

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NUMBER 249 OF 2002

INTRA AFRICA ASSURANCE CO. LTD. APPELLANT

VERSUS

JOHN ODHIAMBO. RESPONDENT

(From the judgment of Mrs. Owino SRM in Nairobi Milimani CMCC No. EJ 340 of 2001)

J U D G M E N T

This is an appeal from the Respondent's declaratory suit. The Respondent was injured in the course of his employment with his employer who was Cementation Building & Civil Engineering Contractors Limited. He, thereafter filed a civil damages claim in HCCC No 445 of 1996 in Nakuru High Court in which he succeeded and was awarded a sum of Ksh.251,000/-

It is in the record and not denied that the Respondent's employer was at the material time insured for such liability with the Respondent herein, Intra Africa Assurance Co. Ltd. It is not clear from the record why the Respondent herein did not recover or proceed to recover the awarded damages from his employer, the Cementation Building Civil Engineering Contractors. Instead, the Respondent filed a declaratory suit in Milimani Nairobi in CMCC No EJ 340 of 2011 purporting to enforce the judgment and decree in Nakuru HCCC no. 445 of 1996. The suit was straineously defended by the Appellant who raised the defence that there was no common law or statutory privity of contract between the parties to enable the enforcement of the stated decree.

It is clear from the record that the said defence did not impress the lower court trial magistrate who proceeded to enter a declaratory judgment against the Appellant as the insurer of the Respondent in the resemblance of the operation of Section 10(1) of the Insurance (Motor Vehicles Third Party Risk) Act. That is what aggrieved the Appellant who filed this appeal.

The main and only issue for determination in this appeal is whether an insurer is bound to honour a judgment passed against the insured where an employee was injured in the course of his employment in an industrial accident in resemblance of a motor vehicle accident injuries.

The trial court answered this question in the affirmative.

The Respondent in this appeal who was given every opportunity to submit in his support failed to do. The Appellant put in his submissions and answered the issue in the negative.

I have carefully considered the issue. I find no provision in the Labour Laws resembling Section 10(1) & 2 of Insurance (Motor Vehicles Third Party Risks) Act, Cap 405. I am neither aware of such provisions in the common law practices. The nearest Labour Law provision which looks nearly similar to Section 10(1) of Cap 405 is Section 27(1) of the Workmen's Compensation Act, Cap 236 (Now repealed) which stated thus: -

“Where an employer has entered into a contract with any insurers in respect of any liability, under this Act, to any workman, then, in the event of the employer becoming bankrupt, or making a compensation or arrangement with his creditors, or if the employer is a company, in the event of the company having commenced to be wound up or receiver or manager of the company's business or undertaking having been duly appointed, the rights of the employer

against the insurers as respects the liability shall, notwithstanding anything contained in the laws relating to bankruptcy and the winding up of companies for the time being in force, be transferred to and vest in the workman and upon any such transfer the insurers shall have the same rights and remedies and be subject to the same liabilities as if they were the employer:

Provided that the insurers shall not be under any grater liability to the workman than they would have been to the employer.”

Proper reading of the above provision shows that the right provided therein would only accrue in the event the employer becomes bankrupt, or making a composition or arrangement with creditors etc. In this case, there is no evidence of the employer of the Respondent being in a similar status. The Respondent therefore had no basis upon which to seek to make the insurer liable. To that end the trial magistrate clearly erred in law and facts to declare the insurance liable and should have dismissed the declaratory suit at that point, especially since the defence was brought to her attention.

The end result accordingly is that this appeal has merit and succeeds. The lower court ruling dated the 25th April, 2009, is hereby set aside as that suit is dismissed. Costs here and below are to the Appellant. Orders accordingly.

Dated and delivered at Nairobi this 17th day of February, 2014.

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D A ONYANCHA

JUDGE