



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

Civil Case 1453 of 2005

1. Civil Practice and Procedure
2. Suit finalized
3. Original subject
 - a) Running Down Cause – Test suit
 - b) Motor vehicle self accident
 - c) Several passengers in one vehicle
 - d) Female adult aged 35 years old in 2004
 - e) Injuries fatal
 - f) Liability 100% against defendant
 - g) Quantum for loss of dependancy and loss of expectation of life Ksh.5.870,000/-.
4. Defendant insured with M/s Insurance Company of East Africa
 - a) Company unit of decretal sum that could be paid is Ksh. 2 million
 - b) Notice of motion application filed on 8.12.01 seeking courts orders to deposit Ksh.2 million into the court/subrogation.

5. In reply: the application not sustainable

The insurance company is not party to the main suit non disclosure of facts.

6. Held:

- i) The cause of action being insurance company begins to run when the main suit is finalized.
- ii) Declaratory suit should have been filed in the applicants insurance company name.
- iii) Non disclosure of material fact

iv) Application struck out Preliminary Objection allowed

7. Advocates:

E.K. Mutua for Mutua & Co. Advocates for the plaintiff/applicant

A.Ambani for Njeri Kariuki & Co. Advocates for the defendant/applicant

THOMAS MUOKA MUTHOKA & ANOTHER.....PLAINTIFF

VERSUS

ERNEST JACOB KISAKA.....DEFENDANT

RULING

I: BACKGROUND

1: I had heard and determined a Running Down cause on the 21 June 2006. The suit in question was sued as a TEST SUIT hereby a motor vehicle was involved in a self accident. I held that the defendant were 100% liable for this accident. I am made to understand that there is also another suit Hccc1454/05 convening the same accident and duly finalized by myself.

2. In this present suit I awarded estate of the deceased, after formal proof, a sum of Ksh,5,810,000/-.

3. The insurance company, ie Insurance company of East African through their advocates attempted to pay to the said advocate for the plaintiff a sum of Ksh.2 million. The advocate rejected this sum and filed a declaratory suit (off the record). The insurance company filed a notice of motion in the main suit seeking orders to deposit Ksh. 2 million to court

II: PROCEDURE

4. I did request the advocates to address me on whether the insurance company should file an application in this main suit that has been finalized?

5. The advocate for the respondent/plaintiff stated that the insurance company is not party to this suit and this has no locus to file application. The plaintiffs have since filed a declaratory suit in which an application pending the striking out of the defence has been made before the Milimani Commercial Courts. It is unclear why a declaratory suit should be filed with the High Court a Milimani Court instead of the central registry.

6. The applicant conceded they are not party to the suit. They nonetheless state through their advocate that they can come into this file through their subrogation rights.

III FINDING ON PROCEDURE

7. The Hon. Chief Justice Apaloo (as he then was) through his practice notice has clarified the position of insurance company. A notice is issued to the insurance company prior to the suit being filed to notify them of the dispute involving the insured. The insurance company is not made a party to the claim in the suit. It is normal practice for the insurance company to engage advocates to represent then insured. A subrogation claim within a trial would arise in cases of material loss claim whereby the insurance company seeks to have a refund from a defendant for damages caused to their insured/plaintiff's material loss. A claim of subrogation does not mention the insurance company as a party. The party is the plaintiff who must come to give evidence to court, supported by a witness from the insurance company to prove payments that had been duly paid to the said plaintiff.

8. This present suit never involved a subrogation claim. The application to deposit Ksh. 2 million to court as part payment or otherwise is not a subrogation claim. The advocate for the insurance company has relied on order 21 r 1 Civil Procedure Rules that dealing with the method of payment of the decretal amount.

9. The advocate for the insurance was required to file a declaratory suit and not a notice of motion application. This is because the cause of action for the insurance company begins to run at the time judgment is entered. The issue, in a separate file, is then determined as whether payments are to be made by the insurance company.

10. If per chance the plaintiff alleges they have filed a declaratory suit, then this matter should be dealt in that said suit.

11. I hereby struck out the notice of motion dated 6 December 2006 as being incorrectly before this court.

Dated this 31st day of January 2007 at Nairobi.

M.A. ANG'AWA

JUDGE

E.K. Mutua for Mutua & Co. Advocates for the plaintiff

A. Ambani for Njeri Kariuki & Co. Advocates for the defendant