



**REPUBLIC OF KENYA**

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

**CIVIL CASE NO. 96 OF 2012**

**DUNCAN MUTHUI MUTUVI.....PLAINTIFF**

**VERSUS**

**INVESCO ASSURANCE COMPANY LIMITED.....DEFENDANT**

**J U D G M E N T**

**A. Introduction**

1. The plaintiff instituted suit against the defendant for a declaration that the defendants were liable to satisfy the decretal amount, costs and interest entered against them in **Embu SPMCC No. 83 of 2007**.
2. The defendants put in a defence denying the plaint and further asserting that the defendants in the primary suit had no cover with the defendant herein and further that the defendant herein was under statutory management and all cases against their policyholder had been stayed by court order.
3. The defendants further pleaded that this court lacked jurisdiction to try this suit.
4. Halfway through the trial, the defendant's advocate on record ceased acting on their behalf. Despite service on the defendant in their registered office, the company never sought to defend their case by way of adducing evidence.

**B. Plaintiff's Case**

5. The Plaintiff testified that on the 6/2/2006 at around 6am, as he stood about 3 metres from the edge of the road, he was hit by a car, registration no. KAR 296D, which was being driven at a very high speed.
6. The plaintiff testified that a motorcycle driver took him to Embu Provincial General Hospital. He further testified that he sustained a broken left leg, swollen chest and cut on the head and that he stayed with a plaster on his legs for 2 years.
7. It was the plaintiff's testimony that after he was treated he reported the matter to the police who issued him with a police abstract revealing the details of the accident including the driver, Stephen Njue, and the owner of the motor vehicle, Peter Warui Njeru, and the insurance company as the defendant.
8. The plaintiff further testified that he instituted suit against the individuals above in the Senior Principal Magistrate's Court in Embu in Case No. 83 of 2007 and was awarded Kshs. 200,000/= on the 26/08/2008, which the defendant's agent therein did not satisfy.
9. In cross-examination, the plaintiff testified that he was not aware that the defendant was in statutory management when he served them with the decree and asserted that the insurance company was obligated to satisfy his claim.
10. In re-examination, the plaintiff testified that he filed his case in the Senior Principal Magistrate's Court on the 21/03/2007, a time when the insurance company was in operation a fact that is evidenced by the defence filed by their advocates on record.

**C. Plaintiff's Submissions**

11. The Plaintiff submitted that judgement was entered for him in the primary suit against the defendant's agent. It was his submission that the defendant herein instructed counsel in the case in the subordinate court to put in a defence on behalf of his agents.
12. The Plaintiff further submitted that the defendants herein were liable to satisfy the judgement decree as they had been served with a

statutory notice prior to commencement of the primary suit in the subordinate court, at a time when the defendants were still in operation. He relied on section 10 (1) of the Insurance (Motor Vehicles Third Party Risks) Act as well as the case of **Mohmed Athman Mjahid v Gateway Company Limited (2005) eKLR.**

#### **D. The Determination**

13. From the beginning this court takes judicial notice that the defendant herein was placed under Statutory Management on 28<sup>th</sup> February 2008 and after intense restructuring, it emerged from Statutory Management on 18<sup>th</sup> January 2010 being licensed to transact all lines of general insurance business.

14. From the facts above it is clear that the primary suit was entertained during the lifetime of the defendant herein. The defendants in the primary suit even put in a defence. It is only the final judgement that was entered after the defendant herein had entered into statutory management. As such, all the issues as to liability were determined and settled in the primary suit. The only issue before this court is whether the defendants herein are liable to pay the decretal sum entered against their agents.

15. In the case of **In The Matter Of Concord Insurance Company [2014] eKLR**, albeit in different circumstances, the Court held that;

*“Section 67C (10) of the Insurance Act was not intended to deny legitimate suitors of their right to institute proceedings for relief against an insured of an insurance Company under receivership for tortious acts of or breaches by the insured. The said section is intended to allow the manager to discharge his duties in relation to the revival of the insurance Company. In my own view, I think, the protection offered by the moratorium and court orders attendant thereto is to the Company from payments by the insurer (Company) of its policy-holders and other creditors, and not necessarily to the policy-holders or other creditors against liability from third parties.” (Emphasis added)*

16. It bears repeating that this suit is novel. The primary suit was entertained during the lifetime of the defendant herein. The judgement against the defendant's agent was made after the defendant had entered statutory management.

17. In the instant case, we have a defendant who successfully was placed under statutory management and was revived and on the other hand, you have an accident victim who has been rightly awarded compensation and cannot access the fruits of his judgement. It is also worth noting that the defendant has not provided any evidence to back their opposition to the claim.

18. The jurisdiction of this court is well provided in Article 165 of the Constitution and in the circumstances. It is my considered opinion that the plaintiff has proved his case and merits grant of the prayers sought.

19. Consequently, I find that the plaintiff has proved his case on the balance of probabilities and I hereby enter judgment in his favour against the defendant on the following terms: -

*a) That a declaration do issue that the defendant is liable to satisfy the decretal amount of Kshs. 200,000/= awarded by the trial court in Embu SPMCC No. 83 of 2007 with interest at court rates from date of judgement.*

*b) That a declaration do issue that the defendant is liable to pay the plaintiff costs of the suit in Embu SPMCC No. 83 of 2007 with interest at court rates from the date of judgement.*

*c) That the costs of this suit be met by the defendant.*

20. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 19<sup>TH</sup> DAY OF DECEMBER, 2018.**

**F. MUCHEMI**

**JUDGE**

**In the presence of: -**

**Mr. Okwaro for the defendant**