



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: GICHERU, AKIWUMI & SHAH, JJ.A.)

CIVIL APPEAL NO. 15 OF 1992

KENYA BUS SERVICES IIMITED.....APPELLANT

AND

SUSAN MUTETI.....RESPONDENT

(Appeal from the Ruling of the High Court of Kenya at
Nairobi (Mr. Justice J.A. Mango) dated 12th March, 1991

in

H.C.C.C. NO. 4972 OF 1987)

JUDGMENT OF THE COURT

This appeal raises a short issue which is: Can an insurer (or a tortfeasor) who is dealing with the advocates for the injured party upon settlement of claim, pay directly to the injured party, the sum in respect of the claim for damages and at the same time pay party and party costs to the advocates for the injured party by a separate payment?

The facts in the matter In issue in the superior court are not_ in dispute. The appellant's insurers acting through their advocates, settled the claim of the respondent who was the injured party. The respondent was represented by the firm of M/S. Mutula Kilonzo & Company Advocates. By an application dated 1st May. 1990 and filed on 4th June, 1990, M/S. Mutula Kilonzo Company sought orders of the superior court to enter Judgment in that only if there was a proper assignment by the client to the advocate, could the advocate seek payment and to say so he relied

on section 136 of The Transfer of Property Act 1382, of India as is applicable to Kenya. The said section does not deal with the situation envisaged by Mr. Keith. The section simply stops a judge, a legal practitioner or officer connected with any court of Justice from buying or trafficking in, or stipulating for, or agreeing to receive, any share of, or interest in, in any actionable claim and further prohibits any court from enforcing at the instance of such persons any actionable claim dealt with by him as aforesaid. Mr. Keith in our view has totally misapplied and misapprehended the meaning of the said section. That section primarily stops any such person from having an interest in an actionable claim. It does not talk of

an advocate having no right to receive moneys on behalf of his client.

Acting on Mr. Keith's letter, the Association advised all its members to issue separate cheques, one for the claimants and the other for party and party costs to their advocates.

The learned judge in the superior court saw nothing wrong with Mr. Keith's opinion on the face of it. We think, with respect, he did not consider the implication of section 136 of the Transfer Property of Act. We have already pointed out what that section envisages. However, the learned judge came to correct conclusion in the end.

Mr. Keith, it is clear to us, did not consider the issue of the scope of the authority of an advocate. There can be no doubt, that generally an advocate is 'authorized to act as his client's agent in all matters not falling within an exception which may reasonably be expected to arise for decision in the course of the proceedings. See Re: Newen, Carruthers v. Newen, (1903) 1Ch 812. "All Matters" just referred to by us would also inter alia involve receipt by an advocate of moneys on behalf of, his client. A solicitor in England or an advocate in Kenya has general authority to compromise an action. In the Re: Newen case supra, Farwell J. had this to say at page 318:

""The next point is this. It is said that Mr. Ryley had no authority to settle the matter at all. Now it is clear from Freswitch v. Foley 18 C.B. (N.S.) 806 that a solicitor has a general authority to compromise an action on behalf of his client. Sir Montague Smith's judgment expresses the general principle very plainly. He says (2) that is Ibid 186) "The attorney is the general agent of the client in all matters which may reasonably be expected to arise

for decision in the cause.""

It follows therefore in our view that an attorney is obviously entitled to demand and receive moneys due to his client until such time his instructions are withdrawn.

Order III rule 6 of Civil Procedure Rules clearly stipulates that an advocate on record, until properly removed or changed, is considered the advocate of the party until final conclusion of the cause or matter, including any review or appeal.

The Advocates Act (Cap. 16 Laws of Kenya) provides very clear safeguards for clients whose moneys may be misappropriated by advocates. The advocates have to comply with The Advocates(Accounts) Rules. These are the safeguards provided. Any dishonest lawyer will be subject to the jurisdiction of The Disciplinary Committee as set out in the Advocates Act.

Insurers cannot take upon themselves the alleged duty of protecting the "insuring public". The law as stated takes care of the problems. Furthermore a third party who makes claims against a tort-feasor is not a member of "the insuring public".

The insurers must be aware that a discharge voucher duly signed by the claimant giving full discharge to the insurer and the insured protects the insurers. It is not the concern of the insurers to see if an advocate is honest or dishonest. The advocate after deducting his fees (including advocate- and client element thereof) is bound to pay the balance of the awarded or agreed damages to his client.

The insurer when negotiating a settlement or defending a claim steps into the shoes of the insured under the subrogation rights granted to the insurer in the contract (policy) of insurance. It would therefore be wrong to say that "there is nothing between the insurer and the claimant", as the learned judge says. There again, with respect, the learned judge misdirected himself. However in the end, as stated earlier by us, he arrived at the correct decision.

The upshot is that this appeal is dismissed with costs. It is so ordered.

Dated and delivered at Nairobi. this 8th day of March, 1996.

J.E. GICHERU

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JUDGE OF APPEAL

A.M. AKIWUMI

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JUDGE OF APPEAL

A.B. SHAH

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JUDGE OF APPEAL

I certify that this is a

Copy of the original.

DEPUTY REGISTRAR