



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 301 OF 2001

SAMUEL WAMBUA NZENGULA PLAINTIFF

V E R S U S

GEOFFREY KAIYONGI T/A

KAWANGWARE ENTERPRISES1ST DEFENDANT

HIGHWAY CARRIERS LIMITED 2ND DEFENDANT

RULING

1. The Plaintiff's suit against the Defendants was seeking damages resulting in motor vehicle accident where the Plaintiff suffered severe injuries to his right leg resulting in his amputation. That accident occurred on 16th June 2000.
2. The Plaintiff adduced evidence in Court on 16th February 2006. Although the case was adjourned on that day to enable the Plaintiffs call more evidence none was produced. The case was adjourned severally and on 2nd October 2008 the Plaintiff's Counsel informed the Court that the Plaintiff was not intending to call any more evidence. The Plaintiff on that day closed his case.
3. On 17th November 2010 when the case was coming up for the defence hearing the Defendants did not attend Court nor avail any witnesses and their learned Counsel proceeded to close the defence case without calling any evidence.
4. The date for the delivery of the judgment was adjourned from time to time and finally was delivered on 13th August 2012. That judgment was in favour of the Plaintiff in the sum of Kshs. 2,680,562.80/-.
5. It is when the Plaintiff made demand of payment of that judgment amount that the Defendants filed the Notice of Motion dated 30th November 2012.
6. The Defendant seeks by that Motion an order to review or set aside the judgment of 13th August 2012. The application is based on two grounds- firstly that the Defendants were not notified of the hearing date of 17th November 2011. This was the date that the case was due for the Defence hearing. Secondly, it is based on the ground that the Defendants insurer Invesco Assurance Co. Ltd was under statutory management and had obtained orders staying the suit against it.

7. On 17th November 2010 when the case came up for defence hearing the Defendants counsel did not inform the Court that the Defendants were unaware of that date. Rather, their Counsel informed the Court that there had been some negotiations between the parties and that the Defendants had made some '**promises**'. Learned Counsel for the defence on that day, made an application for an adjournment which application was denied by the Court. It was then that the defence Counsel closed the defence case without calling evidence.
8. Defence in my view fails to prove the first ground. It fails to prove that it had not been informed about the hearing date. The defence ought to have obtained an affidavit from their then Counsel to confirm that it had not been informed of the hearing date of 17th November 2011. It should be noted that the learned Counsel for the defence proceeded to participate in subsequent attendances in Court without ever stating that the Defendants were unaware of the hearing notice. It is for that reason that the Court rejects the Defendants first ground for seeking review or setting aside of the judgment.
9. The second ground is based on the order of the Court in **Nairobi HCC No. 318 of 2008 (OS)**. The Court in that matter made an order on 30th June 2008 as follows-

“UPON READING THE ORIGINATING SUMMONS presented in court on the 16th day of June 2008 by Counsel for the Applicant under Section 348 of the Companies Act, Rules 3, 4 and 9P of the Companies (High Court) Rules, Section 67C of the Insurance Act, Section 3A of the Civil Procedure Act and Order XXXVI of the Civil Procedure Rules AND UPON READING the Supporting Affidavit of Geoffrey Njenga sworn on the 12th day of June 2008 together with the Annexures thereto AND UPON HEARING Counsel for the Applicant ex-parte-

IT IS HEREBY ORDERED THAT:-

1. ***THAT this application be and is hereby certified as urgent and shall be heard on priority basis.***
2. ***THAT no civil proceedings of whatever nature or form shall be entertained and or filed in any court or tribunal against Invesco Assurance Company Limited (Under Statutory Management) or its policy holders during the currency of the Moratorium declared by the Statutory Manager on 01.03.2008;***
3. ***THAT all civil proceedings whatever their nature or form and whatever their stage currently subsisting in various courts and tribunals against Invesco Assurance Company Limited (Under Statutory Management) or its policy holders be and are hereby suspended and shall remain suspended during the currency of the Moratorium declared by the Statutory Manager on 01.03.2008;***
4. ***THAT all taxation proceedings whatever their nature or form currently subsisting in various courts and tribunals against policy holders of Invesco Assurance Company Limited (Under Statutory Management) and for which the Company may become liable be and are hereby suspended and shall remain suspended during the currency of the Moratorium declared by the Statutory Manager on 01.03.2008;***
5. ***THAT no statutory notices, demands or claims of whatever nature or form shall be issued or be effective against Invesco Assurance Company Limited (Under Statutory Management) or its property or its policy holders during the currency of the Moratorium declared by the Statutory Manager on 01.03.2008,***
6. ***THAT the running of time for the purpose of any law of limitation in respect of any notice, demand or claim by any policy holder or creditor of Invesco Assurance Company Limited (Under Statutory Management) is suspended and shall remain suspended during the currency of the Moratorium declared by the Statutory Manager on 01.03.2008;***
7. ***THAT the Applicant is hereby granted leave to publicize the foregoing orders by publishing them in the Kenya Gazette, the Daily Nation newspaper and Standard newspaper; and***
8. ***THAT the costs of this application shall be in the cause.***

GIVEN under my hand and seal of the Honourable Court this 30th day of June, 2008.

ISSUED at Nairobi this 1st day of July, 2008.

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DEPUTY REGISTRAR

HIGH COURT OF KENYA AT NAIROBI

(MILIMANI COMMERCIAL COURTS)”

The Defendants argue that the proceedings of this case were stayed by that order.

10. In the first instance it ought to be noted that the Plaintiff adduced

evidence before that order was issued by the Court in **HCC NO. 318 of 2008 (OS)**. The Plaintiff adduced evidence on 16th February 2006. The stay order therefore did not affect this proceedings in that regard. The Plaintiff closed his case on 2nd October 2008 without calling further evidence. Thereafter, the only proceeding relevant to the judgment that was issued by this Court is the presentation of written submissions by the Plaintiff on 15th December 2010. The Defendant in relation to those written submissions failed to show to this court that the order of 30th June 2008 in **HCC 318 of 2008 (OS)** was still subsisting as at 15th December 2010. The burden of proof was on the Defendants to so prove but they failed to prove it.

11. The Defendants also relied on the order of 16th November 2011

which was also issued in **HCC 318 of 2008 (OS)**. That order was in the following terms-

“IT IS HEREBY ORDERED:-

1. ***THAT the proceedings, decrees, warrants and all taxations in matters annexed hereto as schedule A. The said matters having proceeded in contempt of the orders granted by the Honourable Lady Justice Lesiit on the 30th day of June 2008 enforcing the moratorium granted by statutory manager of Invesco Assurance Company Limited be and are hereby set aside.***
2. ***THAT a stay of execution with respect to such warrants, decrees and legal costs arising from contracts, suits and policies issued by the applicant prior to the moratorium declared by the Statutory Manager on 1st March 2008 for the next one (1) year which suits, decrees and warrants are more specifically set out in schedule annexed hereto as B be and are hereby granted.***
3. ***THAT all civil proceedings of whatever nature or form filed in nay court or tribunal and subsisting as against Invesco Assurance Company Limited or its policy holders during the existence of the Moratorium declared by the Statutory Manager on 01.03.2008 and all their Consequential Orders be and are hereby declared NULL AND VOID.***
4. ***THAT all taxations by the Applicant’s Advocates set out in schedule C annexed hereto and proceedings whatever their nature or form currently subsisting in various courts sand tribunals against Invesco Assurance Company Limited that relate to suits that proceeded during the Moratorium period declared by the Statutory Manager on 01.03.2008 be and are hereby declared NULL AND VOID.***
5. ***THAT all statutory notices, demands or claims of whatever nature of form issued and/or effected against Invesco Assurance Company Limited or its policy holders during the Moratorium period declared by the Statutory Manager on 01.03.2008 be and are hereby declared NULL AND VOID;***

GIVEN under my hand and seal of this Honourable Court at NAIROBI this 16th day of

November, 2011.

ISSUED at NAIROBI this 1st day of December, 2011.

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DEPUTY REGISTRAR

HIGH OF KENYA – MILIMANI

PENAL NOTICE

TAKE NOTICE that you are hereby required to obey, observe and abide this order and you are hereby warned that if you disobey the same, you may be cited for contempt of Court and you may be committed to Civil jail for a period not exceeding six (6) months.”

12. That order refers to a schedule marked as 'A'. That schedule contains

all the matters that were affected by that order. The Defendants annexed a separate sheet of paper bearing a list of different matters filed in different Courts and this case was reflected in that list. But that sheet does not bear as mark stated as schedule 'A'. There is therefore nothing before this Court marked as schedule 'A' bearing this case number.

13. The Defendants also relied on the order of 26th June 2010 in HC NRB

Petition No. 1178 of 2007 which order was in the following terms-

“IT IS HEREBY DECLARED AND ORDERED BY CONSENT

- 1. That a declaration be and is hereby made that the enforcement of the Decrees held by the Third parties in the ancillary suits named in the Affidavit of Julius Wokabi sworn on the 19th day of October 2007 (hereto annexed) save for those listed in the Notice of Appointment of Ndumu Kimani & Co. dated 19th November 2007 (hereto annexed) will contravene the Petitioners rights under Section 70(a), 70(c), 75(1)(3)(6) and 76(1) of the Constitution and in particular the Petitioners rights to secure protection of the Law, the right to privacy of properties, the right to peaceful enjoyment of property and the protection against deprivation and Arbitrary entry of property.***
- 2. That a declaration be and is hereby issued that the first Respondent by reason of the declared negligence in the discharge of his statutory obligations and on his failure to take remedial or any remedial measures in time, or at all to forestall the necessity of this fictitious suits and/or claims, acted recklessly and negligently and contravened the Petitioners constitutional rights to the due protection of the Law and Property.***
- 3. That a declaration be and is hereby issued that the Petitioner owes no fiduciary duty to the interested parties in the ancillary suits, and is not bound by the Insurance Act to meet any financial or statutory obligations falling under fraud and all the proceedings hereunder be and are hereby stayed pending police investigations.***
- 4. That a declaration be and is hereby issued that the police do investigate the fraud herein and give the Second Respondent its findings to enable prosecution of the Claimants in the ancillary suits.***
- 5. That each party bears its own costs of the Petition.***

GIVEN under my hand and the seal of the Court this 22nd day of June 2010.

ISSUED at Nairobi this 14th day of November, 2011.

DEPUTY REGISTRAR

MILIMANI COMMERCIAL COURTS”

14.As it will be noted that order related to matters set out in an affidavit

of Wokambi. That affidavit was not availed to this Court for this Court to confirm that this matter was one of the matters mentioned in that affidavit and thereby affected by the order of 22nd June 2010.

15.All in all, the Defendant failed on a balance of probability to prove

that there were conservatory orders stopping this matter from proceeding to hearing.

16.Even if the Defendant had proved that this matter was affected by the

order in **HCC 318 of 2008 (OS)** at most the proceedings that would have been affected by such a stay were those where the Court received the parties submissions. The submissions were ordered to be filed by consent of both parties. Although the Defendants were represented their Counsel failed or refused to file such submissions. Judgment was finally delivered on 13th August 2012. Nothing has been brought to the attention of the Court to show that the stay subsisted up to that period.

17.In the end the Defendants' Notice of Motion dated 30th November

2012 is dismissed with costs to the Plaintiff.

Dated and delivered at Mombasa this 17th day of October, 2013.

MARY KASANGO

JUDGE