



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 47 OF 2017

DIRECTLINE ASSURANCE COMPANY LIMITED.....APPELLANT

-versus-

SILVESTER EDWARD MUTISO &

JOEL MUTUA MUTISO

(Both suing as the Administrators Ad Litem of the Estate of

DORCAS KAMANTHE MUTISO (Deceased).....RESPONDENT

(Being an appeal from the judgement and decree of Honourable

Ms. Martha Opanga, Senior Resident Magistrate in Kithimani PMCC No. 105 of 2015 delivered on 23.3.2017)

JUDGEMENT

1. One of the main issue for determination in this appeal is the effect of a judgement against an insurance company (insurer) to satisfy judgements and/or claims arising from a suit against the insured in the instance where the suit had abated against the insured.
2. The background of this appeal is that the Respondents herein, **SILVESTER EDWARD MUTISO & JOEL MUTUA MUTISO**, filed **Kithimani Principal Magistrate's Civil Case No. 26 of 2011** (hereinafter referred to as '**the primary suit**') as administrators ad litem of the estate of the late **DORCAS KAMANTHE MUTISO** (hereinafter referred to as '**the deceased**') who allegedly died out of a road traffic accident on 27.2.2010. The judgement in the primary suit was delivered on 7.8.14 against **DAVID MWANGI GATHENGA** who was the owner of motor vehicle registration KAV 189H (hereinafter referred to as '**the offending vehicle**') which vehicle was duly insured by **DIRECTLINE ASSURANCE COMPANY LIMITED**, the Appellant herein. I will henceforth refer to the said **DAVID MWANGI GATHENGA** as '**the insured**'.
3. Judgement in favour of the Respondent herein as against the insured was entered in the primary suit on 7.8.2014 for Kshs. 1,272,900/= with costs and interests. A decree for Kshs. 1,477,795/= was eventually drawn. Since the decree remained unsettled, the Respondents herein instituted **Kithimani Principal Magistrate's Civil Case No. 105 of 2015** against the Appellant herein for purposes of enforcing that judgment. That suit sought for a declaration that the Appellant was bound to satisfy the judgment in the primary suit being the insurer of the insured's vehicle. The suit was filed on 18/03/2015. I will refer to that suit as '**the declaratory suit**'.
4. The declaratory suit was heard, and judgment delivered on 23.3.2017 in favour of the Respondents as against the Appellant. The Appellant however appealed the judgment in the declaratory suit hence this appeal.
5. The Appellant preferred ten grounds which are condensed as follows: -
 1. ***THAT the trial court erred in law in failing to find that the Respondents' suit against the appellants insured had abated pursuant to the mandatory provisions of Order 24 Rule 4 of the Civil Procedure Rules; and***
 2. ***THAT the trial court erred in law in failing to find that there was no valid judgement capable of enforcement as against the appellant pursuant to the provisions of Section 10 of the Insurance (Motor Vehicle, Third Party Risks) Act, Cap 405 Laws of Kenya; and***
 3. ***THAT the trial court erred in law in failing to find that the doctrine of estoppel could not be used to found a cause of action.***

6. Directions were taken to the effect that the appeal be disposed of by way of written submissions. The Appellant's Counsel framed four issues for determination as follows: -

“(a) Whether the trial court erred in law in failing to find that the Respondents’ suit against the appellants insured had abated pursuant to the mandatory provisions of Order 24 Rule 4 of the Civil Procedure Rules;

(b) Whether the trial court erred in law in failing to find that there was no valid judgement capable of enforcement as against the appellant pursuant to the provisions of Section 10 of the Insurance (Motor Vehicle, Third Party Risks) Act, Cap 405 Laws of Kenya; and

(c) Whether the trial court erred in law in failing to find that the doctrine of estoppel could not be used to found a cause of action.”

7. On the first issue the Appellant's Counsel submitted that it was the appellants' testimony during trial that during the pendency of the proceedings in **Kithimani PMCC 26 of 2011**, the appellant's insured passed away on or about 4th April, 2011 and a copy of the death certificate was produced and the information was brought to the attention of the then Respondents' advocate on record and thus the suit abated against the insured by operation of law. The appellant cited the provisions of Order 24 Rule 4 of the Civil Procedure Rules and the case of **Kenya Farmers' Co-operative Union Limited v Charles Murgor (Deceased) t/a Kaptabei Coffee Estate (2005) eKLR**.

8. On the second issue, it was submitted that the Appellant could not be compelled to satisfy the decree in the primary suit since by the time judgment was entered in the declaratory suit the Appellant's insured had died and therefore the trial court erred in hearing the case that was non-existent. They cited the case of **Titus Kiragu v Jackson Mugo Mathai & Another [2013] eKLR**.

9. On the third issue, it was submitted that the trial court erred in finding that the appellant was estopped from refraining from honouring the judgement and further by relying on the RTGS transfers that were not formally produced in court to make the finding. It was further submitted that the judgement of the subordinate court be set aside for being erroneous and be substituted with an order dismissing the suit against the appellant with costs.

10. The Respondents' in their submissions framed three issues for determination. Firstly, whether the trial court erred in law in finding that the suit against the appellant's insured was valid and capable of being enforced against the appellant; Secondly, whether the appellant is estopped from refraining from settling the claim under the doctrine of estoppel and acquiescence and Finally whether the Appellant is bound to satisfy the judgement entered against it's insured. On the first issue, counsel submitted that the judgement was delivered against the defendants jointly and severally and thus the appellant's insured was liable to pay the decretal amount to the Respondent. On the second issue, learned counsel submitted that the doctrine of estoppel stops the appellant from pleading that the suit had abated and the appellant acquiesced by continuing to pay up and cited the case of **Rajnikantkhetshi Shah v Habib Bank A.G. Zurich (2016) eKLR**. On the third issue, counsel submitted that by dint of Section 10 of CAP 405, Laws of Kenya, the appellant is statutorily bound to settle the decretal amount owing to the Respondent and prayed that the court exercise its inherent jurisdiction under Section 3A to dismiss the appeal for it is a waste of time.

11. As the first appellate Court, my role is to revisit the evidence on record, evaluate it and reach my own conclusion in the matter. (See the case of **Selle & Another vs. Associated Motor Boat Co. Ltd (1968) EA 123**). This court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in **Mwanasokoni v Kenya Bus Service Ltd. (1982-88) 1 KAR 278** and **Kiruga v Kiruga & Another (1988) KLR 348**).

12. I have carefully and keenly read and understood the proceedings and the judgments of the lower court in the declaratory suit as well as the Record of Appeal, the grounds thereof, the submissions by the parties and the decisions referred thereto.

13. Since the appeal hinges on the effect of the death of the appellant's insured on the declaratory suit, it is imperative that I first deal with the law on the subject. The relevant law is Order 24 of the Civil Procedure Rules that provides that

1. The death of a plaintiff or defendant shall not cause the suit to abate if the cause of action survives or continues.

2. Where there are more plaintiffs or defendants than one, and any one of them dies, and where the cause of action survives or of continues to the surviving plaintiff or plaintiffs alone or against them or defendants dies surviving defendant or defendants alone, the court shall cause an entry to that effect to be made on the record, and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants

3. (1) Where one of two or more plaintiffs dies and the cause of action does not survive or continue to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.

(2) Where within one year no application is made under sub-rule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the court may award to him the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased plaintiff:

Provided the court may, for good reason on application, extend the time.

4. (1) Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.

(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.

(3) Where within one year no application is made under subrule (1), the suit shall abate as against the deceased defendant

5.

6.

7. (1) Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.

(2) The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the trustee or official receiver in the case of a bankrupt plaintiff may apply for an order to revive a suit which has abated or to set aside an order of dismissal; and, if it is proved that he was prevented by any sufficient cause from continuing the suit, the court shall revive the suit or set aside such dismissal upon such terms as to costs or otherwise as it thinks fit".

14. Similarly, **Section 10** of the **Insurance (Motor Vehicles Third Party Risks) Act**, Chapter 405 of the Laws of Kenya (hereinafter referred to as '**the Act**') is what the respondents hinged their suit and it provides as follows -

"Duty of insurer to satisfy judgments against persons insured:

(1) 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) is obtained against any person insured by 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 persons entitled to 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.

(2) No sum shall be payable by an insurer under the foregoing provisions of this section –

(a) in respect of any judgment, unless before or within fourteen days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings; or

(b) in respect of any judgment, so long as execution thereon is stayed pending an appeal; or

(c) in connexion with any liability if, before the happening of the event which was the cause of the death or bodily injury giving rise to the liability, the policy was cancelled by mutual consent or by virtue of any provisions contained therein, and either

(i) before the happening of the event the certificate was surrendered to the insurer, or the person to whom the certificate was issued made a statutory declaration stating that the certificate had been lost or destroyed; or

(ii) after the happening of the event, but before the expiration of a period of fourteen days from the taking effect of the cancellation of the policy, the certificate was surrendered to the insurer, or the person to whom the certificate was issued made such a statutory declaration as aforesaid; or

(iii) either before or after the happening of the event, but within a period of twenty – eight days from the taking effect of the cancellation of the policy, the insurer has notified the Registrar of Motor Vehicles and the Commissioner of Police in writing of the failure to surrender the certificate.

(3)

(4) No sum shall be payable by an insurer under the foregoing provisions of this section if in an action commenced before, or within three months after, the commencement of the proceedings in which the judgment was given, he has obtained a declaration that, apart from any provision contained in the policy he is entitled to avoid it on the ground that it was obtained by the non-disclosure of a material fact, or by a representation of fact which was false in some material particular, or, if he has avoided the policy on that ground, that he was entitled so to do apart from any provisions contained in it:

Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not thereby become entitled to the benefit of this subsection as respects any judgment obtained in proceedings commenced before the commencement of that action, unless before or within fourteen days after the commencement of that action he has given

notice thereof to the person who is the plaintiff in the said proceedings specifying the non-disclosure or false representation on which he proposes to rely, and any person to whom notice of such action is so given shall be entitled, if he thinks fit, to be made a party thereto.

15. By placing foregoing provisions of the law with the facts in this case side by side it emerges that the Respondent herein through their Advocates on record in the primary suit vide letter dated **17th May, 2012** were notified of the death of the appellants' insured and there is no contention that the letter was never received. Further, the death certificate was filed as part of the defendant's documents in the declaratory suit that was filed on 18th March, 2015. On record, I find neither application for extension of time within which to apply for revival and substitution under **Order 24 rule 4(1)** nor an application for revival and substitution and I find and hold that the provisions of Order 24 Rule 4(3) apply with full force and therefore the suit against the appellants abated and hence the **Kithimani Civil Suit 105 of 2015** ought not to have seen the light of day for want of the party to the suit as a defendant in the primary suit No. 26 of 2011 since the Appellant's insured died before that suit was concluded. There was therefore nothing to support the declaratory suit that was instituted by the Respondents.

16. The filing of the said suit was hence in contravention of **Order 24 Rule 4 of the Civil Procedure Rules** and whereas **Section 44** of the **Evidence Act** deals with the conclusive nature of judgments *in rem*, the respondents cannot now benefit from the judgment in the declaratory suit that is a non-starter.

17. Looking at the provisions of **the law**, I agree with the Appellant's submission that the learned trial magistrate erred in law in finding that there was a valid judgement to be enforced and also erred in failing to find that the parent suit abated. Even if for argument's sake I were to align myself with the submissions of the Respondent, there ought to have been more evidence on record, for example a consent recorded so as to satisfy the court to uphold the finding of the trial court and in the absence of the same, I am unable to agree with the finding of the trial court. I am guided by the provisions of **Order 25 Rule 5 of the Civil Procedure Rules** that states that

“Where it is proved to the satisfaction of the court, and the court after hearing the parties directs, that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the court shall, on the application of any party, order that such agreement, compromise or satisfaction be recorded and enter judgment in accordance therewith”

“the doctrine of estoppel does not come to the aid of the Respondents in any way since the declaratory suit was a non-starter in view of abatement of the primary suit due to the death of Appellant's insured”.

18. The foregone analysis therefore addresses all the issues raised in the appeal and as such I must find, which I hereby do, that the appeal is merited and same must succeed. The upshot is that the judgement of the trial court in the declaratory suit is hereby set aside and substituted with an order dismissing the said suit with costs to the Appellant. The Appellant is awarded the costs of the appeal.

Orders accordingly.

Dated and Delivered at Machakos this 22nd day of May, 2019.

D.K. KEMEI

JUDGE