



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIVASHA**

**(CORAM: R. MWONGO, J)**

**CIVIL SUIT NO. 15 OF 2015**

**RICHARD BOKE CHACHA.....1<sup>ST</sup> PLAINTIFF/RESPONDENT**  
**FRIDAH KAIMURI KIREMA.....2<sup>ND</sup> PLAINTIFF/RESPONDENT**  
**EMMANUEL TALAM.....3<sup>RD</sup> PLAINTIFF/RESPONDENT**  
**EPHANTUS MWANGI.....4<sup>TH</sup> PLAINTIFF/RESPONDENT**

**VERSUS**

**LINUS KAIKAI.....DEFENDANT/APPLICANT**  
**JUBILEE INSURANCE CO. LTD.....RESPONDENT**

**RULING**

**Background**

1. By a judgment delivered on 28<sup>th</sup> May 2020, this court finally determined all issues in the pleadings in the road traffic suit before it for compensation.
2. Consequently, awards of damages were made as follows: To the 1<sup>st</sup> Plaintiff Kshs 6,603,309 plus special damages denominated in Shillings, Rupees and Dollars. To the 2<sup>nd</sup> Plaintiff Kshs 25,033,093/= and to the 3<sup>rd</sup> Plaintiff Kshs 540,000/=.
3. The Jubilee Insurance Company paid Kshs 6,000,000/= in part settlement of the total award of damages.

**Application and Parties Representations**

4. By a motion dated 7<sup>th</sup> October 2020, the Defendant has filed an application seeking orders as follows:

***“1. That the Jubilee Insurance Company Limited of Kenya be enjoined as necessary party to this suit pursuant to Section 34 of the Civil Procedure Act.***

***2. That the Jubilee Insurance Company Limited of Kenya be ordered to pay the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs the balance of the decretal sum being Kshs 28,164,322.27.***

***3. That in the alternative, the Jubilee Insurance Company Limited be ordered to deposit the balance of the decretal sum being Kshs 28,164,322.27 in Court or in the provide alternative security of Kshs 10,000,000.00 in the form of an insurance bond for the due performance of the decree pending hearing and the intended appeal by the Defendant.***

***4. That, costs of the application be provided for.”***

5. The application is filed under **Section 1A, 1B, 3, 3A** and **Section 34** of the **Civil Procedure Act**. There are twelve grounds set out in

support of the application. The pertinent ones to this application are:

*a) .....*

*b) .....*

*c) .....*

*d) .....*

*e) .....*

*f) That, the Jubilee Insurance Company of Kenya Limited subsequently appointed the firm of Murimi, Ndumia, Mbago & Muchela Advocates practicing in Nakuru to represent the Defendant/Applicant herein as an employee of Nation Media Group Limited, who was the insured under the group car-binder policy cover no. P/NRB/2011/2009/40315.*

*g) .....*

*h) That, the Jubilee Insurance Company of Kenya Limited pursuant to Section 11-1 (a) and 2 (a), Part A (I) of the Schedule to the group car-binder policy cover no. P/NRB/2011/2009/40315 partly settled the decree by paying a sum of Kshs 6,000,000.00 to 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs to a liability of Kshs 3,000,000.00 for each Third Party.*

*i) That, the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs were at the time employees of the insured, Nation Media Group Limited, and therefore were an exception to the Limitation on Third Party Liability of Kshs 3,000,000.00 provided for under Section 11-1 (a) and 2 (a), Part A (I) of the Schedule to the group car-binder policy cover no. P/NRB/2011/2009/40315.*

*j) That, the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs as employees of the insured, Nation Media Group Limited were covered under Section 11-1 (a) and 2 (a), Part A (I) of the Schedule to the group car-binder policy cover no. P/NRB/2011/2009/40315. As provided under the Schedule the Jubilee Insurance Company of Kenya Limited had contractual duty of fully indemnify and settle the decretal sums awarded to the Plaintiffs.*

*k) That, the Defendant/Applicant herein was a beneficiary of the group car-binder policy cover no. P/NRB/2011/2009/40315. Nation Media Group Limited, who at material times to the suit herein the Insured under the group insurance policy cover and therefore any of its employees were excluded under Part A of the Schedule to the Insurance Cover.*

*l) That, the Jubilee Insurance Company of Kenya Limited has a contractual statutory duty as the insurer of Nation Media Group Limited under Section 10 of the Insurance (Motor Vehicles Third Party Risks) Act to fully satisfy the decree issued in favour of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs.”*

6. The application is supported by the Affidavit of the Defendant/Applicant.

7. The application is opposed by Jubilee Insurance Company who filed a Preliminary Objection to strike out/dismiss the application on the grounds that.

1. The application is bad in law and amounts to an abuse of court process.

2. That the Respondent cannot be added as a party to the suit after judgment.

3. That issues canvassed in the application present a different cause of action which should have been raised in the proceedings.

8. The parties filed written submissions to dispose of the application.

9. The Applicant's submissions are that this court being the one that passed the decree has residual powers to make necessary orders relating to the execution thereof. The Applicant cited **Adiel Muriithi Philip v Thomas Maingi [2017] eKLR** where the Court of Appeal stated:

*“[13] In this regard, Section 34 of the Civil Procedure Act is relevant. That provision provides as follows:*

*“34(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree shall be determined by the court executing the decree and not by a separate suit.” (Emphasis added).*

*[14] A plain reading of the above provision shows that matters concerning discharge or satisfaction of a decree are determined by the court executing the decree.”*

10. The Applicant herein also cited the case of **Stephen Mbogo Mwangi v Blueshield Insurance Co. Ltd & 2 Others [2009] eKLR** where the High Court stated:

*“Under Section 34 (1) of the Civil Procedure Act, all questions arising between the parties in the suit where the decree was passed relating to the execution, discharge or satisfaction of the decree shall be determined by the court executing the decree and not in a separate suit. It is evident that the plaintiff has a legitimate and valid cause of action against the 1<sup>st</sup> defendant. Under the Insurance Act, the 1<sup>st</sup> defendant is legally mandated to settle any claim once it became due. The plaintiff is therefore entitled to seek the court’s intervention when it is apparent that the 1<sup>st</sup> defendant had failed to abide by its statutory obligation to settle the claim.”*

11. On the strength of this case the Applicant argues that Jubilee Insurance Company Limited has a contractual and statutory duty to the insurer of Nation Media Group Limited, where the Plaintiff worked, to settle the decretal sum.

12. Finally, counsel submitted that where there is a group insurance cover executed by the employer, as in this case when Nation Media Group had a contracted cover, the covered employees were entitled to be indemnified under that policy. On this, the case of **Beatrice Gikunda v CFC Life Assurance Limited [2020] eKLR** was cited.

13. The Respondent submits that **Section 34** of the **Civil Procedure Act** relates to parties to a suit or their representatives; that the section does not permit new parties to be enjoined into an existing suit; that in the present scenario the Applicant seeks interpretation of clauses in an insurance contract which was not the subject matter of the suit in which judgment and decree had been issued.

14. The case of **Roseline Violet Akinyi v Celestine Opiyo Wagwau [2020] eKLR** was cited where Aburili J stated as follows concerning enforcement of a decree by an insurance company:

*“Section 34 of the Civil Procedure Act .....does NOT provide for settlement of a decree by a person who is not a judgment debtor and therefore a party to the proceedings in question cannot enforce a decree against a non-party by whatever name.”*

15. Further the Respondent cited the case of **Brian Muchiri Waihenya v Jubilee Hauliers Ltd & another; Geminia Insurance Co. Ltd (Interested Party) [2018] eKLR**. There, Mulwa J. said:

*“23. I agree with the applicants submission that the doctrine does not bar a court from entertaining a case it has already decided but is so barred from revisiting the matter in a merit-based re- engagement with the case once final judgment has been entered and a decree issued, meaning procedural interlocutory applications only.*

*24. It is plain and clear that this court having pronounced the final judgment and a decree drawn, being asked to re-engage itself and to interrogate whether or not the applicant ought to be enjoined in the suit at the late hour which is already pending before the Court of Appeal would in my very considered view be against the law and laid down principles of functus officio.”*

16. Counsel finally submitted that **Adiel Muriithi’s** case was not relevant, as the point in issue there was not whether a non-party can be enjoined in a suit where a judgment has been rendered.

17. The only point for determination is whether **Section 34** of the **Civil Procedure Act** permits the joinder of Jubilee Insurance Company Limited to the suit as account of the fact that it had insured the Plaintiff’s employer Nation Media Group and the Plaintiffs were beneficiaries of such insurance.

18. **Section 34 (1)** of the **Civil Procedure Act** provides:

*“All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.”* (Emphasis added)

19. Few statutory provisions are as clearly worded as **Section 34 (1)** of the **Civil Procedure Act**. The following conditions must be fulfilled for this section to be invoked. The Applicant must show that the issue in question:

- a) Concerns all or any questions arising and relating to execution, discharge or satisfaction of the subject decree; and
- b) Arises between:
  1. Parties to the suit in which the decree was passed and no others, or
  2. Their representatives;

The provision also dictates that, if these conditions are met they must be determined by the Court executing the decree and not by a separate suit.

20. In the present case, the parties to the suit subject of the decree were the three Plaintiffs and the Defendant/Applicant. By this application seeking to enjoin Jubilee Insurance Company Limited, the Defendant/Applicant is essentially admitting that Jubilee was not a party to the suit, in which the decree was passed, pure and simple.

21. **Adiel Muriithi's** case cited by the Applicant, is easily distinguished. There, the Applicant who invoked Section 34 of the Civil Procedure Act was the Respondent (**Thomas Maingi**) who was also the judgment debtor therein. The Appellant **Adiel Muriithi** was the judgment creditor for Shs 2,495,425/=. The parties had entered into a consent that provided for the Respondent to pay Kshs 1,898,978. A new firm of advocates having been instructed, they sought to obtain a warrant of attachment for the original judgment sum. The Respondent filed a motion for injunctive relief which was denied by the High Court, hence the appeal to the Court of Appeal. The Court of Appeal decision therefore relates to parties to the suit, unlike the present case.

22. In **Stephen Mbogo's** case, Stephen Mbogo filed a suit against Blue Shield Insurance seeking to compel it to settle the entire decree of the lower court issued against the defendants in the lower court. The court was affirming that where a new suit is filed against the insurance company to compel it to settle a decree, the plaintiff has a valid and legitimate cause of action.

23. I need say no more. **Section 34 (1)** of the **Civil Procedure Act** and the authorities are clear. Only a party to a suit where a decree has been issued can file for execution of the decree. Such party must not file a separate suit. Any other person seeking orders in respect of execution but who was not a party to the suit must file a separate suit.

24. Accordingly, the Preliminary Objection succeeds and I hereby dismiss the application with costs.

#### **Administrative directions**

25. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

26. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.

27. Orders accordingly.

**DATED AND DELIVERED IN NAIVASHA BY TELECONFERENCE THIS 25TH DAY OF MAY, 2021.**

**R. MWONGO**

**JUDGE**

Attendance list at video/teleconference:

1. Mr. Chigiti for the Plaintiffs/Respondents
2. Ms Agwata for the Defendant/Applicant
3. Mr. Muchela for the Respondent
4. Court Assistant - Quinter Ogutu