



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT SIAYA**

**CIVIL APPEAL NO. 25 OF 2015**

**ROSELINE VIOLET AKINYI.....APPELLANT**

**VERSUS**

**CELESTINE OPIYO WAGWAU.....RESPONDENT**

*(Being an appeal from the Judgment of Siaya High Court Appeal Case No. 25 of 2015*

*dated 5.4.2017 before Hon. J.A. Makau – Judge)*

**RULING**

1. Vide a judgment dated 5.4.2017, Hon. Makau–Judge, Ordered that the quantum of general damages be set aside and be substituted with general damages of KShs.500,000/= less 25% contributory negligence equaling KShs.375,000 and the appellant to get costs of appeal but the Respondent to get costs of the lower Court with interest.
2. By an application dated 22.6.2018 the applicant herein seeks Orders that the Plaintiff’s costs be assessed by the Court, that the Respondent be directed to pay to the plaintiff the judgment sum of KShs.500,000/= plus costs and interest less 25% totaling KShs.375,000/= and costs of the application.
3. The Notice of Motion is brought under the provisions of **Section 1(2) 2, 1A, (1) 2, (3) 1B a, b, c, d, e, 27(1), (2), 3, 3A, 30, 3 (1) (2) 36, 89, 92, 94 of the Civil Procedure Act and Sections 4(1), (5) 10 (1) of the Insurance (motor vehicle Third Party Risks) Act Cap 405 Laws of Kenya, and Section 102 of the Evidence Act, and Articles (10) 159 (1), (2), 232 of the Constitution.**
4. The grounds upon which the application is premised are among others, the judgment by Hon. J.A. Makau – J. which is dated 5.4.2017 apportioning liability and general damages. It is further claimed that the suit arose out of a Road Traffic Accident involving suit Motor Vehicle Registration No. KBJ 159T Insured by the Respondent’s Insurance Company under **Cap 405 Laws of Kenya** and that under **Section 10 (2) (a) of Cap 405, the Respondent African Merchant Assurance Company Limited (AMACO)** was bound to settle the sum.
5. Further that **Statutory Notice under Section 10 (2) (a)** was served upon the Respondent but that it has neglected or failed to settle decree sum herein yet the Respondent instructed the firm of Peter Karanja to act for the Defendant/Insured **Celestine Opiyo Wagwau** in the proceedings and claim against her.
6. The motion is supported by the Supporting Affidavit sworn by Joseph N. Musomba Advocate on 22.6.3018 restating the grounds in support of the application.
7. The application was served upon the Respondent as per the Affidavits of Service filed in Court. The Respondent filed Grounds of Opposition dated 7.8.2018 contending mainly that the application is bad in law as the applicant ought to have filed a Declaratory Suit. Further, that this Court has no jurisdiction to join the Respondent as a party after judgment is given. That there is no nexus between the Plaintiff’s judgment and its execution thereby the question of contractual liability between the Defendant and the Respondent; that there is no judgment obtained against the Respondent compelling it to satisfy the decree herein. That the Insurer has not admitted that it is liable to settle decree upon the judgment of the Court. That joinder of the Respondent at this stage is prejudicial and that there is no power donated to this court under the cited Section of the Law to make the Orders sought or grant the remedies sought against a non-party to these proceedings.
8. In addition it was contended that there is no basis for joining the Respondent in this appeal suit because the remedy for the applicant lies in a declaratory suit to be instituted and that the applicant cannot execute decree against a non-party to the proceedings as she has no judgment against the said Respondent Insurance Company.

9. According to the respondent, the execution proceedings cannot be turned into an inquiry into the statutory liability between the Respondent and the Plaintiff as the question is not the same as the cause of action between the plaintiff and the Defendant.
10. The Respondent further contended that an Insurer cannot be liable to satisfy any judgment unless all the requirements of the Insurance (**Motor vehicle Third Party Risks**) Act, Cap 405 Laws of Kenya have been established.
11. It was further contended that **Section 34 of the Civil Procedure Act** relates to question of execution of decree and not otherwise, between parties in a suit already decided, and cannot be used to place liability on persons not parties to the suit.
12. Finally, it was contended that the affidavit of Joseph Musomba, being an Advocate for the Plaintiff, is incompetent, void *ab initio*, a nonstarter and an outright abuse of the process of the court which ought to be struck out.
13. At the hearing of the application on 3.12.2019, the Respondent despite being served with a Hearing Notice on 15.11.2019, through the Advocates Otieno Oyoo and Company Advocates, there was no representation hence Mr. Musomba Advocate for the Applicant/Plaintiff proceedings to argue the application dated 22.6.2018.
14. Mr. Musomba wholly relied on the grounds in support of the Notice of Motion and his sworn affidavit arguing that **Section 10 (1) of the Act (Cap 405)** is clear on the Duty of the insurer to satisfy judgments against persons insured.
15. Mr. Musomba argued that the practice of filing declaratory suits is unknown in our Laws and therefore it is unlawful. Further, that the **Civil Procedure Act** is the only known Law for redress in Civil Matters. He cited **Section 34 of the Civil Procedure Act** which makes provision for execution of decrees and submitted that the Respondent issued a valid insurance cover and therefore upon judgment, the Insurance Company takes the position of the judgment –debtor and so, a decree shall issue against them.
16. Relying on **Section 92 of the Civil Procedure Act**, Counsel argued that the **Section of the Civil Procedure Act** is on enforcement of liability of surety and therefore upon judgment, the Insurer becomes a surety liable to settle decree in any proceedings. He argued further that the Section imports **Section 34 of the Act**.
17. On questions to be determined by the court executing the decree, Mr. Musomba argued that **Section 92** of the Civil Procedure Act gives the procedure on how this should be done and that once judgment is rendered, what is required under **Section 94 of the Civil Procedure Act** is to notify the Insurance Company to pay. He relied on a list of 7 authorities filed on 18.7.2018 which include local and foreign decisions and Laws and the Constitution.
18. Citing **Moral Insurance Company Limited versus Steves**, Counsel argued that enforcement of the Insurance contract was upheld. He urged the Court to find that there was merit in the application to enable the Plaintiff/Applicant herein proceed to execute decree against the **AMACO Insurance Company Limited**.

#### DETERMINATION

19. I have carefully considered the applicant's Notice of Motion dated 22.6.2018, the grounds and supporting affidavit, the Grounds of Objection and Replying affidavit of Grace Njuguna and the Oral submissions and authorities relied on by the applicant's counsel.
20. In my humble view, the main issue for determination is whether the application is merited and if so, what orders should this court make.
21. It is not in dispute that the plaintiff in this appeal had a valid judgment of the court which was only varied by the High Court on appeal, in respect of quantum of damages. The suit arose as a result of a road traffic accident involving the plaintiff and the defendant insured's motor vehicle Registration number KBJ 159T.
1. It is also not in dispute that the defendant defended the said suit to the end and was represented by an advocate appointed by the Respondent Insurance Company, **African Merchant Assurance Company Limited, (AMACO)**. Accordingly, I am persuaded that the Insurance Company had notice of the suit and the judgment of the trial court, against its insured defendant, which judgment and decree was appealed from in this appeal.
2. The plaintiff applicant heavily relies on section 10 of the **Insurance (Motor Vehicles Third Party Risks) Act (Cap 405)** Laws of Kenya as well as sections 34, 92 and 94 of the Civil Procedure Act. Section 10 of the **Insurance (Motor Vehicles Third Party Risks) Act** is titled "**Duty of insurer to satisfy judgments against persons insured**" and provides as follows:

*(1) If, after a policy of insurance has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of section 5 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.*

*(2) No sum shall be payable by an insurer under the foregoing provisions of this section—*

*(a) In respect of any judgment, unless before or within fourteen days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings;...*

3. In the instant case, the applicant has not filed any declaratory suit and argues that the practice in Kenya of filing declaratory suits in claims under Cap 405 as is the case herein is unlawful and has no basis in law. On the part of the Respondent, it maintains that the applicant can only get such orders as are sought herein after obtaining judgment in a declaratory suit and that as the Respondent is not a party to these proceedings and as there is no judgment or decree against the Respondent, this court has no jurisdiction to compel the Respondent to settle the decree in the absence of a judgment against the Respondent.

4. **Section 34 of the Civil Procedure Act** which the applicant relies on provides:

*“Questions to be determined by court executing decree.*

*(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.*

*(2) The court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit, or a suit as a proceeding, and may, if necessary, order payment of any additional court fees.*

*(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the court.*

*Explanation.—For the purposes of this section, a plaintiff whose suit has been dismissed, and a defendant against whom a suit has been dismissed, are parties to the suit.”*

5. Section 34 Civil Procedure Act provides for all questions relating to the execution, discharge and satisfaction of a decree between **parties in a suit and their representatives, but does NOT** provide for settlement of a decree by a person **who is not a judgment debtor** and therefore a party to the proceedings in question cannot enforce a decree against a non-party by whatever name.

6. In **Kuronya Auctioneers v Maurice Odhoch & another [2003] eKLR**, the Court Appeal held:

*“Section 34 allows the parties to a suit in which the decree was passed to have determined, in that suit, all questions relating to execution, discharge or satisfaction of the decree. It does not talk of damages payable to a person against whom a decree is executed when he is not the judgment-debtor. For the purposes of compensation for the torts of wrongful execution or trespass the wronged party cannot be said to be a party to the original suit as such a claim does not relate to execution, discharge, or satisfaction of the decree. The first ground of appeal therefore fails.”[emphasis added].*

7. In **James G. K. Njoroge t/a Baraka Tools & Hardware v Apa Insurance Company Limited & 3 others [2018] eKLR**, the Court of Appeal held, inter alia, after considering sections 92 and 94 of the Civil procedure Act:

*“We have considered these provisions, and find that under section 92 of the Civil Procedure Act, for the application to succeed the appellant had to satisfy the court that the 1st respondent had become liable, for the payment of the decree or part thereof, either as a surety, or in fulfillment of a condition imposed upon him in the proceedings by the court.*

8. Section 92 of the **Civil procedure Act** provides:

*“Enforcement of liability of surety.*

*Where any person has become liable as surety— (a) for the performance of any decree or any part thereof; or (b) for the restitution of any property taken in execution of a decree; or (c) for the payment of any money, or for the fulfillment of any condition imposed on any person, under an order of the court in any suit or in any proceeding consequent thereon, the decree or order may be executed against him, to the extent to which he has rendered himself personally liable, in the manner herein provided for the execution of decrees, and such person shall for the purposes of appeal be deemed a party within the meaning of section 34: Provided that such notice in writing as the court in each case thinks sufficient has been given to the surety.”*

9. In my humble view, for one to be allowed to execute a decree against a person who is not a party to the proceedings, this would offend the provisions of Article 47 of the Constitution and the Fair Administrative Action Act as he or she will be condemned unheard. This is so because even in cases where one seeks for execution of decree through Garnishee proceedings, the Garnishee must be made a party in special proceedings unlike in this case where the applicant simply wants the court to order the Insurance Company to settle decree without instituting any suit and obtaining decree against it.

10. For that reason, therefore, in my humble view, notwithstanding the provisions of section 10 of the Motor Insurance Act, the statutory duty imposed on the insurance company to settle claims arising from decree of a court of competent jurisdiction can only be invoked in declaratory suit where the insurance company is a party and not in proceedings where the insurance company is not a party.

11. I have also considered the pleadings before the trial court in Siaya PM CC No. 97 of 2010 and I observe that the case against the Respondent's insured, Roselyne Violet Akinyi, was not seriously contested as the parties entered a consent on liability on 27/7/2015 and submitted on quantum of damages, giving rise to the contested judgment of 26/5/2015 rendered by Hon. C.O.Okore, SRM, on quantum of

damages alone.

12. I note further from the record of appeal that the Respondent was notified by way of a Notice dated November 4<sup>th</sup> 2010 of the intention to sue its insured following the accident of 2<sup>nd</sup> October, 2010 involving the plaintiff Celestine Opiyo Wagwau and Motor Vehicle Registration No KBJ 159T wherein the plaintiff was injured. That being the case, the Respondent cannot be heard to argue that there was no valid judgment against its insured, and that it had no notice of the filing of the suit or that it had no valid cover for the Defendant Motor vehicle since it has never filed suit to avoid the policy quoted in that notice.

13. In **Joseph Mwangi Gitundu vs Gateway Insurance Co. Ltd, Gikonyo J** expressed himself as follows with respect to the liability of insurers to meet third party claims against its insured:

***“...under section 10(1) of Cap 405 Laws of Kenya, the insurer has a statutory obligation to pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.”***

14. I agree that the insurer has a statutory obligation which it can only avoid in the circumstances provided under section 10 as follows:

***“No sum shall be payable by an insurer under the foregoing provisions of this section if in an action commenced before, or within three months after, the commencement of the proceedings in which the judgment was given, he has obtained a declaration that, apart from any provision contained in the policy he is entitled to avoid it on the ground that it was obtained by the non-disclosure of a material fact, or by a representation of fact which was false in some material particular, or, if he has avoided the policy on that ground, that he was entitled so to do apart from any provision contained in it...”***

15. However, where there is no avoidance of the policy the decree holder can still file a declaratory suit and proceed to obtain summary judgment in her favour, on account that there is no triable issue, as opposed to seeking to enforce the judgment through these proceedings where the insurance company is not a party.

16. In my view, the statutory duty imposed on the insurance company only gives the applicant the right to sue for recovery of the amounts due in a decree against the insured and not a right to expressly execute decree against the insurance company without obtaining any decree against it.

17. I have perused the authorities relied on by the applicant’s counsel. The same are persuasive and therefore not binding on this court. In any event, counsel claims that the practice in Kenya of filing declaratory suits is unlawful and unknown in law. However, there is no substantive proceeding before this court seeking for such a declaration. In the first authority of **Uganda Transport Co. Ltd v Kewaza and Another [1973] EA 276** the court of Appeal was dealing with the issue of whether the insurance company was the agent of the insured and therefore whether service of summons on the insurance company on behalf of the insured defendant was valid service.

18. The decision in Kisumu Chief Magistrate’s Court is not an authority as far as this court is concerned. Furthermore, the section 34 of the Civil Procedure Act as cited were interpreted by the Court of Appeal as follows in **Kuronya Auctioneers v Maurice Odhoch & another [supra]** that : **“Section 34 allows the parties to a suit in which the decree was passed to have determined, in that suit, all questions relating to execution, discharge or satisfaction of the decree. It does not talk of damages payable to a person against whom a decree is executed when he is not the judgment-debtor.”**

19. On the other hand, the decision in **Century Indemnity Co. v Rogere [1932] S.C.R 529** from the Supreme Court of Ontario is clear that the claim was based on a specific provision in Rule 590 on **GARNISHEE**. The application herein has not been brought under the Garnishee proceedings as stipulated in Order 23 of the Civil procedure Rules. Similarly in **Joan Nichols v Herbert Marshall**, the proceedings were clearly Garnishee proceedings instituted against the insurance company governed by specific garnisheement law of KANSAS. The same position obtains in the **Moral Insurance Co. v Steves** where the Supreme Court of Oklahoma was dealing specifically with Garnishee proceedings instituted against the insurance company, unlike the proceedings herein where there is absolutely no Garnishee proceeding instituted against the Insurance Company in execution of decree issued against its insured. Furthermore, in Kenya, Garnishee proceedings are not the same as those contemplated in the persuasive authorities cited by Mr. Musomba advocate for the applicant.

20. Accordingly, although Mr. Musomba urged this court to be novel in the matter beforehand, I find and hold that the application dated 22/6/2018 is not meritorious. The same is declined and dismissed. Each party to bear their own costs and the trial court record to be resubmitted forthwith to the trial court for the execution of decree in the manner stipulated in law.

21. Orders accordingly.

**Dated, signed and Delivered at Siaya this 21<sup>st</sup> Day of January 2020.**

**R.E.ABURILI**

**JUDGE**

Parties and their advocates absent

CA: Brenda and Modestar present