



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAKURU  
CIVIL APPEAL NO. 121 OF 2007**

*(Being an appeal from the judgment/decree of Hon. Wendy Kagendo Senior Resident Magistrate,  
Nakuru delivered on 15<sup>th</sup> June, 2007 in Nakuru CMCC No. 841 of 2002)*

**GEMINIA INSURANCE COMPANY  
LIMITED.....APPELLANT  
VERSUS  
KENNEDY OTIENO ONYANGO.....  
.....RESPONDENT**

**JUDGMENT**

The Appellant was sued by the Respondent in the lower court for:

- (a) *A declaration that the Appellant (Defendant) is bound to satisfy the decree in Nakuru Resident Magistrate's Court Civil Suit No. 2302 of 1995, or ALTERNATIVELY,*
- (b) *Judgment (be entered) for the Plaintiff as against the Defendant (Appellant) in the sum of Kshs 96,680/= plus,*
- (c) *Costs of the suit,*
- (d) *Interest on (a) and (b) and (c) above.*

In a judgment delivered on 15<sup>th</sup> June 2007, the learned Senior Resident Magistrate found for the Respondent liable in the said sum of Ksh 96,680/= plus interest @12% of Ksh 66,711.50, thus making a total sum of Ksh 163,391.50.

Being aggrieved with the said judgment and decree the Appellant has come to this court on appeal, and in a Memorandum of Appeal dated 13<sup>th</sup> July 2007 and filed on the same date, the Appellant lists five grounds why the judgment/decree of the lower court should be reviewed and/or set aside with costs to the Appellant.

The grounds are -

- (1) *THAT the learned trial magistrate erred in law in finding that the right to subrogate creates a privity of contract between the Appellant (Insurance company) and Respondent (Third party),*
- (2) *THAT the learned trial magistrate erred in law in making a finding that third party claims could be enforced in respect of Workmen's Compensation claims yet that is NOT envisaged in the provisions of Insurance (Motor Vehicles Third Party Risks) Act,*
- (3) *THAT the learned trial magistrate grossly erred in law in making a finding that there existed a contractual and legal relationship between the Appellant and the Respondent,*
- (4) *THAT the learned trial magistrate erred in law in making a finding that the Respondent could enforce a judgment in respect of a workman's compensation claim against the Appellant which was not a contractual obligation unlike a statutory obligation under the provisions of Insurance (Motor Vehicles Third Party Risks) Act in respect of motor vehicles only,*

**(5) THAT the learned trial magistrate erred in law in failing to appreciate the legal nature of Workmen's compensation policy as contradistinguished to a Third party policy in terms of Cap. 405 of the Laws of Kenya.**

The Appeal was argued with passion by both counsel for the Appellant (*Mr. Murimi*) and the Respondent (*Mr. Musembi*), with authorities on both sides why the appeal should be allowed, or why it should be dismissed. A short background to the appeal is therefore useful.

The Respondent was an employee of a company called Lomolo (1962) Limited (*in this judgment referred to as "the Employer"*). He sued the Employer in Nakuru Chief Magistrate's Court Civil Case No. 2302 of 1995, and obtained judgment in the sum of Kshs 74,000/= being general and special damages. Party and Party costs were assessed at Shs 26,680/= thus making a total of Ksh 96,680/=, the subject of the declaratory judgment in Chief Magistrates Curt Civil Case No. 841 of 2002, the judgment and decree of which is the subject of the Appeal herein, and therefore this judgment.

The pertinent issue, (*Mr. Murimi Counsel for the Appellant submitted*) for the court to determine is whether an employee injured in an industrial accident or who suffers injury in an industrial accident can lay claim and sustain a declaratory suit against his employer's insurers? Put differently Mr. Murimi submitted, do the provisions of the **Insurance (Third Party Risks) Act** (*Cap 405, Laws of Kenya*), (*which relates to Insurance of motor vehicles against Third Party Risks (Accidents) on roads apply and extend to industrial injury accidents and claims?*)

Mr. Murimi submitted that the lower court failed to address itself to that very pertinent issue. Counsel also submitted that he trial court failed to address itself to another equally pertinent issue whether the Respondent had any cause of action against the Appellant and if so, what was the cause of action, an action founded on tort or contract or any known statutory obligation against the appellants?

In Mr. Murimi's submission, the Respondent had no cause of action against the appellant and the whole judgment was erroneous. Counsel relied upon several cases, namely **JACOB MARIANUS KIRIANA VS. KENINDIA ASSURANCE CO. LTD** (*Nairobi HCCC No. 2154 of 2001*), (*on a cause of action, and principles of subrogation*). **GEMINIA INSURANCE CO. LTD vs. KENNEDY OTIENO ONYANGO** (*NAKURU HCCA NO. 193 OF 2002*), **GERALD WACHIRA T/a WACHIRA SAWMILLS VS. BLUE SHIELD INSURANCE CO. LTD** (*Nakuru HCCC No. 31 of 1995*), **LABAN MACHARIA vs. THE COMMISSIONER OF INSURANCE & ANOTHER** (*Nairobi HC MISC. APPL. NO. 33 OF 2004*) and **CORPORATE INSURANCE CO. LTD vs. ELIAS OKINYI OFIRE** (*Civil Appeal No. 12 of 1998*) Counsel also relied upon the provisions of the Insurance (Motor Vehicle Third Party Risks) Act, (*Cap. 405 Laws of Kenya*).

In opposition to the appeal, Mr. Musembi submitted that the appeal lacks merit, it is not brought in good faith, and should be dismissed with costs. Counsel asked this court as the first appellate court to appreciate and evaluate the evidence before the lower court, as if the appeal were a re-trial. For this proposition counsel relied upon the cases of **SELLE VS. ASSOCIATED MOTOR BOAT COMPANY AND OTHERS, [1968] E.A. 123, NAKURU INDUSTRIES VS. ANTONIO MUNGE MUGWE** (*Nakuru HCCA No. 149 of 2005*), and **HARDWOOD ENGINEERING WORKS LTD VS. PATRICK GATHIE MORAGOR** (*NAKURU HCCA NO. 182 OF 2004*).

Counsel submitted that from the trial of the suit on liability that is to say, Nakuru C.M.C. Civil Case No. 2302 of 1995, no witnesses were called, and judgment was entered by consent, both on liability and quantum and that M/s Sheth & Wathigo Advocates for the Appellant were expressly instructed to enter into a consent judgment, and that therefore the provisions, of the Motor Insurance (Third Party Risks) Act have no application.

Counsel submitted that the moment the Appellant instructed Seth & Wathigo & Co. Advocates, to pay the Respondents a certain sum, a contractual nexus was created between the Appellants and the Respondent. The Appellant cannot consequently be heard to say that the Respondent has no cause of action, or that no cause of action arose.

Counsel argued that the Motor Vehicle Insurance (Third Party Risks) Act does not apply on the ground that the matter did not go trial, and that what the Respondent was trying to enforce in Nakuru C.M.C. Civil Case No. 841 of 2002 was not a claim under that Act, but rather a contract, a binding contract between him and the Appellant. It was therefore dishonest and an act of bad faith Counsel submitted, for the Appellant to now turn round and attempt to hide behind the provisions of the Act aforesaid.

Mr. Musembi further submitted that the Appellant was estopped from making any claim that would release them from their liability. They are estopped by record. Counsel relied upon passages set out paragraph 2137 of **PHIPSON ON EVIDENCE (12<sup>th</sup> Edn. (Sweet & Maxwell)** at pp. 912-14.

Lastly, Mr. Musembi argued, the consent orders entered into between the Appellant and the Respondent have not been denied, set aside, or otherwise challenged. Counsel relied upon the decisions of the Court in **SHAH vs. DHARAMSHI [1981] K.L.R. 560** and **JOB KIPNANDI CHEBON vs. MAKANA TRANSPORTERS LTD & 4 OTHERS (Nakuru HCCC No. 254 of 2000)**.

The sum total of the Respondent's Counsel submission is that the appeal herein lacks merit, that the Respondent continues to suffer since 1995. He is entitled to the fruits of judgment that the court should allow him to have faith in the *judicial system* by dismissing the appeal.

### **ANALYSIS OF SUBMISSIONS**

I have deliberately set out *in extenso*, submissions by counsel for the Appellant, and the Respondent respectively. The issue raised by the appeal is basically one, whether the Respondent had any cause of action against the Appellant. The answer to that question will determine whether or not the appeal herein has any merit at all and should, or should not succeed.

Before that basic issue is answered, I wish to address briefly the submissions by counsel for the Respondent and in particular that the last submission that the appeal should be allowed so that the Appellant can have faith in the "*justice system*".

I am saddened by this submission by learned counsel for the Respondent? What is the "*justice system*" in relation to an appeal or a claim in a suit? Counsel for the appellant might wish to ponder on that question. I would only say that cases, both at first instance, and on appeal, are decided upon on the basis of evidence and the application of relevant law to that evidence. No case, or claim however meritorious, or undeserving it may be, is decided on the basis of *faith in the justice system*, if that phrase refers to judicial decisions and not anything comprised in that phrase.

**Secondly**, I have examined carefully, the record of proceedings in Nakuru S.R.MC. Civil Case No. 2302 of 1995, the progenitor of Nakuru C. M. C. Civil Case No. 841 of 2002. The parties in SRM's Civil Case No. 2302 of 1995 were the Respondent vs. Lomoto Sisal Estates Ltd. The record of 2/10/2001 - before S. Muketi SRM is thus -  
***"Court - By consent judgment for the Plaintiff against the Defendant. The Defendant to shoulder 80% liability. The Plaintiff to bear 20% contribution. Mention on 16/10/2001 with a view to record a consent on quantum."***

On 16/10/2001 the record shows Mr. Musembi for Plaintiff, and Mr. Olora for Defendant and further -

***"By consent judgment for the plaintiff on general damages Kshs 90,000/= less 20% (Kshs 1,800/=) i.e. 72,000/= party and party costs - Shs 23,680/= there be a stay of execution for 30 days. S. Muketi, SRM."***

I have examined the record of correspondence between counsel for the Respondent and the firm of Sheth and Wathigo, counsel then for the Defendant Lomolo Sisal Estates Ltd, and I found no reference at all to the Appellant herein. I am consequently perplexed by the Respondent's counsel's submissions that Nakuru CMC Civil Case No. 841 of 2002, a declaratory suit was upon a consent between the Appellant and the Respondent! I was unable to find such consent. If there was any such representation by the firm of Seth & Wathigo Advocates, that the Appellant would be responsible for the payment of the consent sum, it certainly was not reduced into writing between (1) Lomolo Sisal Estates Ltd (*the primary debtor or obligor*), (2) the Appellant (*Gemina Insurance Company Ltd*), the guarantor/surety and (d) the Kennedy Otieno Onyango (*the Respondent*) that the surety or guarantor would assume the payment of the decree on behalf of the primary obligor, the Appellant herein.

**Thirdly** even if there was such an agreement (*novation agreement*) (*and there is no evidence on record of any such agreement*) it would not, with respect to counsel for the Respondent have given, or give rise to a declaratory suit. It would have given rise right to an action on contract of surety or guarantee. That would be a fresh or separate suit, but not a declaratory suit.

In our law, only one statute, the Motor Insurance (Third Party Risks) Act, permits the institution of declaratory suit to enforce awards by courts against insureds, (*S. 10(1) of the Act*) or to avoid such liability (*section 10(2) of the said Act*).

In our law also, a declaratory suit will lie by an owner against a trespasser or occupier of land to

which he has no colour of right, or by a beneficiary against a trustee holding title for his benefit, or by a junior brother that the elder brother held title in trust for him and perhaps others. A declaratory judgment will not lie in contract unless it is for enforcement of it in a proper suit, seeking orders where such contract is valid and therefore binding and enforceable.

It is of course correct in our law that a consent judgment or order is in the nature of a contract. Like all such contracts it is only enforceable against the party to the contract. It cannot be imputed against a third party unless there is a novation agreement as already explained above.

So when learned counsel for the Respondent referred to a couple cases regarding the nature of a consent judgment, and to estoppels by record, those decisions, and opinions are of course correct in the context in which they were decided but have absolutely no application to the facts in this case.

**Lastly**, to return to the basic question whether the Respondent had a cause of action against the Appellant in CMC Civil Case No. 841 of 2002, I think as it must be now be clear from the above analysis, for the enforcement of a contractual obligation, there must in the first instance be a valid, and therefore, binding and enforceable contract in law. Barring trust situations, for a declaratory suit, there must be a contract of insurance between either Appellant and the Respondent, or between the Appellant and an Insured Party whose rights are subrogated to the insurer, for risks insured, and declared to be payable by the insurer. That is the case in motor vehicle (*third party risks*) law. It is not the law in respect of industrial injuries.

Section 5 of the Workmen's Compensation Act (*Cap. 236, Laws of Kenya*), obligates the employer or factory owner, to pay compensation to its employee for injuries arising from industrial accidents. Unfortunately, that law does not confer any declaratory rights upon an employee against the employer's insurer. So in this case, even if the Appellant was the insurer of Lomolo Sisal Estate Ltd (*the primary debtor - as explained above*), only the primary debtor, the insured under the Workmen's Compensation had a cause of action against the Appellant.

To the primary question herein whether or not the Respondent had any cause of action against the Appellant in terms of the declaratory suit, the answer must be that the Respondent had no such cause of action against the Appellant.

I would with respect concur with the views expressed by Waki J (*as he then was*) in **JACOB MARIANCES KIRIANA VS. KENINDIA ASSURANCE COMPANY LIMITED** (*Nairobi HCCC No. 2154 of 2001*), where the learned Judge said -

***"I think it is plain beyond peradventure that there was no privity of contract between the Plaintiff and the Insurer. The cause of action here is based upon a legal doctrine which clearly does not avail the Plaintiff. Subrogation is available to the insurer upon indemnifying the insured. There is statutory provision in Section 10(1) of the Insurance (Motor Vehicle - Third Party Risks .. to force a settlement of a decree obtained against an insured in risks covered under that Act. The risk covered is not disclosed in this suit but it is not stated as one that arises under Cap. 405, the insurer provided legal services to the insured in court proceedings, is no licence to saddle the insurer with liability that does not lie either in contract or tort."***

I agree with Mr. Murimi, and adopt those words *mutatis mutandis* in this appeal, and state that Nakuru CM Civil Case No. 841 of 2002 was entirely misconceived and did not disclose any reasonable cause of action against the Appellant. The learned magistrate erred in law, arrived at an entirely erroneous conclusion. Finally and by way of unsolicited advice, the Respondent's remedy was execution against the primary debtor, Lomo Sisal Estate Ltd, and not a declaratory suit against the Appellant.

Whether or not the Respondent or his counsel has faith in the justice system by the decision herein, the appeal herein is merited in law and is allowed with costs both for the appeal and lower court. There shall be orders accordingly.

**Dated, signed and delivered at Nakuru this 12<sup>th</sup> day of November 2010**

**M. J. ANYARA EMUKULE  
JUDGE**