



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Suit 442 of 2008

JOHN ISAAC OBIYEPLAINTIFF/APPLICANT

VERSUS

STANDARD ASSURANCE (K) LIMITED....DEFENDANT/RESPONDENT

RULING

1. The application before court is the Chamber Summons dated 29/10/08 by which the Applicant seeks two main orders:- (a) that this court's file in respect of HCCC No. 187 of 2006, Nairobi, namely Rose Atieno Kitoyi –vs- John Isaac Obiye & Another be sent for, as the record therein is material to this suit and (b) that the Honourable Court be pleased to enter judgment on admission in respect of Prayer (iii) of the Amended Plaint and order settlement of the decretal amount in NRB HCCC No. 187 of 2006 forthwith or execution be directed against it instead of the Plaintiff. The Applicant also prays for such other orders as may meet the ends of justice.

2. The application is premised on 5 grounds appearing on the face thereof, namely:-

(a) *The defendant/respondent herein had the conduct and control of NBI HCCC No. 187 of 2006, under obligations imposed both by the Insurance regulations CAP. 405 Laws of Kenya, and the contract of insurance.*

(b) *The defendant sanctioned a consent judgment for a huge sum of money and also committed itself to pay by instalments but failed to honour the same.*

(c) *The defendant has admitted in writing in a letter dated 7/10/08 that it is processing payment in the above terms.*

(d) *The defendant was also consulted on the issue of postponement of payment in terms of the court order recorded in case 187 of 2006 on 8.10.08 and the Legal Manager advised the plaintiff's Lawyer herein that it was okay, that was over the cellphone at 10.02 a.m.*

(e) *That the liability falls squarely on the defendant and the conduct and correspondence exhibited in this application leaves no doubt as to the said liability being undisputed.*

3. There is also a sworn affidavit made by John Isaac Obiye on 29/10/2005 in support of the application. In the affidavit, the deponent avers that ?

(a) *he is the owner of motor vehicle Registration No. KAL 288H which was involved in an accident on 9/04/2003 thereby giving rise to Nairobi HCCC No. 187 of 2006*

(b) *he had taken out a policy of insurance with the Defendant against the risk of injury to Third parties*

under Policy No. 010/081/00 1748/2001 a policy that was still valid as at the time of the accident

(c) he believed that the Defendant herein would pay compensation for damage suffered in an accident involving the insured motor vehicle upon the insured giving prompt notice of the accident; policy excess (if so required), passing on any third party correspondence to the insurer and be ready and willing to allow the insurer to take over the conduct of the case

(d) he complied with all the requirements of the Defendant with respect to the accident that gave rise to HCCC No. 187 of 2003

(e) the Defendants herein admitted liability and went further to agree on terms of payment which were to be effected by 15/10/2008

(f) the Defendant paid the auctioneers charges amounting to Kshs.80,000/= and also made a first instalment on the decretal amount in the sum of Kshs.150,000/= and also made proposals on how to settle the balance of the decretal sum

(g) to date, the balance is yet to be paid despite many meetings held between the parties and the Defendant's promises to pay

(h) if the Defendant is not made to pay the decretal sum, the Applicant's properties will be sold in execution of the same.

4. Attached to Mr. Obiye's affidavit are a number of annexures confirming that the accident was reported to the Defendant. That the Defendant gave instructions to M/s Christine Oraro & Co. Advocates to act on behalf of the Defendant in this matter; and that on 16/10/2008, the Defendant made payment for Kshs.150,000/= in favour of M/s Makhandia & Makhandia Advocates on behalf of the Applicant herein. The Defendant's letter dated 7/10/2008, written on a without prejudice basis, must be the one that gave rise to the instalment payment made on 16/10/2008.

5. There is no reply to the Applicant's application; but there is on record an application dated 27/10/2008 seeking to refer this whole matter to arbitration on the basis that the cause of action herein is founded on an allegation of breach of the terms of an insurance policy which provides that all disputes arising therefrom between the parties be referred to the decision of an arbitrator. The further ground is that there is indeed a dispute between the parties that warrants referral of this suit to an arbitrator for hearing and determination. On 18/11/2008, this honourable court declined to stay this suit pending referral to an arbitration process.

6. There is also on record an affidavit dated 13/11/2008 sworn by John Isaac Obiye in reply to the Respondents application dated 27/10/2008. To that affidavit is annexed a copy of the consent judgment entered into between the parties in HCCC No. 187 of 2006 in which judgment was entered for the Plaintiff as against the Defendant on the 18/07/2008 in the sum of Kshs.859,071/= all inclusive. The judgment sum was to be liquidated in three (3) equal instalments to be paid within Forty Five (45) days of the filing of the consent and the subsequent instalments to be paid on the 1st day of each succeeding month after the 1st instalment is paid. The consent provided for a stay of Forty Five (45) days from the date of filing of the consent which was 18/07/2008. It was after the above consent was filed and an amount of Kshs.150,000/= paid on 16/10/2008 in part payment of the decretal sum that the Respondent herein filed its application dated 27/10/2008.

7. In the amended plaint filed in court on 6/10/2008, the Plaintiff/Applicant prays for the following reliefs:-

i. Damages for breach of contract

ii. Loss of Business as pleaded in paragraph 12

iii. A declaration that the Defendant is fully liable to meet the decretal sums, costs, interest and auctioneer charges in HCCC No. 187 of 2006

iv. Costs and interest of the suit

v. Any further relief that this Honourable Court may deem fit to grant.

8. The evidence on record is that the auctioneers charges have already been paid by the Defendant/Respondent, plus one instalment payment of Kshs.150,000/=, Order XII Rule 6 of the Civil Procedure Rules under which this application is made provides as follows:-

“6. Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the court for such judgment or order, as upon such admissions; he may be entitled to, without waiting for the determination of any other questions between the parties; and the court may upon such application make such order, or give such judgment, as the court may think just.”

9. I have now considered the pleadings and the application including the affidavits on record and the submissions made by counsel for the Applicant/Plaintiff. The issue that is for determination is whether on the facts placed before me, the Plaintiff/Applicant is entitled to a judgment on admission. For me to enter a judgment on admission, the Applicant must demonstrate to the court in no uncertain terms that there is an unqualified admission of the Plaintiff’s claim. The court may be able to get such an admission from the pleadings and in correspondence before action or in the affidavits filed. What is the position in this case? It is clear from the record that on 18/07/2008, the parties, herein entered into a consent judgment in HCCC 187 of 2006. In the affidavit supporting the Respondent’s application dated 27/10/2008, there is no denial that the said consent judgment was entered into; there is also no denial that the Defendant consented to liquidate the decretal sum in the terms of the consent order whose details I have already set out above. In the circumstances of this case, I am satisfied that the Respondent admitted his indebtedness and even went ahead to pay auctioneers charges amounting to Kshs.80,000/= and to make a first instalment in the sum of Kshs.150,000/=. I see no reason why the Respondent should not be held liable for the decretal sum in HCCC No. 187 of 2006.

10. Accordingly I order that the Defendant is fully liable to meet the decretal sums, costs and interest and auctioneers charges in Nairobi HCCC No. 187 of 2006 – Rose Atieno Kitoyi –vs- John Isaac Obiye & Another.

11. As regards the other reliefs sought, the Plaintiff/Applicant must adduce evidence in support of his claims. Accordingly, the parties will take dates at the registry for the hearing of the remaining issues in this matter. The Applicant shall have the costs of this application. The costs of the suit shall await the outcome of the rest of the suit.

It is so ordered.

Dated and delivered at Nairobi this 24th day of July 2009.

R.N. SITATI

JUDGE

Delivered in the presence:-

..... For the Plaintiff/Applicant

..... For the Defendant/Respondent

..... court clerk