IN **THE** COURT O**F APPEAL**

AT KAMPALA

(Coram: lubogo, V-P , Nyamuchoncho JA 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 l4th June, 1982)

IN

**CIVIL** SUIT **NO. 335 of 1981** JUDGMENT OF **LUBOGO V-P.**

On 31st December 1980 there was an accident between the appellants 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

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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

**1** 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 regard 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 filed with the committee; no failure of 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 crictized

The learned trial Judge when he said that section 29 of the Decree no.5 of 1975 eroded the common law jurisdiction of the court and that the suit was premature because of the mandatory character of section 36(1) of the Decree and its creation of conditions precedent before filing a suit in the courts of law.

**Naturally Dr.** Byamugisha supported the decision of the trial judge. **He submitted** that under section 21 of the Decree the owner of 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 license 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 a** 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 makeprovisions 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

Party risks and how to go about it if one wants to recover the Fund. It lays down certain procedure to be followed for the 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 1 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 if the Fund and all related, matters of administrative nature.

From section 20 to section 27 of Decree one finds provisions ' regarding payment of **premium and other** matters to that effect. Then from section 28 to 42 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 condition to be **fulf**illed 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 Committees and the Registrar the Board Chairman has **never** been 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 provide:

”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 expedition’s 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 legislature 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 have been that it has no jurisdiction.

This was so in matilda Namatovn 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 198Q that mayindo** J. made a radical departure from those decisions **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 n**tungwerisho** **(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 **live with her husband in a matrimonial home** which he offered to her**,** received **assistance** from the National Assistance

**Board.** In **the** proceedings 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 absolute liability to the husband disintegration or deserts, lord **Godard C.J 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 **the law** beyond what it expressly declares.

Lord Goddard went on to cite Minet v Leman (**1855**) 26 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 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 ALLER P. 1**  without stating the facts of the case as they **are** **so** involved **Viscount Simonds said:**

**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 c**ircuity 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 exclude e**xcept** **by** clear words".

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**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 a 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 not inserted in the** Decree.

**The only East African authority cited to us is**  **Chite v East African Community (1970) EAC 487** The plaintiff, an employee of the east African Community filed a suit against the community for demotion and arrears of salary, the defendant contented that no action of the Commission can be inquired into by court**.** Kneller .J. relying on English authorities which is 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 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 are** 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 courts below and 1 would remit the case to the High Court for hearing on **merit** 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 the appellant.**

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

**M. OGENG**

**REGISTRAR**

**IN TH E 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 of Uganda at Kampala (Mr.

Oteng J.) Dated 14th June 1982

**in**

**High Court Civil Suit No. 335/81)**

**Judgment of 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 section 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 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 **section .29** **is** really about, it would be it would be convenient to reproduce the relevant portion of this section which is subsection (1) of that section. Sub-section (1) provides:-

**”29** (1) E**very** 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 Section 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 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

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for the damage done **by this** 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, section 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 ………………………… 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 o**f litigation **as to any matter or thing in respect of which t**he Fund is liable t**o indemnify him**.......... Again the liability is

**recognized.**

**Section 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, **section 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 section 43 **is** a very useful guide to discover the intention

**behind section 29.** It makes the National Insurance Corporation (N.1.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 **causes damage** can be sued independently of the Fund. His remedy would be **in** those circumstances to call on the fund to indemnify him from liability to pay damages in accordance with section 22 of the **Decree** I do not think **section. 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.**

**Signed; P. NYAMUCHONCHO**

**JUSTICE OF THE APPEAL COURT**

.... \*

Mr. Kityo for appellant

Dr.Byamugisha for respondent,

I certify that this a true copy of the original.

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M OGENG

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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 AST**H**ANA , J.A.**

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

* Asthana
* **JUSTICE OF APPEAL.**

Judgment delivered in the presence of Mr. Kityo **and Dr. Byamugisha.**

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

M. OGENG

**REGISTRY**