



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**  
**CIVIL CASE NO.59 OF 2003**

**JUDITH KEMUMA OMBUNA )**

**(minor) suing through her father and next friend )**

**ZACHARY OMBUNA MARORO ) ..... PLAINTIFF**

**VERSUS**

**MADISON INSURANCE CO. LTD ..... DEFENDANT.**

**RULING**

Applicant sought order restraining the respondent from executing for shs.537,976/= or any other sum.

The plaintiff filed this declaratory suit against the applicant asking that he satisfy the decretal sum in Kisii HCCC.NO.131 of 1998. The decretal sum then was shown as shs.665,000/=. By a consent judgment was entered in favour of the plaintiff as prayed. The defendant thereafter paid the decretal sums, interest and costs. In the substantive suit liability had been apportioned at 70%-30% in favour of the Plaintiff. Apparently after the applicant had paid the decretal sum the respondent made an application in the substantive suit and liability was enhance from 70% to 100% against the respondent. On 24/2/04 counsel for respondent wrote to the applicant and threatened to execute for the reviewed sum of shs.537, 976/=. Applicant filed this application.

Application was opposed. Court was told the application is premature as there is no decree drawn from the reviewed amount and the letter sent to the applicant was only for information.

First the letter sent was not for information as submitted.

The letter – annexure ‘H’ dated 4/2/04 demands the applicant forward a cheque of shs.537,976/= being the balance of the decretal amount. It further warns them that if the cheque is not received within 14 days execution warrants would issue. That was not information but clear threats to execute. The applicant was perfectly in order to come to counter the threats. As submitted he should not have sat back and wait for the worst to happen.

It is not disputed that the sum of shs.537,976/- is an amount which arose after liability revised. This amount therefore does not form part of the consent judgment entered. By the time the suit was filed the decretal sum was clearly shown as shs.665,000/=. This is what formed the court judgment entered. So far there is no judgment of the new amount of shs.537,976/= and as such the respondent can execute for the same. As submitted by counsel for the applicant the respondent can only file a fresh suit for the amount or apply for a review of the court judgment entered to include the new amount. When the declaratory suit

was filed the decretal sum was clearly known and that is the sum the consent judgment was entered for.

In the circumstances I allow the application as prayed and direct the respondent restrained from executing for the new amount of shs.537,976/- unless he first obtains judgment for the same against the applicant. Costs of this application will be in the cause.

**KABURU BAUNI**

**JUDGE.**

**25/3/04**

Ms. Obaga for Plaintiff/Respondent

Mr. Ngeno for Applicant.

Ms. Obaga:

I apply for leave to appeal against the ruling.

**KABURU BAUNI**

**JUDGE.**

**Court:-** Leave to appeal granted.

**KABURU BAUNI**

**JUDGE**