



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL SUIT NO. 3981 OF 1993**

**AGNES WACHEKE NG'ANG'A .....  
PLAINTIFF**

**VERSUS**

**TUWEI CHELUMET .....1<sup>ST</sup>  
DEFENDANT**

**KEBIRIGO GENERAL STORES LTD .....2<sup>ND</sup>  
DEFENDANT**

**RULING**

The applicant's application dated 22<sup>nd</sup> March, 2005 seeks the following orders:

**“1. That the Directors of the Defendant/Judgment Debtor (Kebirigo General Stores Ltd.) namely Samson Nyandigisi, Yabesh Nyandigisi and Bethwel Nyandigisi Maoga of P.O. Box 168 Keroka be orally examined on oath as to what debts are owing to the Defendant/Judgment Debtor, and what properties or means of satisfying the Decree that the Defendant/Judgment Debtor possesses.**

**2. That this Honorable Court be pleased to direct the Defendant/Judgment Debtor's said Directors to produce in Court for the Plaintiff's inspection books of accounts and other books, records and or documents belonging to the Defendant/Judgment Debtor.**

**3. That in default of the Directors of the Defendant/Judgment Debtor Company complying with**

the above orders, an order for committal to Civil jail and sequestration of personal property be made against the said Directors personally, or such further orders as the court may deem fit and just to make.

4. That the court does order the said Directors above named of Kebirigo General Stores Limited, the Defendant/Judgment Debtor herein to personally satisfy the decree given on 25<sup>th</sup> July 2001 and issued on 14<sup>th</sup> November 2003 the outstanding amount now being Kshs.273,009.00.

5. That the cost of this application be borne by the Defendant/Judgment Debtor in any event.”

The application was based on the following grounds:

“1. That the plaintiff has an unsatisfied money decree against the Judgment Debtor dated 25<sup>th</sup> July 2001 the outstanding sum being Kshs.273,009.00 inclusive of interest and costs for which the defendant/judgment debtor has failed and/or refused to settle.

2. Attempts to have the Defendant/Judgment Debtor clear the decretal amount amounting to Kshs.273,009.00 inclusive of interest and costs have been unsuccessful as it has refused and/or failed to do so.

3. The plaintiff has been unable to ascertain or identify any attachable property belonging to the Defendant/Judgment Debtor for execution.

4. The plaintiff is unable by any other means to realize the fruits of a successful litigation and continues to suffer prejudice.”

In her affidavit in support of her application, the plaintiff reiterated the aforesaid grounds. The suit that gave rise to the aforesaid judgment relates to an accident where the plaintiff was travelling in the 2<sup>nd</sup> defendants’ motor vehicle registration number KWX 537. The accident occurred on 16<sup>th</sup> August, 1990. The plaintiff was unable to attach anything from the defendants. The 2<sup>nd</sup> defendant’s motor vehicle had been insured in respect of third party risks under the **Insurance (Motor Vehicles Third Party Risks) Act Cap 405 Laws of Kenya**. the 2<sup>nd</sup> defendant filed a Preliminary Objection dated 16<sup>th</sup> July, 2007 citing **Rule 23 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Human Rights and Freedoms of Individual) High Court Practice and Procedure Rules, 2006**, stating that the plaintiff’s application was in breach of his rights as envisaged under the Constitution of Kenya, specifically **Sections 70, 75 and 77**. The 2<sup>nd</sup> defendant further filed a Chamber Summons dated 9<sup>th</sup> of May 2008 and raised the same arguments as in the Preliminary Objection.

The parties filed their submissions which I have carefully perused. When counsel for the parties were highlighting their submissions on 27<sup>th</sup> of January, 2011 Mr. Mungai for the plaintiff abandoned prayer 3 of his client’s application.

The plaintiff’s contention is that the 1<sup>st</sup> defendant was the driver of the 2<sup>nd</sup> defendant’s motor vehicle and consequently the 2<sup>nd</sup> defendant is vicariously liable. It was further contended that immediately after entry of the judgment in the sum of Kshs.150,000/= plus costs and interest, the 2<sup>nd</sup> defendant proposed to pay the same by monthly instalments of Kshs.20,000/= until payment in full and indeed paid the first

instalment but defaulted thereafter. On 16<sup>th</sup> March, 2004 a notice to show cause was issued and the court directed the warrant of attachments do issue. Thereafter no attachable assets of the defendants were traceable.

Under **Order 22 Rule 35** where a decree is for payment of money, the decree holder may apply to the court for an order that the judgment debtor, and in the case of a corporation, any officer thereof, be orally examined as to whether any or what debts are owing to the judgment debtor, and whether the judgment debtor has any and what property or means of satisfying the decree, and the court may make an order for the attendance and examination of such judgment debtor or officer or other person and for the production of any books or documents.

On the other hand, the 2<sup>nd</sup> defendant's contention is that the plaintiff is not entitled to execute the decree against itself because it had complied with **Section 4** of the Insurance (Motor Vehicles Third Party Risks) Act which provides, *inter alia*, as follows:

**“4(1) Subject to this Act, no person shall use, or cause or permit any other person to use, a motor vehicle on a road unless there is in force in relation to the user of the vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third party risks as complies with the requirements of this Act.”**

The 2<sup>nd</sup> defendant further submitted that having complied with the aforesaid provision of the law there was a legitimate expectation on its part that in the event of occurrence of an accident relating to the risks its motor vehicle was covered for, it would be the responsibility of the insurer to settle any claim arising therefrom. The 2<sup>nd</sup> defendant further cited the provisions of **Section 10(1)** of the Act which states as hereunder:

**“10(1) If, after a policy of insurance has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of Section 5 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.”**

It appears that the legal effect of **Section 10(1)** aforesaid is to protect the insured from the liability accruing from judgments and decrees issued against them and place an obligation on the insurer to settle the claims payable. The 2<sup>nd</sup> defendant also cited the provisions of **Section 145** of the **Insurance Act Cap 487** which requires every insurer to re-insure with the Kenya Reinsurance Corporation Limited such proportion of each policy of insurance issued or renewed in Kenya.

It is on the basis of the foregoing that the 2<sup>nd</sup> defendant argued that it is legally exonerated from satisfying any decree in favour of the plaintiff and that all outstanding claims in respect of the said accident should be borne by the Attorney-General and the Commissioner of Insurance.

While I admit that the 2<sup>nd</sup> defendant's argument appears to be well premised in law, I must point out that

the 2<sup>nd</sup> defendant did not seek to join the Attorney-General and the Commissioner of Insurance as parties in this matter. It was not the intention of Parliament that inspite of compliance with the mandatory provisions of **Section 4** of the Insurance (Motor Vehicles Third Party Risks) Act, a motor vehicle owner be subjected to personal liability to settle third party claims. Although as between the vehicle owner and the insurance company there is a private contract, there is a legal obligation on the part of the insurance company to satisfy any decree that arises in respect of the risk covered unless the insurer had taken legal steps to avoid the risk before judgment is entered as against the insured.

In this case, although the 2<sup>nd</sup> defendant stated that its motor vehicle had a third party risks cover, it did not state the name of the insurance company that had provided the said cover and neither was the policy itself shown to the court. The court cannot, in the circumstances, make any orders as against an undisclosed insurance company or the Commissioner of Insurance and/or the Attorney-General who are not parties to this suit.

The 2<sup>nd</sup> defendant has therefore not demonstrated that the plaintiff's effort to pursue execution of her decree amounts to breach of the 2<sup>nd</sup> defendant's constitutional right. In the affidavit sworn by Samson Nyandigisi, a Director of the 2<sup>nd</sup> defendant, he stated in paragraph 6 thereof that:

**“The 2<sup>nd</sup> defendant does not have money to meet the alleged decretal sum of Kshs.150,000/= together with interest and costs nor does he accept liability for the same in view of the foregoing.”**

The 2<sup>nd</sup> defendant did not advance any other reason as to why its directors cannot be examined and/or produce its books of accounts as prayed by the plaintiff. It is to be noted that the 2<sup>nd</sup> defendant had undertaken to liquidate the decretal sum by monthly installments of Kshs.20,000/= and having made only one installment failed and/or neglected to make any further payments. In the circumstances, I grant prayers 1 and 2 of the plaintiff's application.

As regards prayer 4 thereof, the same cannot be granted unless and until the 2<sup>nd</sup> defendant's corporate veil is lifted. No grounds have been advanced by the plaintiff to warrant such an order of lifting the corporate veil of the 2<sup>nd</sup> defendant.

The 2<sup>nd</sup> defendant shall bear the costs of this application.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23<sup>RD</sup> DAY OF MARCH, 2011.**

**D. MUSINGA**

**JUDGE**

**In the presence of:**

**Nazi – court clerk**

**Mr. Kahiga Mungai for the applicant**

**Mr. Kibe Mungai for the 2<sup>nd</sup> defendant**

**No appearance for the 1<sup>st</sup> defendant**

