



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**OF KISII**

**Civil Appeal 191 of 2008**

**IBENCHO IRERO.....APPELLANT**

**-VERSUS-**

**CO-OPERATIVE INSURANCE CO. LTD.....RESPONDENT**

**JUDGMENT**

The facts of this case are that the appellant, as personal representative of the deceased Florence Kemunto Ibencho, filed a suit at the Chief Magistrate's Court at Kisii against BAT (K) LTD who owned motor vehicle registration number KLZ 896 ZA 4360 which was being driven by one Morris Amonde Amullo on 24/6/88 when it fatally injured the deceased. The suit was for compensation. Judgment was obtained on 9/11/2006 for Kshs. 708,536/=. Costs were eventually assessed at Kshs. 205,534/=. Prior to that final judgment, the parties had recorded an order on liability as follows:-

- 1) The driver 37%
  
- 2) The Insured 63%

The appellant filed a declaratory suit against the insurer (the respondent) seeking that it pays the amount in the decree in the suit above. The respondent filed a defence which was struck out with costs and judgment entered for the appellant on 14/5/2008. The respondent applied to have the order set aside on basis that it had not attended the hearing of the application. The application was dismissed with costs on 5/8/2008. On 25/8/2008 the respondent made application under *Order 44 of the Civil Procedure Rules* to have the orders of 14/5/2008 reviewed on basis that there was an error apparent on the face of the court as the appellant had not demonstrated that he had grant of letters of administration to file the suit on behalf of the estate of the deceased. In response to the application, the appellant filed a notice of preliminary objection. He was contenting that the application by the respondent was incompetent, misconceived and otherwise an abuse of the process of the court. The Record shows that the court allowed the objection and the application to be argued together. This was done. A ruling was then delivered setting aside the judgment. In effect the court allowed the respondent's application and refused to sustain the appellant's objection.

The objection had been argued by M/s. Obaga. Her case was that the application was incompetent as the order sought to be reviewed had not been annexed. The court ruled that the requirement that the order sought to be reviewed under *Order 44* should be annexed to the application was a requirement of form only, and not of substance. It is now settled law that in an application of review, the applicant has to extract and append the order for which the review is sought. Without doing this, the application had no substratum and was subsequently fatally defective. M/s. Obaga referred the subordinate court to the decisions in *Protein and Fruits Processor Ltd .V. Credit Bank Ltd And 2 Others [2004] 2 KLR 409*, *Patriotic Guards .V. The Cooperative Insurance Company of Kenya Ltd H.C.(Milimani) C.C. No 935 of 2002*, and *Fidelity Commercial Bank .V. Michael Ruraya Mwangi and another, H.C. (Milimani) C.C. No 232 of 2002*. Those were decisions of the superior court on the point and which the subordinate court was

bound to follow. The order sought to be reviewed had not been extracted or annexed and that made the application by the respondent fatally defective. The court fell into error when it did not sustain the preliminary objection by the appellant.

The result is that the appeal is allowed with costs. The judgment that had been entered against the respondent on 14/5/2008 is reinstated.

Dated, signed and delivered at Kisii this 20<sup>th</sup> day of January 2010.

**A.O.MUCHELULE**  
**JUDGE**

**20/1/2010**

Before A.O.Muchelule-J

Court clerk-Bibu

Mrs. Obaga for appellant

**COURT:** Judgment in open court.

**A.O.MUCHELULE**  
**JUDGE**  
**20/1/2010**