



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**CIVIL SUIT NO. 1379 OF 2002**

**SHITUL FULCHAND SHAH**

*As Personal Representative and Administrator of the Estate of*

**BADRUDDING MOHAMMED ABDULLA KOYA [Deceased).....PLAINTIFF**

**VERSUS**

**HASHIL MOHAMED AMBER.....1<sup>ST</sup> DEFENDANT**

**RUTH AMBER.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. The defendant hereinafter referred to as the applicant has filed the application dated the 4<sup>th</sup> of August 2017. It is brought under Sections 1A, 1B and 3A of the Civil Procedure Act, Order 51 Rule 1 of the Civil Procedure Rules. The applicant seeks that the court be pleased to allow the applicants insurers deposit a sum of Kshs. 2 million being the sum insured as per contract. The applicants aver in the affidavit filed in support by one Gibson Maina Kamau their insurer's legal manager that judgment was delivered on the 15<sup>th</sup> July 2016. That the plaintiff is yet to fix the matter for directions on distribution. That the defendants' insurers are ready to deposit in court the sum of Kshs. 2 million being the settlement of the maximum policy limit. That this position was conveyed to the plaintiff's lawyer vide a letter dated the 3<sup>rd</sup> of October 2016. That the defendant's insurers should be allowed to honour their part of the contract and be excused from further court attendances and that they have taken steps to conclude the matter expeditiously.

2. The matter was canvassed by way of oral submissions. Mr. Waweru for the defendant argued that the plaintiff has not taken action since the judgment was delivered to recover the money and hence the application by the insurers. That interest is accruing and they are willing to pay the sum of 2 million. That at the time of delivery of the judgment he raised the question on how the estate was to receive the funds as the plaintiff had lost contact with the beneficiaries. That their interest is that the actual beneficiaries receive the money as they have no way of ensuring that the money will reach the intended beneficiary. The applicant relied on Civil Appeal 52 of 2013 where the court was called upon to do justice between the parties.

3. Mr. Sarvia counsel for the plaintiff opposed the application. He argued that they have not refused to accept the money as stated. That the defendant wrote to them and sought to deposit the money in court. That the court's judgment was clear judgment was made in favour of the plaintiff and so it is the plaintiff who can recover the proceeds of the judgment. That the defendants' insurance was not appointed by anyone as a policeman to check where the judgment sum ends up. That there is no need for directions. That the application is incompetent and is made on behalf of a party who is not a party in the suit an insurer who cannot claim any relief in the matter. That the defendant is trying through the application to impose upon the plaintiff and the deceased a limit which is contractual between the defendants and their insurer. That the judgment was for a sum of over 6 million, costs have been taxed and no effort has been made by the defendant to settle the sums. That they will be forced to file a declaratory suit.

## **DETERMINATION**

4. On the 15<sup>th</sup> of July 2016 this court entered judgment for the plaintiff against the defendant in the sum of Kshs.6,403,472, plus costs and interest. The sum awarded was to be paid to the family of the deceased for whom the plaintiff was a personal representative. The defendant is back in court seeking to have a sum of 2 million deposited in court. I have considered the oral submissions. The defendants' insurers have made the application. They were not parties to the suit though they instructed the defendants' lawyer in this matter. The orders they seek cannot be granted as they are seeking orders to enforce a contract they had with their clients the defendants. The plaintiff has a judgment which he is entitled to enforce. There has been no appeal. In **Civil Appeal No 52 of 2013 Juma Ali Mbwana and another vs Umi Omar Musa**, the applicant sought a stay of execution and one of the issues dealt with was whether an officer of the insurance company that had insured the motor vehicle the subject of the judgment could swear an affidavit in support of an application for stay of execution of the judgment even if the insurance company is not a party to the proceedings. The application before this court is not for a stay of execution but one seeking permission to deposit a sum of 2 million in court. The deponent of the affidavit is an officer of the insurance. The defendants should pursue their clients on their contractual obligation. The plaintiff is entitled to the fruits of his judgment. I find their application misplaced. I agree with the submission that the defendants' insurer seem to be policing the plaintiff. I find no merit in the application and it is dismissed. No orders as to costs.

Dated signed and delivered this **13th day** of December **2017**

**R. E. OUGO**

**JUDGE**

**In the presence of;**

**Plaintiff / Respondent Absent**

**Mr. Mwaniki h/b for Mr. Waweru For the Defendant/ Applicant**

**Ms Charity court Clerk**