



REPUBLIC OF KENYA



KENYA LAW
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Obadha v Invesco Assurance Co. Ltd; Omoro & 2 others (Interested Parties) (Miscellaneous Civil Case 2 of 2023) [2023] KEHC 22765 (KLR) (21 September 2023) (Ruling)

Neutral citation: [2023] KEHC 22765 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
MISCELLANEOUS CIVIL CASE 2 OF 2023
DO OGEMBO, J
SEPTEMBER 21, 2023**

BETWEEN

MICHAEL OBADHA APPLICANT

AND

INVESCO ASSURANCE CO. LTD RESPONDENT

AND

LILIAN ATIENO OMORO INTERESTED PARTY

RUTH MASAWA INTERESTED PARTY

VITALIS KIPNGETICH RONO INTERESTED PARTY

RULING

1. The interested parties herein Lilian Atieno omoro, Ruth Masawa and Vitalis Kipngetich Rono have moved this court vide a Notice of motion application dated 9-2-2023. The same seeks the following orders.
 - i. That this court be pleased to review its judgment dated 9-2-2022 and the consequential orders including the decree dated 9-2-2022 arising from the judgment of the court.
 - ii. That this honorable court be pleased to find that the plaintiff has a legal duty towards the interested parties to enforce his decree in this matter against the Defender.
 - iii. That this honorable court be pleased to order the plaintiff to enforce his decree dated 9-2-2022 against the Defendant for the settlement of the interested parties claims against the Defendant being PMCC 55, 56 and 127/18 (Ukwala).



2. In the Affidavit in support of his application, the 1st interested party has deponed that judgements were delivered in their favor against the plaintiff, who was the defendant in the trial cases and that this suit is just but another method to ensure that the decree is not settled.
3. In the replying Affidavit of the plaintiff, the plaintiff denies that this suit is investigated to avoid settling the decretal sum and that the applicants ought to proceed with execution against the insurance company and not to compel him to help execute the decree.
4. This application was conversed by way of written submissions; both the interested parties and the plaintiff filed their set of submissions. From the side of the interested parties, it was submitted that the plaintiff has a legal duty towards the interested parties in settling the decree. That on 9-2-2022 the court rendered judgement that the plaintiff is not liable to settle all claims against him including Ukwala PMCC Number 55, 56 and 127/2018. That there is new and important evidence that was not within the knowledge of the court the time of the judgement. The interested parties based their arguments on section 80 of the [Civil Procedure Act](#), and Order 45 Rule 1 of the [Civil Procedure Rules](#).
6. That it was not available to the court when it rendered its judgement that the Defendant (Invesco Assurance) is under liquidation. That the orders aggrieved of bars the interested parties from executing against the plaintiff who has himself failed to pursue the Defendant (Insurer) to settle the decree. The applicants have submitted that there has been no delay in bringing this application. And that because there is no order, Judgement or decree that the applicant holds against Invesco Insurance, the applicants cannot execute the insurers, which is now under liquidation.
7. The court was urged to review and set aside the judgement dated 9-2-2022 and order that the Respondent to personally settle the applicant's decrees arising from Ukwala PMCC Number 55, 56 and 27 of 2018.
8. The plaintiff, respondent has on the other hand, submitted that this application falls short of the basic threshold or review. That the purported new evidence is a judgement of the High Court of an unrelated matter on 4-5-2022, after this court had rendered itself in this matter on 9-2-2022.
9. Counsel relied on [Anwar Ali & Another v Monica Muthoni & Ano](#) [2021] eKLR in which the court (Chepkwonyi) held;

“further Order 45(1) of the [Civil Procedure Rules](#), 2010 provide the conditions under which a court can allow an application for review. The court of Appeal in the case of [Pancras T. Swai v KBL Ltd](#) [2014] eKLR, reiterated the conditions set by order 45 and held that for an application to succeed in application for review, he must establish to the satisfaction of the court any one of the following 3 main grounds;

 - i. That there is discovery of new and important evidence which was not available to the applicant when the judgement order was passed despite having exercised due diligence; or
 - ii. That there was a mistake or error apparent on the face of the record; or
 - iii. That sufficient reason exists to warrant the review sought.
 - iv. In addition to proving the existence of the above grounds, the applicant must also demonstrate that the application was filed without unreasonable delay.
10. It was submitted, based on [Turbo Highway Eldoret Ltd v Synergy Industrial Credit Ltd](#) eKLR (cited in [Rose Kaiza v Angelo Unpanjuiza](#) [2009] eKLR that the ground of discovery of new evidence does



- not have merit, since the discovery ought to be of new or important which after due diligence was not within the knowledge of the party or could not have been produced when the decree was being made.
11. The Respondent also challenged the exhibits produced by the applicant on the basis that they were filed late and that submissions cannot take the place of evidence (*Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Ano.* [2014] eKLR. And that in any case on 2-3-2023 the Hon. Justice Mabeya, sitting at Milimani revoked the notice and re-instated Invesco Assurance back to business. Court was urged to dismiss this application.
 12. I have considered the submissions of the parties herein. As I understand it, the interested parties herein obtained judgement against the plaintiff herein in Ukwala PM'S court case numbers 55, 56 and 27/2018. Relevant decrees was issued regarding the same. The plaintiff thereafter filed this suit against his insurers (Invesco Assurance), the Defendant herein, seeking several declaratory orders that it is the Defendant who is liable to settle the judgement and decrees issue in favor of the interested parties against the plaintiff herein before the trial court. This court, by the ruling dated 9-2-2022 allowed the case of the plaintiff and issued the various declaratory orders prayed for against the Defendant.
 13. I have considered the said ruling of the court (The Hon. Justice R.E. Aburili) dated 9-2-2022. The orders issued herein in favor of the plaintiff and against the Defendant herein and relevant to this application, seem to me, to be orders 3 and 4 that is
 - 3) A declaration is hereby made that any liability against the plaintiff in respect of any loss and damage or injury caused, sustained or incurred following the accident of 8-6-2018 along Busia Road involving the motor vehicle Reg. No KBU 211X and respecting policy No. 65/0804/1/006533/2014/07-Tpo shall be settled by the defendant herein, Invesco Insurance Company Limited.
 - 4) A declaration that the Defendant is liable to settle all the claims past, present and future against the plaintiff arising from the accident that occurred on the 8-6-2018 involving motor vehicle registration number KBV 211X
 14. In the said finding of the court, the court ordered the Defendant to re-imburse the plaintiff the sum of Kshs.997, 318/= already paid by the plaintiff to various claimants.
 15. It is clear that the declaratory suit of the plaintiff against the Defendant (The Insurer) was brought pursuant to section 10 (4) of the *Insurance (Motor Vehicle Third Party Risks) Act*. It was (is) a case seeking enforcement of the right of the insured against the insurer.
 16. I have considered the whole ruling sought be reviewed by way of this application. First, the interested parties (applicants to this application) were not parties to the dispute between the plaintiff and his insurers. The ruling did not make any finding as to the relationship between the interested parties and the plaintiff regarding the judgements entered in favor of the plaintiffs in the trial court. The said judgement against the plaintiff still stand and there is no appeal filed before this court to challenge the same.
 17. A scrutiny of the ruling indeed confirms the legal position that those judgements obtained against the plaintiff would be settled by the insurer. Nowhere in the said ruling and orders of the court did the court declare that in that event, the interested parties cannot execute their judgement against the plaintiff. In fact, the court did not find the execution and recovery already made against the plaintiff to be unlawful or irregular, the court only ordered the Defendant (Insurer) to reimburse the plaintiff the sum of Kshs.997,318/= already paid out by the plaintiff in settling the decretal sums and appurtenant costs in time with insurance contractual obligations of the Defendant.



18. The submissions of the parties herein largely dealt with whether the interested parties have met the threshold for an order of reviews of the orders of the court of 9-2-2022. With respect, and in review of the findings made herein above, I will refrain from considering the said submissions. This is because there is no finding to be revised or reviewed in the orders of the court of 9-2-2022, which were duly a restatement of the obligations of the insurer (Defendant) towards the insured (Plaintiff) as regard settlement of decrees and judgements obtained against the plaintiff as a result of the risks covered by the insure under the valid third party insurance policy cover.
19. I accordingly therefore find no merit in the application of the interested parties dated 9-2-2022. Same is dismissed with costs.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 21ST DAY OF SEPTEMBER, 2023

D.O. OGEMBO

JUDGE

21.9.2023

Court: (Online) in the presence of Mr. Esilaba for 1st Respondent, Mr. Nyengeye for Interested parties.

D.O. OGEMBO

JUDGE

21.9.2023

Court: Certified copies to be supplied to parties upon payment of requisite charges.

D.O. OGEMBO

JUDGE

21. 9.2023

