



Editorial Summary

1. *Civil Appeal*
2. *Civil Practice and Procedure*
3. *Subject of Subordinate Court Case*

Declaratory Suit

- 3.1 *Tort*
- 3.2 *Primary suit, pedestrian motor vehicle accident.*
- 3.3 *Insurance company fails to pay.*
- 3.4 *Declaratory suit filed to compel payment.*
- 3.5 *Application for summary judgment granted.*
Defence struck out on 22nd June 2010.
- 3.6 *Insurance company appeals on*
12th July 2010.
- 3.7 *Respondent original defendants issues*
warrants of execution, 19th July 2010.
- 3.8 *Insurance company deposits decretal sum*
to court of Ksh. 547,165/- on 30th July 2010.
- 3.9 *Application 22nd July 2010 for stay of execution*
heard interparte.
- 3.10 *Ruling by court Sitati J:*

- i) *Application for stay of execution granted.*
- ii) *Condition that the decretal sum be deposited in an interest earning account within 15 days from 13th December 2011.*
- iii) *The respondent declines to sign form to open joint account on grounds that the applicant was in default of court orders. Orders given on 13th December 2011 and payment should have been made by 31st December 2011.*
- iv) *Applicant, insurance company files application 20th February 2012 to vary court orders.*

4. *Application to vary court orders*

Dated 20th February 2012.

- 4.1 *That the respondent refused to complete forms.*
- 4.2 *That time required to enlarge the time to comply.*
- 4.3 *Vary orders to allow decretal sum remain in court.*
- 4.4 *Respondent served, failed to attend court.*

5. *Held:*

- i) *Application granted to vary orders of court.*

- ii) 15 days granted to open joint account failure to,
decretal sum to remain deposited in court till
finalization of appeal.

6. Case Law:

7. Advocates :

i) O Wachira instructed by M/s Ombonya & Co Advocates for appellant/applicant

ii) N Kaburu holding brief for M/s Nelson Kaburu & Co Advocates for respondent/respondent
absent

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

CIVIL APPEAL NO. 271 OF 2010

OCCIDENTAL INSURANCE CO LTDAPPELLANT/ APPLICANT

VERSUS

ABRAHAM NJAGI NJIRU JACK MORRIS W NJIRURESPONDENTS

*(Being an appeal from the Order and decree of Hon.P. Gichohi Esq, Chairperson Senior Principal
Magistrate in Case No. 2623 of 2009 dated 22nd June 2010 at Nairobi)*

R U L I N G

Application to vary orders of the court dated

20th February 2012

I. BACKGROUND

1. A motor vehicle ran down a pedestrian on the 21st October 2003. The pedestrian sustained injuries. She filed suit against the owners of the said vehicle in the subordinate court case

CMCC 9688/04

Jane Njoki Mathagu

Vs

Charles Waimira Kangagi

2. Judgment was served against the original defendant. The insurance company declined to pay. The original plaintiff filed a declaratory suit seeking orders of the court to hold that the insurance company was liable to pay.

CMCC 2623/09

Abraham Njagi Njiru

Jack Moris W Njau

(suing as administrator Ad litiu of the

Estate Jane Njoki Mathengi

Now deceased)

Vs

Occidental Insurance Co. Ltd

3. The insurance company ordered that they were liable to pay. The pedestrian estate applied to have the defence struck out. This was duly granted by the court on 22nd June 2010.

4. A conditional interim stay of execution was granted by the High Court of the orders of the Hon. Magistrate. This was because on 19th July 2010 warrants to execute were taken out. The appellant filed appeal on 12th July 2010. By an application of 22nd July 2010 to the High Court, the insurance company prayed for stay of execution. A deposit of the decretal sum of Ksh. 547,165/- was made to court on 30th July 2010 when interim stay had been granted on 23rd July 2010.

5. An interparte hearing was heard between the parties before Sitati J. In her ruling, the Hon. Judge granted orders of “stay of execution.” Noting that the decretal sum was already deposited to court, she made orders that the said decretal sum be deposited in an interest earning account within 15 days of the ruling being read.

6. The ruling was read on behalf of the Hon. Judge by Mwera J on 13th December 2011. In compliance of the court order the insurance company, through their advocate sent bank forms to be signed by registered post on 23rd December 2010. The respondent declined to sign the forms on grounds that the forms were received on 17th January 2010. It therefore means that the 15 days to comply with the court orders expired on the 31st December 2011. Therefore, they were proceedings to execute unless the payments to them were made.

7. The insurance company returned to this court and prayed that time be enlarged, to which the forms may be signed. That in the alternative, the decretal sum deposited in court, remain deposited in court.

8. The respondent was served with the application of 20th February 201 but failed to attend court. The application proceeded to hearing under Order 12 r Civil Procedure Rules.

II APPLICATION 20TH FEBRUARY 2012

9. The appellant, insurance company seeks to vary this court’s orders issued by Sitati J. The Hon. Judge has been transferred out of Nairobi. The rules under Order 18 r Civil Procedure Rules permits another judge to take over her matters and deal with the same.

10. This rule, applies to this application.

III OPINION

11. Whereas, the respondent did not file a replying affidavit opposing the application, by a letter of 18th January 2012 written to the applicant, it clearly shows that the reasons of wishing to proceed with the execution is that the orders of Sitati J were not complied with. This is the 15 days period given to sign the papers for bank deposit to court.

12. The orders stated that within 15 days, the joint bank account be opened. These orders were issued on 13th December 2011. The appellant, insurance company forwarded the forms by post, ten days later being the 23rd December 2011. According to law, the date in which time begins to run, when a document is posted, is the day it is mailed. In this case, 23rd December 2011 and not when the documents were received on 17th January 2012.

13. The law, further states that time does not run over the Christmas vacation that begins on the 21st December of one year and ends on 13th January of the next year. This therefore means that the appellant insurance company were within time in forwarding the documents to be signed. The 15 days did not lapse on 31st December 2011. The correct position is that it would lapse at the end of January 2012.

14. This court would therefore hold that the application herein be allowed. The court herein orders that the decretal sum be deposited in a joint account within 15 days of today's date, failure to, the said decretal sum remain deposited in court till the finalization of the appeal. There be a stay of execution, in any event till the finalization of the appeal.

15. The costs of this application is awarded to the appellant/applicant to be paid by the respondent.

DATED THIS 29TH DAY OF FEBRUARY, 2012 AT NAIROBI

M.A. ANG'AWA
JUDGE

Advocates :

iii) O Wachira instructed by M/s Ombonya & Co Advocates for appellant/applicant

iv) N Kaburu holding brief for M/s Nelson Kaburu & Co Advocates for respondent/respondent absent