



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT MALINDI

CIVIL APPEAL NO. 36 OF 2016

INVESCO ASSURANCE COMPANY LIMITED.....APPELLANT

VERSUS

GRACE NEEMA CHARO ALIAS NEEMA MENZA....RESPONDENT

[An appeal against the ruling dated 25th October, 2016 delivered by L. N. Juma, RM in Kilifi SPMCCC No. 259 of 2014, Grace Neema Charo alias Neema Menza v Invesco Assurance Co. Ltd]

JUDGEMENT

1. The Appellant is Invesco Co. Ltd and the Respondent is Grace Neema Charo alias Neema Menza. This appeal is against the decision delivered on 25th October, 2016 by Mrs L. N. Juma, RM in Kilifi SPMCCC No. 259 of 2014 dismissing the Appellant's application dated 18th July, 2016 seeking the dismissal of the suit for being statutorily barred by virtue of Section 4(1)(d) of the Limitation of Actions Act, Cap. 22.
2. According to the Appellant, the Respondent's claim against the Appellant was premised on Section 10 of the Insurance (Motor Vehicles Third Party Risks) Act, Cap. 405 and as such time started running from the date of the delivery of the judgement that was being sought to be enforced through the suit.
3. The Appellant faults the trial magistrate for holding that the claim was a claim for recovery of a judgment and the same had a lifespan of 12 years by virtue of Section 4(4) of the Limitation of Actions Act.
4. The Respondent's position is that the trial magistrate correctly interpreted the law.
5. Section 10(1) of the Insurance (Motor Vehicles Third Party Risks) Act, Cap. 405 provides as follows:

“10. 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.”
6. Relying on the decision in **Nairobi HCCC No. 113 of 2010 Samuel Okoth & 7 others v Consolidated Bank [2012] eKLR**, the trial magistrate held that the applicable provision was Section 4(4) of the Limitation of Actions Act which allows for action to be brought upon a judgment anytime within 12 years from the date of the delivery of the judgment.
7. The Appellant's position is that that the Respondent's cause of action in the suit before the trial court is not based upon the judgment in the primary suit but is an action to recover the amount decreed in the primary suit from the Appellant by virtue of Section 10 of Cap. 405 and therefore Section 4(1) (d) of Cap. 22 and not Section 4(4) of Cap. 22 is the applicable provision.
8. The facts are not disputed. The Respondent's claim against the Appellant in the trial court arose from a judgment entered against the Appellant's insured on 18th September, 2007 in the primary suit.
9. The Respondent's suit against the Appellant was filed on 30th October, 2014. Section 4(1) of the Limitation of Actions Act provides that:-

“The following actions may not be brought after the end of six years from the date on which the cause of action accrued.

(a) ...

(b) ...

(c) ...

(d) actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty and forfeiture.”

10. Applying the cited provision to the Respondent’s case would render the same statutorily barred thus calling for its dismissal since six years had lapsed from the date of the delivery of the judgement in the primary suit and the time the Respondent’s case, which is the subject of this appeal, was filed.

11. The trial court however found that the action against the Appellant was an action brought upon a judgment and the applicable provision is Section 4(4) of the Limitation of Actions Act which states:-

“(4) An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.”

12. In **Samuel Okoth** (supra) the plaintiffs filed suits against their former employer, Consolidated Bank of Kenya Ltd, seeking tabulation of their dues based on a declaratory judgment delivered earlier on. The bank applied to dismiss the claims on among others grounds, that the suits were statute barred by virtue of Section 4(1) of the Limitation of Actions Act.

13. Dismissing the application, H. P. G. Waweru, J stated that:-

“15. The suit is thus not *res judicata*. It is an action brought upon a judgment within the meaning of Section 4(4) of the Limitation of Actions Act which provides

16. Is the action time-barred? It is not. The judgment sought to be enforced was delivered on 12th May 2009. The present suit was filed on 1st March 2010. Twelve years is a long way away.”

14. The facts in the case of **Samuel Okoth** (supra) cannot be said to be dissimilar to those of the case that was before the trial court. It is therefore inevitable that the same conclusion must be reached. Section 10 of Cap. 405 opens a door to a person who has obtained a judgment against an insured to go after the insurer. It does not *per se* create a new cause of action. The cause of action remains one namely the event that gave rise to the claim against the insured.

15. The judgment can either be enforced against the insured or the insurer. Section 10 of Cap. 405 creates an avenue through which the judgment can be enforced against the insurer. The provision does not create a new cause of action separate from that which gave rise to the claim. It is simply a mechanism for executing the judgment. The applicable provision of the Limitation of Actions Act, Cap. 22 is Section 4(4). For that reason the 12 years allowed by the law for commencing a suit upon a judgement had not expired by the time the Respondent instituted the declaratory suit against the Appellant.

16. The trial magistrate’s decision is therefore correct. This means that the Appellant’s appeal is without merit. As such, the appeal is dismissed with costs to the Respondent.

Dated and Signed at Nairobi this 7th day of May, 2019

W. Korir,

Judge of the High Court

Dated, Countersigned and Delivered at Malindi this 20th day of June, 2019

R. Nyakundi,

Judge of the High Court