

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL CASE NO 61 OF 1991

GABRIEL NDUNGU KINUTHIA.....APPLICANT

VERSUS

GEORGE W WAWERU.....RESPONDENT

RULING

On 27th December 1991, the plaintiff/applicant filed a suit against the defendant/respondent and claimed from him both general and special damages arising out of an accident which occurred on 16th June 1989 along Nyeri-Nyahururu Road in which the plaintiff/applicant sustained severe injuries, hence the suit subject to this ruling.

The allegation was that he was a passenger in the defendant/respondent's motor vehicle Reg No KZE 903 when it overturned causing him the injuries complained of. A defence was filed by the defendant/respondent through his firm of advocates Mbugua and Mbugua in which liability was actually denied saying that the accident occurred through inevitable circumstances or as an act of God, whatever that meant.

It would appear that after the suit was filed in Court parties entered into negotiations to attempt an out of Court settlement of the matter and there was a discharge of indemnity voucher signed by the plaintiff/applicant on 27th January 1992 acknowledging receipt of the sum of Kshs 67,900/= on a without prejudice basis being a payment in full and final settlement of all claims whatsoever made against the defendant/respondent and or his insurance company otherwise known as Stallion Insurance Co Ltd.

As a result of this document the plaintiff/applicant through his counsel Njuguna & Co, Advocates filed an application on 21st April 1992 to pray for entry of judgment against the defendant/respondent in the sum of Kshs 67,900/= with costs and interests. In support of this application, counsel states that before the defence was filed in the case an out of Court settlement had been reached between the plaintiff/applicant and the defendant/respondent's insurance company, the said Stallion Insurance Company Ltd in the sum of Kshs 67,900/=. That pursuant to the settlement, the plaintiff/applicant executed a discharge voucher in favour of the defendant/respondent and his insurance company which document is annexed to the application. On this basis, therefore, the plaintiff/applicant prayed for entry of judgment under order 12 rule 6 of the Civil Procedure Rules.

Under that order: -

“ Any party may at any stage of a suit where admission of facts has been made either on the pleadings or otherwise, apply to the Court for such judgment or order as upon such admission he may be entitled to, without waiting for the determination of any other question between the parties, and the Court may upon such application make any order, or give such judgment as the Court may think just.”

I must confess, I am not quite sure whether the word “otherwise” in order 12 rule 6 of the Civil Procedure Rules includes a document signed, even if it is an admission, by a party other than a party to the suit. In this suit, a discharge voucher was issued by Stallion Insurance Co Ltd which is not a party to this suit. At the same time if one has to go strictly by the document attached to support this application, then it is arguable whether the plaintiff/applicant has received or not received the amount of Kshs 67,900/= indicated in the discharge voucher and certainly this is an argument which would as well raise a triable

issue which cannot be disposed of by way of this application.

On the other hand even if negotiations for an out of Court settlement have been going on and the discharge voucher signed by the plaintiff/applicant in favour of the insurance what action has the plaintiff/applicant or his counsel taken in respect thereof by way of follow-up to give rise to the claim that an out of Court settlement had been reached? That a discharge voucher was signed in favour of Stallion Insurance Company does not make that insurance company a party to the suit and is not enough to warrant prayer of this nature being made at this stage.

In my view this application is misconceived if not bad in law for trying to drag a third party into a case without following the relevant procedures. I dismiss the application but order that each party do bear his or it's own costs.

Dated and delivered at Eldoret this 19th day of May , 1992.

D.S.K AGANYANYA

JUDGE