a married woman, who without justification refused to live with her husband in matrimonial home which he offered her, received assistance from the National Assistance Board. In the proceedings by the Board before justices for an order against the husband for payment of sums paid to the wife by way of assistance, it was held that the National Assistance Act, 1948 did not impose an absolute liability to the husband. After

deserts Lord Goddard CJ had this to say:

> "It is said that this construction is unavoidable by reason of the section being prefaced by the words "for the purpose of this Act", but it may be presumed that the legislature does not intend to make substantial alteration in in the law beyond what it expressly declares".

Lord Goddard went on to cite Minet v Leman (1855) 20 Beav at p.278 stated as a principle of construction which could be disputed:

> "---------- the general words of the Act are not to be construed as to alter the previous policy of the law, unless no sense or meaning can be applied to those words consistently with the intention of preserving the existing policy untouched ----------".

As I said before I cannot read into the provision of the Decree the intention to oust the jurisdiction of the courts or a departure from the existing policy of the previous law. Another English authority is Pyx Granite Co. v Ministry of Housing (1959) 3 All E.R. pl. Without stating the facts of the case as they are so involved Viscount Simonds said:

> "The question is whether the statutory remedy is the only remedy and the right of the subject to have recourse to the courts of law is excluded ----------. But I agree with Lord Denning & Morris L.J., in thinking that this circuity is not necessary. It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's Courts for the determination of his rights is not to be excluded except by clear words".

Indeed, that is what the Decree is purporting to do. First, one has to file his claim with the Committee and then if the claim is not settled within the prescribed period then to file the claim in the court of competent jurisdiction on obtaining a certificate. This is a circuitous procedure which would deprive the litigant his ordinary recourse to the courts if clear words to the effect are not inserted in the Decree.

The only East African authority cited to us is Chite v East African Community (1970) E.A. 487. The plaintiff, an

employee of the East African Community filed a suit against the Community for demotion and arrears of salary, the defendant contended that no actions of the Commission can be inquired into by any court. Kneller J relying on English authorities which are very persuasive on the point under discussion had this to say:

> "If the legislature intends to exclude the jurisdiction of all courts, including superior one, express words or necessary implication are necessary: See Albon v Pyke (1842)4 Man & G 421 at p 424 Tindal C.J.
> "Very clear words will be required to oust altogether the jurisdiction of the Queen's courts in matters of private rights".

These three authorities make is absolutely clear that express or clear words are necessary if the jurisdiction of the courts is to be ousted or at least necessary implication. These clear words or necessary implication are absent in the Decree. The suit therefore, was properly instituted in the High Court as it has jurisdiction to hear such suits brought under the Motor Vehicle (Third Party Risks) Insurance Fund Decree No. 5 of 1978. The question of premature, therefore, does not arise.

I would allow the appeal with costs in this court and court below and I would remit the case to the High Court for hearing on merits, and as Nyamuchoncho and Asthana J.J.A. agree I make the order in those terms.

DATED AT KAMPALA this 31st ..... DAY OF JANUARY ..... 1983.

(D.L.K. Lubogo)
VICE-PRESIDENT.

Dr. Byamugisha for respondent.
Mr. Kityo for appellant.

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

(M. Ogang)
REGISTRAR.

IN THE COURT OF APPEAL

AT KAMPALA

(Coram: Lubogo V.P., Nyamuchoncho J., Asthana J.A.)

CIVIL APPEAL NO. 7 OF 1982

BETWEEN

D.S. MUBIRU :: APPELLANT

AND

THE CO-OPERATIVE BANK LIMITED :::::::::::::::::::::::::: RESPONDENT

(Appeal from a Ruling and Order, of the High Court of Uganda at Kampala (Mr. Oteng J.) dated 14th June, 1982

IN

High Court Civil Suit No. 335/81)

J U D G M E N T - Nyamuchoncho J.A.

I have read the judgment of the learned V-P in draft and I agree with it.

The question posed in this appeal is whether s.29 of Decree 5 of 1978, precludes an action being brought against the owner of a motor vehicle who is insured with the Fund and which is involved in an accident causing damage to the property of another, unless and until the procedure laid down in s.32 (which directs all claims, other than claims against the nominal defendant, to be submitted to the Registrar of the Fund); s.34 (which lays down a period of ninety days within which to settle the claim) and s.36 (which requires the Committee to issue a certificate to enable the claimant to file a suit in a court of law if the claim is not settled within sixty days) has been exhausted; or whether s.29 deals with claims other than claims against the nominal defendant and the tortfeasor. In order to understand what s.29 is really about, it would be convenient to reproduce the relevant portion of this section which is sub-section (1) of that section. Sub-section (1) provides:-

"29 (1) Every claim, other than a claim involving the nominal defendant under s.39 of this decree, shall, within sixty days of the accident out of which it arises, be filed before the Committee or Tribunal with the Registrar of the Fund in such manner as may be prescribed."

This sub-section postulates that claims under the Decree can be brought against two bodies it mentions one as being the 'nominal defendant': It does not, however, tell us who is the other body. S.29 simply enacts, every claim ..... shall within sixty days .... be filed before the Committee, the question is, it is a claim against whom? We have got to find out. To do so, we have to look at s.1 (2) of the Decree. This sub-section, after incorporating the Fund, provides that the Fund may sue or be sued in the manner provided in s.27 of the Decree. When we turn to s.27, we find that, besides providing that the nominal defendant shall be sued for the purposes of s.39 (1), it provides that in any other proceedings under the Decree or in any action brought against or by the Fund, the Fund shall sue or be sued under the title, the Motor Vehicle (Third Party Risks) Insurance Fund. A claim and under s.29 is a proceeding under the Decree and, therefore, such proceeding should be brought against the Fund under the title "the Motor Vehicle (Third Party Risks)." That is the second body which can be sued by virtue of s.29.

As I see it, ss.27 and 29 of the Decree, do not preclude a claim being brought against a tortfeasor, that is to say, the owner of a motor vehicle which causes damage, to recover damages from him for the damage done by his vehicle. Liability for the damage caused by his motor vehicle is unaffected by these sections. Indeed, the liability of the tortfeasor under the Decree is preserved. See, for example, s.24 (1) where it is provided that it shall be the duty of the owner soon after the accident has occurred to give notice in writing to the Fund of the fact of the

accident ..... and to take all such steps as the Fund may reasonably require in relation thereto whether or not any claims have actually been made against the owner on account of the accident. The words underlined are important. They recognise the liability of the tortfeasor. And, in sub section (5) thereof, it is provided that the owner of a motor vehicle whom the Fund is liable to indemnify under a contract of insurance shall not, without the written consent of the Fund, enter upon or incur the expense of litigation as to any matter or thing in respect of which the Fund is liable to indemnify him ..... Again the liability is recognised.

S.29 of the Decree, therefore, enables a person who has suffered damage as a result of a motor accident to sue the Fund instead of suing the owner of the motor vehicle as hitherto has been the case. But it does not bar any action being brought against the tortfeasor; all those provisions which the trial judge held are mandatory and preclude an action being brought operate only where the Fund is sued. Accordingly, s.29 refers only to claims against the Fund and, of course, the nominal defendant, it has nothing to do with claims against tortfeasors. In this connection, s.43 is a very useful guide to discover the intention behind s.29. It makes the National Insurance Corporation (N.I.C.) liable to be sued in respect of the claims existing immediately before the Decree came into force (which was 15th July, 1978). Thus, putting all claims under the Decree and those before it came into force on the same footing.

I, therefore, hold that the owner of a motor vehicle which caused damage can be sued independently of the Fund. His remedy would be, in those circumstances to call on the fund to indemnify him in full from liability to pay damages in accordance with s.22 of the Decree. I do not think s.24 (5) of the Decree (Supra) would assist him if he obeys it to the letter and refuses to enter

upon litigation as it invites him to do. I see nothing in the Decree to stop a judgment being entered against him which he would have to satisfy. Such provision was common with Insurance Companies before the law was changed in 1970 and would enable the companies to disclaim liability, where the tortfeasor did not comply ..... with such provision but, in my view it cannot assist the Fund. I would allow the appeal with costs here and in the court below.

DATED AT KAMPALA this 31st DAY OF JANUARY, 1983.

Sgd: (P. NYAMUCHONCHO)
JUSTICE OF APPEAL.

Mr. Kityo for appellant.

Mr. Nyamugisha for respondent.

I certify that this a
true copy of the original.

(M. Ogang)
REGISTRAR.

IN THE COURT OF APPEAL

AT KAMPALA

(Coram: Lubogo, V-P, Nyamuchoncho, J.A., Asthana, J.A.)

CIVIL APPEAL NO. 7 OF 1982

BETWEEN

D.S. MUBIRU :: APPELLANT

AND

THE CO-OPERATIVE BANK LIMITED :::::::::::::::::::: RESPONDENT

(Appeal from a judgment of the High Court of Uganda at Kampala (Mr. E.A. Oteng) dated 14th June, 1982.

in

High Court Civil Suit No. 335/81.)

JUDGMENT OF ASTHANA, J.A.

I have read the draft judgments of the learned V.P. and Nyamuchoncho J.A. and I agree with them. I would allow the appeal in terms proposed by the learned V.P.

B.B. Asthana
JUSTICE OF APPEAL.
31/1/83

Judgment delivered in the presence of

Mr. Kityo and Dr. Byamugisha.

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

M. OGANG
REGISTRAR.