



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**MISC. CIVIL APPLICATION NOS. 21, 22 & 23 OF 2016**

T K (Minor suing through father and next friend

L K K) ..... <sup>ST</sup> PLAINTIFF/RESPONDENT

N M B also Known as M M ..... <sup>2<sup>ND</sup></sup> PLAINTIFF/RESPONDENT

S K ..... <sup>3<sup>RD</sup></sup> PLAINTIFF/RESPNDENT

**VERSUS**

**DIRECTLINE ASSURANCE CO. LTD ..... DEFENDANT/APPLICANT**

**RULING**

The applications dated 13<sup>th</sup> April, 2016 seeks orders of execution pending the hearing and determination of the appeal. The applications are supported by the affidavit of Sandra Nyakweba. The respondents filed a replying affidavit in respect of each application sworn by Geoffrey Kilonzo Advocate. Parties agreed to determine the application by way of written submissions. Counsel for the applicants filed his submissions. Counsel for respondents relied on their replying affidavit.

The background to the applications is that the dispute arise from a road traffic accident which occurred on 30<sup>th</sup> April, 2012. The respondents filed civil cases before the subordinate court and were awarded damages respectively. An application for leave to appeal out of time was filed. This court allowed the applicant to file appeal out of time provided that the decretal sum is deposited in joint accounts of counsels for the parties herein.

The respondents filed declaratory suits against the insurance company and judgements were entered in their favour on 10<sup>th</sup> February, 2016. It is that judgement the applicant would like to stay pending the hearing and determination of the appeal.

According to counsel for the respondents, the current applications have been overtaken by events and are res-judicata. When this court dealt with the issue of leave to appeal out of time, it did not stay the declaratory suits. The suits proceeded to final conclusion and judgement was entered in favour of the respondents.

It is clear that the cases involve the same cause of action. In the first set of cases where damages were granted by the trial court, the issue at hand was the accident which occurred on 30<sup>th</sup> April, 2012. Ordinarily, it is the insurance company which insured the accident vehicle that settles the decretal sum. Thus, both judgements emanate from the same cause of action and are supposed to be paid by the applicant herein – Directline Assurance Company Ltd. The amount to be deposited in the joint account is meant to satisfy the same victims of the accidents. In essence therefore, the two judgments of the subordinate court flow from the same source which is the accident of 30<sup>th</sup> April, 2012. There can be no issue of res-judicata as the insurance company was not a party to the earlier suit and subsequent application for leave to appeal out of time. Had execution been levied in the earlier suits, it would have been against the insured. Since the judgement has been entered in the declaratory suit, the respondents

can execute against the insurance company. The current application is therefore not res-judicate.

I do order that the decretal sum be deposited in a joint account of both counsels within thirty (30) days hereof. The respondents will not suffer any prejudice. The amount awarded to them as damages will be in the joint account pending the determination of the appeal. The applicant is hereby ordered to ensure that the record of appeal is filed and served within sixty (60) days hereof.

In the end, the application dated 13<sup>th</sup> April, 2016 is granted as prayed. Costs shall follow the outcome of the main suit.

**Dated and delivered in Malindi this 2<sup>nd</sup> day of February, 2017.**

**S.J. CHITEMBWE**

**JUDGE**