REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
CIVIL APPLICATION NO. NAI. 228 OF 1998 (89/98 UR)
CORAM: KWACH, SHAH & OWUOR JJ.A
BETWEEN

DAVID KINYANJUI.

PETER CHEGE.

FRANCIS MAINA..... APPLICANTS

AND

MESHACK OMARI

MONYORI.....RESPONDENT

(Application for stay of execution of the judgment and decree of honourable justice Mbogholi-Msagha dated 5th June, 1998 and the order dated 26th June 1998 in H.C.C.C. NO. 5155 OF 1992
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RULING OF THE COURT

On 5th June, 1998, the superior court (Mbogholi Msagha J) entered judgment, in H.C.C.C. NO. 5155 of 1992, against the present applicants (defendants) in the sum of Shs.1,608,036/00 with costs and interests.

On 26th June, 1998 the superior court granted the respondent (the plaintiff) leave to execute the decree before taxation pursuant to an application filed in that court on 12th June, 1998. The said application was stated to have been brought under Order 21 rules 41 and 47, and Order 48 rule 3 of Civil Procedure Rules. Surprisingly that court also granted leave to the plaintiff to execute the decree against United Insurance Company Limited (the insurer) as the purported guarantor to the applicant when the insurer was not a party to the suit.It is not clear how the insurer's liability to satisfy the decree arose. The learned judge, in his ruling delivered on 3rd September, 1998 said that there was nothing on record to show that the guarantee was withdrawn and that the insurer had entered the arena of conflict well aware of the consequences. It is trite law that anyone who is not a party to the suit cannot be made liable to meet any decree in the suit unless he is brought into the suit and given an opportunity to state his case or defend his position.

It appears that at one stage previously when the present applicants had filed an appeal against the judgment of the superior court (O'kubasu J) the insurer had given some bond or surety for security pending appeal which appeal was allowed and the decree was set aside. Once the decree is set aside, the surety bond such as it may have been, becomes a dead letter.But the important point is that the insurer

was never made a party to the suit, if indeed it could be so brought into the suit. It must be borne in mind that in respect of a material damage claim the party suffering damage cannot eventually proceed against the tortfeasor's insurer as there is no provision in our law for such eventuality. The Insurance (Motor Vehicles Third Party Risks) Act, Cap 405, Laws of Kenya gives right to such a person to file a declaratory suit against the tortfeasor's insurer if the claim is for physical injuries or death.

The order to execute the decree against the insurer is a nullity and an illegality and although the application before us is one under rule 5(2)(b) of the Rules of this court we set aside that order ex-debito-justitiae.

We come now to the issue of stay of execution of the decree pending the hearing and determination of the intended appeal. The first decree issued by the superior court was for 2,701,500 which figure, inexplicably, came to be upped to a sum of Sh.4,649,980/50. Mr. B'womote says that he has no knowledge who could have amended the sealed decree to a figure of Shs.4,649,980.50. We will say no more save to direct Mr. Njai, the Principal Deputy Registrar of the superior court, to carry out investigations in this regard.

We note that although leave to execute the decree before taxation was granted on 26th June, 1998 the decree proper, in terms as laid down procedurally in order 20 of the Civil Procedure Rules was not sealed until late September, 1998. How an unsealed decree could have been executed remains a matter of surprise and conjecture.

The cost of repairs to the respondent's vehicle was in the sum of Shs.152,736/00. The repairs were said to have been effected within one month or a month and half. Yet the learned judge proceeded to award a sum of Shs.1,444,000/= for damages for loss of user for the period from 2nd February, 1991 to 30th November, 1991 on the basis that as the respondent was unable to raise a sum of Shs.152,736/= to pay for the repairs and that as the damage was caused by the applicants they ought to pay for loss of user for the said period. The respondent's vehicle had clocked according to Mr. B'womote's submissions in the superior court, 43,515 miles as at the date of accident and was 5 months old. It was allegedly a new vehicle when bought. It is surprising, therefore, that he could not pay Shs.152,000/= odd for the asking more so when, according to him, his net income per day was Shs.4,800/=. In five months he would have netted a sum of Shs.720,000/= if he was to be believed, and he was believed.At least it is arguable that his claim for loss of user was too exaggerated. It is also arguable that that head of claim was not properly proved because Mr. B'womote said in his submissions before the superior court that if his client has set forth the dates separately for daily items, (presumably to prove daily losses) the amount of paper he would have used would have been astronomical. What is on record is that the respondent had entered into a contract with Apple Office Hygienic Services for hire of his vehicle at Shs.4,000/= per day. Of that sum what would have remained net, after deduction of fuel costs, driver's and conductor's salary, wear and tear of vehicle etc is a matter for conjuncture at this stage. It appears that no one from Apple Office Hygienic Services gave evidence and the said contract was produced by Mr. Paul Buti who simply witnessed the agreement.

It has been stated by this court time and again that special damages must be strictly proved. These can never be a matter of conjecture or general assessment by the superior court or any other court. Putting it simply the damages for loss of user as assessed and as awarded would be the basis of an arguable appeal.

Coming the to issue as to whether or not the appeal, if successful, would be rendered nugatory, we can only say that if the respondent was not able to raise a sum of Shs.150,000/= for nearly eight months, he would be quite unable to refund the sum of Shs.1,444,000/= awarded to him for loss of user together with interest.

There is however no argument on the sum of Shs.164,036/= for other special damages claimed and interest thereon at the rate of 12% per annum from 28th September, 1992 till date of payment. This sum comes to Shs.291,200/= as of now; to that we would add an element of costs at Shs.25,000/= and we order that the total of these two sums: being Shs.316,200/= be paid by the applicants to the respondents within the next 10 days failing which execution in that respect may issue. The execution of the balance of

the decretal sum is hereby stayed and these are our orders. The costs of this application will be costs in the intended appeal.

We were absolutely astounded by the total unpreparedness on part of Mr. Nyaga when he rose to argue this application. That is not expected of advocates who appear before any court, least of all, this Court. We expect that advocates who file urgent applications for hearing by this Court must know their responsibility to their clients which sadly, in the case of Mr. Nyaga, was lacking to say the least.

Dated and delivered at Nairobi this 23rd day of October, 1998.

R. O. KWACH

JUDGE OF APPEAL

A. B. SHAH

JUDGE OF APPEAL

E. OWUOR

JUDGE OF APPEAL

Certify that this is a true copy of the original.

DEPUTY REGISTRAR.