REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

CIVIL SUIT NO. E9 OF 2020

KASSAM HAULIERS LTD.....PLAINTIFF

-VERSUS-

TAKAFUL INSURANCE OF AFRICA LIMITED.....DEFENDANT

AND

JULIAH WAMBUI NGARUIYA

(Suing as the administrator of the Estate of the Deceased

Samuel Mbugua Mungai).....INTERESTED PARTY

RULING

1. By a Motion on Notice dated 29th December, 2020, the Plaintiff/Applicant herein seeks the following orders:

(a) Spent.

(b) Spent.

(c) That there be stay of execution in HCCC 9 OF 2019 at Machakos High Court (Juliah Wambui Ngaruiya – Suing as the administrator of the Estate of the Deceased Samuel Mbugua Mungai vs. Kassam Hauliers Ltd – pending the hearing and determination of the instant the instant suit.

(d) That the costs be provided for.

2. According to the Applicant, vide a policy of insurance (P/MSA/2017/102/103865) issued by Takaful Insurance of East Africa, the Defendant herein to the Plaintiff, the Plaintiff's motor vehicle registration KBW 868R was insured against third party risks for the period between 4th October, 2018 to 3rd October, 2019. During the pendency of the said cover the said motor vehicle was involved in a road traffic accident on 17th December, 2018 in which **Samuel Mbugua Mungai**, the deceased herein, died. Consequently, the deceased's widow, the interested party herein instituted Machakos HCCC No. 9 of 2019 seeking damages against the Plaintiff. In the said suit the Defendant instructed a firm of advocates to represent the Plaintiff herein.

3. However unbeknown to the Plaintiff the said firm of advocates on 7th July, 2019 entered into a consent with the interested party on liability at 90%:10% and thereafter paid a sum of Kshs 3,000,000/- to the interested party being the alleged maximum policy limit and then advised the Plaintiff to appoint its own advocates to take over the further conduct of the matter. According to the Plaintiff had the policy been availed to the court, the withdrawal of the said firm appointed by the Defendant herein and the payment of Kshs 3,000,000/- would not have been countenanced.

4. It was disclosed that on 6th February, 2020 judgement was entered in favour of the interested party against the Plaintiff for the sum of Kshs 38,775,682.00 together with costs and interest and that the amount stood at Kshs 38,775,682.00 at the time of the swearing of the affidavit in support of the application. According to the Plaintiff, contrary to the view held by the Defendant, the Defendant's liability to third parties was unlimited and that the actions of the Defendant left the Plaintiff exposed to the risk of execution and liquidation in the said sum unless the said sum is paid and that the Defendant was intent on avoiding the said contract of insurance. Though the execution of the said judgement was stayed on condition that half of the decretal sum be deposit in a joint interest earning account, the Plaintiff contended that it was not in a

position to do so and stands to suffer irreparably in the event that execution is levied as it is likely that it will be liquidated yet the Defendant through this suit is seeking to compel the Defendant to honour the terms of the said policy.

5. In response to the application, the Defendant filed a replying affidavit sworn by **Safiya Karua**, the Defendant's Legal & Compliance Officer on 22nd January, 2021 in which he contended that the Application is incompetent as it violates the provisions of Section 34 of the ***Civil Procedure Act*** which proscribes existence of separate proceedings in the same Court touching on the question of challenge of execution of a decree. It was further averred that the Application is *res judicata* to the extent that it requires the same Court but in separate proceedings to decide on a concluded issue of stay of execution.

6. According to the Defendant, it was the insurer of the Plaintiff for an assortment of motor vehicles including the subject motor vehicle KBW 868R which was involved in an accident on 17th December 2018. It was averred that both the policy document and the policy schedule are modeled on the standardized documents prepared by the Insurance Regulatory Authority.

7. Arising from the accident, Machakos HCCC No. 9 of 2019 was instituted against the Plaintiff and the Defendant instructed one of the firms in its panel of Advocates that is Macharia Burugu and Company to deal with the matter and defend the Plaintiff as is the norm. Consequently, the Defendant herein assessed the likelihood of success in the said suit and the potential quantum of damages and opted to engage in negotiations with the Plaintiff in the suit. It formed the view that the potential damages would exceed Kshs 3,000,000 which in its view is the insurers limit under Section 5 (b) (iv) of the ***Insurance (Motor Vehicles Third Party Risks) Act*** Cap 405 and the policy of insurance. Consequently, liability was negotiated liability at 90:10 in favour of the Plaintiff and the Court was to thereafter assess damages.

8. Consequently, the Defendant paid the Plaintiff therein a sum of Kshs 3,000,000.00 thereby discharging the Defendant from all obligations to the Plaintiff herein under the law and the insurance policy. The Defendant also advised the Plaintiff herein to directly appoint a fresh firm of lawyers to defend it in the remaining portion of the proceedings. As a result, the Plaintiff instructed the firm of Wandai Matheka and Company Advocates who filed a Memorandum of Appearance instead of a Notice of Appointment of Advocates yet there was already an Appearance and Defence on record from the Defendant's erstwhile instructed firm. Nevertheless, the said firm represented the Plaintiff at the hearing in the said suit and even cross examined the Plaintiff.

9. It was averred that upon hearing and determination of the said suit, the Plaintiff herein was on 6th February 2020 found liable for a sum of Kshs 38,775,682.50 plus costs and interest after deducting Kshs 3 million already paid by the insurance company, the Defendant herein. It was deposed that the Plaintiff has already been granted a conditional stay of execution pending appeal in Machakos HCCC No. 9 of 2019.

10. The Defendant was opined that the Defendant herein is not obligated to settle a sum of more than Kshs 3,000,000.00 in the said suit and that any sum in excess of that should be settled by the insured, the Plaintiff herein. The Defendant denied that it represented to the Plaintiff that liability to any single Third party under the policy of insurance was unlimited and that the policy does not state as such and the policy is in any event subject to the law, *inter alia* the ***Insurance (Motor Vehicles Third Party Risks) Act*** Cap 405. The Defendant added that the Plaintiff did not agree with the Defendant on any special or additional insurance cover exceeding Kshs 3,000,000/= for bodily injury and neither did the Plaintiff make any proposal for such a cover or pay any higher premiums so as to be entitled to such a higher cover.

11. It was the Defendant's position that the Application is frivolous and vexatious in addition to being *res judicata* and contrary to Section 34 of the ***Civil Procedure Act***. It was clarified that instead of repudiating the policy, the Defendant instead settled the full amount required as per the policy and the law.

12. On her part, the interested party relied on the following grounds:

> **1) In view of the MANDATORY provisions of Section 34 of the Civil Procedure Act this Court lacks jurisdiction to determine, hear or otherwise adjudicate on any issue as between the parties or their representatives in MACHAKOS HCCC NO. 9 OF 2020 JULIAH WAMBUI NGARUYIA (Suing as the Administrator of the Estate of the deceased SAMUEL MBUGUA MUNGAI) VS KASSAM HAULIERS LIMITED.**
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> **2) There exists a Competent Order issued in MACHAKOS HCCC NO. 9 OF 2020 JULIAH WAMBUI NGARUYIA (Suing as the Administrator of the Estate of the deceased SAMUEL MBUGUA MUNGAI) VS KASSAM HAULIERS LIMITED which Order was not complied with.**
>
> **3) This Courts lucks supervisory powers and/or appellate powers over MACHAKOS HCCC NO. 9 OF 2020 JULIAH WAMBUI NGARUYIA (Suing as the Administrator of the Estate of the deceased SAMUEL MBUGUA MUNGAI) VS KASSAM HAULIERS LIMITED on how to exercise its jurisdiction and it matters not if the two matters are being handled by the same Judge.**
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> **4) No substantive Orders have been sought as against the interested party in the plaintiff's application dated 29th December 2020 and the interested party is neither the plaintiff nor the defendant in this suit so as to be said to be a party to this suit and her interests is only on who will satisfy her decree as opposed to whether her decree should be satisfied?**
>
> **5) Jurisdiction cannot be assumed by the court because a party thinks the court has jurisdiction, or for convenience of the parties or upon the consent of the parties.**

13. It was submitted on behalf of the Interested Party that in accordance with section 34 of the ***Civil Procedure Act*** this court has no jurisdiction to hear this Application. According to the Interested Party, the trial Court in **Machakos HCCC No. 9 of 2020 - Juliah Wambui Ngaruyia (Suing as the Administrator of the Estate of the deceased Samuel Mbugua Mungai) vs. Kassam Hauliers Limited** has already issued a competent Order which was not complied with.

14. According to the Interested Party, this Court cannot issue an Order of stay of execution without the requirement of security as the same would be contrary to Order 42 R 6(2)(b) and Order 22 Rule (3) of the ***Civil Procedure Rules***. It was however submitted that the circumstances of the present application are not covered by the aforesaid provisions. According to the Interested Party, jurisdiction cannot be assumed by the court because a party thinks the court has jurisdiction, or for convenience of the parties or upon the consent of the parties.

15. The Interested Party noted that there are now 2 parallel proceedings on the execution of the Plaintiff's (interested party herein) decree which offends section 34 of the ***Civil Procedure Act***. Based thereon it was submitted that any issues between parties or their representative should only be determined in hear this Application and reliance was placed on the decisions of **Ochieng, J** in **Nairobi (Milimani Commercial Courts) Civil Case 613 of 2005 - BIF East Africa Limited vs. Fuelex Kenya Limited** and **Havelock, J** in Nairobi **(Milimani Commercial & Admiralty Division) Civil Case No. 746 of 2012 - Nazir Jinnah vs. Asmahan Peterson & 2 Others**.

16. It was submitted that since all questions relating to execution and satisfaction of a decree can only be determined by the Court issuing the decree and not by way of a separate suit, the plaintiff cannot challenge the satisfaction of the decree in hear this Application. According to the Interested Party, the trial Court in **Machakos HCCC No. 9 of 2020 - Juliah Wambui Ngaruyia (Suing as the Administrator of the Estate of the deceased Samuel Mbugua Mungai) vs. Kassam Hauliers Limited** nor its execution in this suit.

17. It was further submitted that literal reading of Order 22 Rule (3) demonstrates that Stay of execution can be granted temporarily by the court to which a decree has been sent for execution pending the making of an application to which an appeal lies or the court that issued the decree.

18. The Interested Party relied on N**airobi HCCA 427 of 2015 Stanley Karanja Wainaina & Another vs. Ridon Anyangu Mutubwa [2016] eKLR** and **Nairobi Misc App 51 of 2013 Republic vs. The Commissioner for Investigations & Enforcement 'Ex-Parte' Wananchi Group Kenya Limited [2014] eKLR, Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [2002] KLR 63** as regards the necessity to furnish security.

19. This Court was therefore urged to to find that not only doesn't it have jurisdiction to hear this application but the same has no merit hence should be struck out and or dismissed it with costs.

Determination

20. I have considered the application, the affidavits both in support of and in opposition to the application herein as well as the submissions filed.

21. In this case it is not disputed that the Plaintiff/Applicant is the judgement debtor in the primary suit where the Interested Party is the decree holder. The Applicant contends that the Defendant was the insurer of the vehicle which caused the accident the subject matter of that primary suit and that contention is not challenged by the Defendant herein. In this suit, the Applicant seeks to compel the Defendant to meet its obligations under the contract of insurance by satisfying the said decree. In the meantime, he seeks to have the execution and proceedings in the primary suit stayed. There is no doubt that the said order of stay if granted will affect the interests of the Interested Party herein.

22. In **Brek Sulum Hemed vs. Constituency Development Fund Board & Another [2014] eKLR** the court held that;

> **"As necessary parties, the provisions of rule 10 Order 1 will apply to require that their involvement to be necessary for the court to effectually and completely adjudicate upon and settle all questions involved in the suit'. As Interested parties, the applicants need only demonstrate interest in the subject of the suit or in other relevant matter affecting the suit…and in giving effect to the Article 159 principle of substantial justice without undue regard to technicalities of procedure, I allow the applicants' application for them to be joined in the suit, as necessary or interested parties."**

23. In ***Departed Asians Property Custodian Board –V- Jaffer Brothers Ltd Supreme Court of Uganda (1999) I.E.A 55*** *it as held that:*

> ***"A clear distinction is called for between joining a party who ought to have been joined as a defendant and one whose presence before the court is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit…A party may be joined in a suit, not because there is a cause of action against it, but because that party's presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all the questions involved in the cause or matter."***

24. Similarly, the Supreme Court of Kenya in ***Trusted Society of Human Rights Alliance vs. Mumo Matemo & 5 Others (2014) eKLR*** held as follows with regard to an interested party**:**

> **"Suffice it so say that while *an interested party has a 'stake/interest' directly in the case,* an amicus's interest is its 'fidelity' to the law: that an informed decision is reached by the Court having taken into account all relevant laws, and entertained legal arguments and principles brought to light in the Courtroom. *Consequently, an interested party is one who has a stake in the proceedings, though he or she was not a party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause. (emphasis added).***

25. Further, in ***Gateway Insurance Co. Ltd –v- Moses JaikaLuvai (2008) eKLR*****, Ibrahim, J** (as he then was) stated that:

> **"The plaintiffs in the suits which the insurer seeks to avoid liability under Section 10(1) by way of declaratory suit must be**

notified of the institution of the declaration suit and after which the said Plaintiffs are entitled to be made parties to the Insurer's suit if they think fit. The provision is mandatory and the Court has no discretion on the matter. The discretion and election lies with the Plaintiffs who have sued the insured for damages and losses arising from motor accidents. It is a right which none of the parties or the Court can take away."

26. In **Fidelity Shield Insurance Company Limited vs. Joseph IhaWanja [2018] eKLR** it was held that:-

"An interested party is the one who has a stake in the proceedings though he was not a party in the cause ab intio. This is in line with the definition quoted above. The party must demonstrate that it is necessary for him to be joined as a party to enable the court to settle all the questions involved in the suit. It is not sufficient for a party to state he has an interest he must convince the court that his being enjoined in the suit is crucial and will be necessary to assist the court in the determination of the questions involved in the suit. The applicant has stated the factual basis for this application which she has indicated is not in dispute and the facts are pleaded in the plaint. The pleading by the plaintiff is alleging a breach of the policy. Simply stated the plaintiff is seeking to avoid liability to pay the interested parties. It is based on a claim that the defendant was not using the motor vehicle on that particular day for the insured purpose. The plaintiff seeks a declaration that he is not bound to settle decree in Baricho R. M. C.C. 36, 37, 38, 39, 40 & 41 of 2013 or any other suit that maybe filed in future on account of suits having arisen inbreach of the express provisions of the own goods master comprehensive policy No. MC 03312 887. There is no doubt that the decision of this court will affect the rights and interests of the interested party. The interested party has a stake and or interest in the case. This was well stated in the Supreme Court in *Trusted Society of Human Rights Alliance –v- Mumo Materu& Others,* (Supra). The applicant will be affected by the decision and has a stake in the proceedings. The interest of Justice demands he be party in the proceedings. This matter is brought under section 10 of the Insurance *Motor Vehicle 3rd Party Risk)* Act. The provision makes it mandatory for the Insurer to settle the Judgment(s) in respect of persons it has insured against claims by 3rd parties. Such claims are where death or bodily injuries has resulted from an accident involving the vehicles insure under the Act. Section 10(4) is mandatory that a person who has been given notice of the proceedings to repudiate liability shall be entitled if he thinks fit to be made a party thereto. It means that if such a party wishes to be enjoined in the suit, the court has no discretion, it has to allow such a party to be enjoined in this suit. I am in agreement with the decision of Justice Ibrahim as he then was in the case of *Gateway Insurance Co. Ltd –V- Moses JaikaLuvai,* (Supra) that if the party applies to be joined in the suit the court is without discretion, it must allow him. Where a party has been given a right by a statutory provision to be enjoined in a suit, the plaintiff or the party cannot take away the right. I am in agreement with the counsel for the interested parties that the interested party has the legal basis in Section 10(4) of Insurance Act to be enjoined in this suit."

27. Based on the said decisions I am satisfied that the Interested Party is properly joined to these proceedings.

28. In the instant application, the Applicant seeks stay execution of the decree in the primary suit pending the determination of this suit. The application is however predicated, *inter alia*, upon Sections 1, 1A and 3A of the ***Civil Procedure Act*** and Order 51 Rule 1 of the ***Civil Procedure Rules***.

29. To my mind, Article 159 of the Constitution does not create a cause of action. As was held by the Supreme Court in **Michael Mungai vs. Housing Finance Co. (K) Ltd & 5 other [2017] eKLR**:

"We hasten to add that before us is not an issue that can be wished away by the provisions of Article 159 of the Constitution, as mere technicalities. Before a Court of law can invoke Article 159 of the Constitution and focus on substantive justice, the Court must at the first instance be properly moved and there must be before it a legitimate and cognizable cause of action. In the case of *Raila Odinga v I.E.B.C & Others (2013) eKLR,* this Court said that Article 159(2)(d) of the Constitution simply means that a court of law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the court. We are unable to see before us a prima facie cause of action that can warrant invocation of Article 159 of the Constitution for the question, what is it that is before us" remains unanswered."

30. I associate myself with the decision of the Court of Appeal (**Kiage, JA**) in **Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 6 Others [2013] eKLR** that:

"I am not in the least persuaded that Article 159 of the Constitution and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succour and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned."

31. In **Ujagar Singh vs. Runda Coffee Estates Ltd. [1966] EA 263**, it was held by the East African Court of Appeal that there can be no doubt that the High Court has power to order a stay of execution in the exercise of its inherent jurisdiction. The Court expressed itself as hereunder:

"Lack of jurisdiction in this court to entertain an application for the stay of execution of an order of the High Court until an appeal is lodged in this court causes the court no alarm. Every court has an inherent jurisdiction to stay its own order and

the jurisdiction of the High Court to stay its own order does not depend solely on Order 41. There is absolutely no reason to assume that in a proper case the High Court would not exercise its powers and grant a stay of execution if it is informed that appeal proceedings are contemplated until at least such time as would enable the appeal to be lodged and the Court of Appeal to be possessed of jurisdiction in relation to the order of the High Court."

32. As was held in **Jadva Karsan vs. Harnam Singh Bhogal [1953] 20 (1) EACA 74**:

"It is true that there is a wider power under section 97 [now 3A of the Civil Procedure Act] to stay proceedings where the ends of justice so require or to prevent an abuse of the Court process."

33. It is submitted based on section 34 of the ***Civil Procedure Act***, that this Court has no jurisdiction to issue the orders sought. The said provision provides as hereunder:

34. Section 34 of the ***Civil Procedure Act*** states that:

34. (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.

35. What then are the conditions necessary for section 34 aforesaid to be invoked. First, the questions must arise between the parties to the suit in which the decree was passed or their representatives. Those questions must relate to the execution, discharge or satisfaction of the decree. It is in that regard that I agree with **Ochieng, J** in **Nairobi (Milimani Commercial Courts) Civil Case 613 of 2005 - BIF East Africa Limited vs. Fuelex Kenya Limited** where he held that:

"If the 1st plaintiff were to be allowed to institute and sustain a separate suit, with a view to challenging the execution process in HCCC No. 713 of 1999, the results might bring the court into disrepute…If we were to allow people to challenge execution processes through separate suits, the end-result could be two or more inconsistent decisions, by courts of concurrent jurisdictions. For instance, the court herein might possibly find that the execution process should be put on hold permanently. If that were to happen, there would be two decisions of the superior court, relating to the same properties, but with orders pulling in different directions. In the one case, the court would have given the go-ahead to execution, whilst in the other case, the court would have stopped that very same execution. I would be loath to permit the development of a possibility. And, in my view, the only way to ensure that the court is not exposed to the possibility of inconsistent decisions is by allowing the application dated 15th December 2005. Accordingly, the plaint filed herein is hereby struck out, and the plaintiff's suit is dismissed."

36. She similarly, I agree with the decision of **Havelock, J** in Nairobi **(Milimani Commercial & Admiralty Division) Civil Case No. 746 of 2012 - Nazir Jinnah vs. Asmahan Peterson & 2 Others** where he held that:

"I have considered the provisions of section 34 (1) of the Civil Procedure Act which are very clear…To my mind therefore, any questions as to the value of the suit motor vehicle, the legality of the auction sale or the execution process should be addressed to the court executing the decree. In this instance, it is the Chief Magistrate's Court at Milimani. As I read section 34 (1) this Court has no jurisdiction in relation to such matters and on that ground alone, I would dismiss the Plaintiff's application dated 28 November 2012 and order that the suit herein be struck out."

37. As regards *res judicata*, Section 7 of the ***Civil Procedure Act, 2010*** provides as hereunder:

"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

38. As regards the rationale of the doctrine of *res judicata*, reliance was placed on the decision of the Court of Appeal in **Independent Electoral & Boundaries Commission –vs- Maina Kiai & 5 Others (2017) eKLR.**

"The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice."

39. In the **Maina Kiai** case (supra), the Court quoted with approval the Indian Supreme Court in the case of **Lal Chand vs. Radha Kishan, AIR 1977 SC 789** where it was stated;

"The principle of res judicata is conceived in the larger public interest which requires that all litigation must, sooner than later, come to an end. The principle is also founded in equity, justice and good conscience which require that a party which has once succeeded on an issue should not be permitted to be harassed by a multiplicity of proceedings involving determination of the same issue. The practical effect of the res judicata doctrine is that it is a complete estoppel against any suit that runs afoul of it, and there is no way of going around it – not even by consent of the parties – because it is the court itself that is debarred by a jurisdictional injunct, from entertaining such suit."

40. In **Lotta vs. Tanaki [2003] 2 EA 556** it was held as follows:

"The doctrine of *res judicata* is provided for in Order 9 of the Civil Procedure Code of 1966 and its object is to bar multiplicity of suits and guarantee finality to litigation. It makes conclusive a final judgement between the same parties or their privies on the same issue by a court of competent jurisdiction in the subject matter of the suit. The scheme of section 9 therefore contemplates five conditions which, when co-existent, will bar a subsequent suit. The Conditions are: (i) the matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit; (ii) the former suit must have been between the same parties or privies claiming under them; (iii) the parties must have litigated under the same title in the former suit; (iv) the court which decided the former suit must have been competent to try the subsequent suit; and (v) the matter in issue must have been heard and finally decided in the former suit."

41. In **Gurbachan Singh Kalsi vs. Yowani Ekori Civil Appeal No. 62 of 1958** the former East African Court of Appeal stated as follows:

"Where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgement, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence, might have brought forward at the time…No more actions than one can be brought for the same cause of action and the principle is that where there is but one cause of action, damages must be assessed once and for all…A cause of action is every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgement of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."

42. In **Apondi vs. Canuald Metal Packaging [2005] 1 EA 12 Waki, JA** stated as follows:

"A party is at liberty to choose a forum which has the jurisdiction to adjudicate his claim, or choose to forego part of his claim and he cannot be heard to complain about that choice after the event and it would be otherwise oppressive and prejudicial to other parties and an abuse of the Court process to allow litigation by instalments."

43. However, it is trite that the mere addition of parties in a subsequent suit does not necessarily render the doctrine of *res judicata* inapplicable since a party cannot escape the said doctrine by simply undertaking a cosmetic surgery to his pleadings. If the added parties peg their claim under the same title as the parties in the earlier suit, the doctrine will still be invoked since the addition of the party would in that case be for the sole purpose of decoration and dressing and nothing else. Under explanation 6 to section 7 of the ***Civil Procedure Act***, where persons litigate *bona fide* in respect of a public right claimed in common by themselves and others, all persons interested in such right shall, for the purposes of the section, be deemed to claim under the persons so litigating.

44. In the cases of **Mburu Kinyua vs. Gachini Tuti [1978] KLR 69; [1976-80] 1 KLR 790** and **Churanji Lal & Co vs. Bhaijee (1932) 14 KLR 28** it was held that:

"However, caution must be taken to distinguish between discovery of new facts and fresh happenings. The former may not necessarily escape the application of the doctrine since parties cannot by face-lifting the pleadings evade the said doctrine. In the case of Siri Ram Kaura vs. M J E Morgan Civil Application No. 71 of 1960 [1961] EA 462 the then East African Court of Appeal stated as follows:

"The general principle is that a party cannot in a subsequent proceeding raise a ground of claim or defence which has been decided or which, upon the pleadings or the form of issue, was open to him in a former proceeding between the same parties. The mere discovery of fresh evidence (as distinguished from the development of fresh circumstances) on matters which have been open for controversy in the earlier proceedings is no answer to a defence of res judicata...The law with regard to *res judicata* is that it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in a litigation can be allowed to re-open that litigation merely by saying, that since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up to the same relief which I asked for before, but it being in addition to the facts which I have mentioned, it ought now to be allowed to be the foundation of a new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact. The only way in which that could possibly be admitted would be if the litigant were prepared to say, I will show you that this is a fact which entirely changes the aspect of the case, and I will show you further that it was not, and could not by reasonable diligence have been ascertained by me before...The point is not whether the respondent was badly advised in bringing the first application prematurely; but whether he has since discovered a fact which entirely changes the aspect of the case and which could not

have been discovered with reasonable diligence when he made his first application."

45. In **Nancy Mwangi T/A Worthlin Marketers vs. Airtel Networks (K) Ltd (Formerly Celtel Kenya Ltd) & 2 others [2014] eKLR** the Court quoted the case of **E.T vs. Attorney General & Another (2012) eKLR** wherein the court noted thus:

> **"The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi Vs National Bank of Kenya Limited and Others (2001) EA 177 the court held that, 'parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.' In that case the court quoted Kuloba J., in the case of Njangu Vs Wambugu and another Nairobi HCCC No.2340 of 1991 (unreported) where he stated, 'If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic fact lift on every occasion he comes to curt, then I do not see the use of the doctrine of res judicata….."**

46. It is therefore clear that parties are not to evade the application of *res judicata* by simply conjuring up parties or issues with a view to giving the case a different complexion from the one that was given to the former suit.

47. It is clear that the Plaintiff and the Interested Parties herein were parties in **Machakos HCCC No. 9 of 2020 - Juliah Wambui Ngaruyia (Suing as the Administrator of the Estate of the deceased Samuel Mbugua Mungai) vs. Kassam Hauliers Limited.** The Defendant herein was however not a party thereto and it has not been contended that any of the said parties was either suing and being sued as the representative of the Defendant herein.

48. As regard the cause of action, the former suit was in respect of a claim for damages arising from a road traffic accident while the present suit is premised on section 10 of the ***Insurance (Motor Vehicles Third Party Risk) Act*** Cap 405 which states that:

> ***(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; or***
>
> ***(b) in respect of any judgment, so long as execution thereon is stayed pending an appeal; or***
>
> ***(c) in connexion with any liability if, before the happening of the event which was the cause of the death or bodily injury giving rise to the liability, the policy was cancelled by mutual consent or by virtue of any provision contained therein, and either—***
>
> ***(i) before the happening of the event the certificate was surrendered to the insurer, or the person to whom the certificate was issued made a statutory declaration stating that the certificate had been lost or destroyed; or***
>
> ***(ii) after the happening of the event, but before the expiration of a period of fourteen days from the taking effect of the cancellation of the policy, the certificate was surrendered to the insurer, or the person to whom the certificate was issued made such a statutory declaration as aforesaid; or***
>
> ***(iii) either before or after the happening of the event, but within a period of twenty-eight days from the taking effect of the cancellation of the policy, the insurer has notified the Registrar of Motor Vehicles and the Commissioner of Police in writing of the failure to surrender the certificate.***
>
> ***(3) It shall be the duty of a person who makes a statutory declaration, as provided in subparagraphs (i) and (ii) of paragraph (c) of subsection (2), to cause such statutory declaration to be delivered to the insurer.***
>
> ***(4) 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:***
>
> ***Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not thereby become entitled to the benefit of this subsection as respects any judgment obtained in proceedings commenced before the commencement of that action, unless before or within fourteen days after the commencement of that action he has given notice thereof to the person who is the plaintiff in the said proceedings specifying the non-disclosure or false representation on which he proposes to rely, and any***

person to whom notice of such action is so given shall be entitled, if he thinks fit, to be made a party thereto.

(5) Deleted by Act No. 8 of 2009, s. 41.

(6) In this section, "material" means of such a nature as to influence the judgment of a prudent insurer in determining whether he will take the risk, and, if so, at what premium and on what conditions; and "liability covered by the terms of the policy" means a liability which is covered by the policy or which would be so covered but for the fact that the insurer is entitled to avoid or cancel, or has avoided or cancelled, the policy.

(7) In this Act, references to a certificate of insurance in any provision relating to the surrender or the loss or destruction of a certificate of insurance shall, in relation to policies under which more than one certificate is issued, be construed as references to all the certificates, and shall, where any copy has been issued of any certificate, be construed as including a reference to that copy.

49. Section 34 of the ***Civil Procedure Act*** only relates to the execution, discharge or satisfaction of the decree. The present suit does not relate primarily relate to the said issues. The execution of the decree in **Machakos HCCC No. 9 of 2020 - Juliah Wambui Ngaruyia (Suing as the Administrator of the Estate of the deceased Samuel Mbugua Mungai) vs. Kassam Hauliers Limited** is only a collateral issue to the suit. Accordingly, neither section 34 aforesaid nor the doctrine of *res judicata* can be successfully invoked to defeat this suit.

50. However, this Court cannot lose sight of the fact that in in **Machakos HCCC No. 9 of 2020 - Juliah Wambui Ngaruyia (Suing as the Administrator of the Estate of the deceased Samuel Mbugua Mungai) vs. Kassam Hauliers Limited,** the Applicant was granted a conditional stay of execution of the very decree it seeks to stay in these proceedings which conditions the Applicant did not comply with. By granting the present application, the applicant will in effect obtain a stay of execution of the judgement in **Machakos HCCC No. 9 of 2020 - Juliah Wambui Ngaruyia (Suing as the Administrator of the Estate of the deceased Samuel Mbugua Mungai) vs. Kassam Hauliers Limited**.

51. By granting the orders sought in the present application, the Applicant would have achieved through the backdoor what it failed to achieve through its failure to comply with the conditions imposed on it in order to enjoy stay of execution. To do so would, in my respectful view, amount to a grave abuse of the process of the Court. In **Mitchell and Others vs. Director of Public Prosecutions and Another (1987) LRC (const) 128,** it was held that:

" ….in civilized society legal process is the machinery used in the courts of law to vindicate a man's rights or to enforce his duties. It can be used properly, it can be used improperly, and so abused. An instance of this is where it is diverted from its proper purpose, and is used with some ulterior motive, for some collateral one or to gain some collateral advantage, which the law does not recognize as legitimate use of that process. But the circumstance in which abuse of process can arise are varied and incapable of exhaustive listing. Sometimes it can be shown by the very steps taken and sometimes extrinsic evidence only. But if and when it is shown it happened, it would be wrong to allow the misuse of that process to continue. Rules of court may and usually do provide for its frustration in some instance. Others attract the res judicata rule. But apart from and independent of these there is the inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty to intervene and stop proceedings, or put an end to it. This inherent power has been used time and again to put a summary end to a process which seeks to raise and have determined an issue which has been decided against the party issuing it in earlier proceedings between the parties."

52. As was held by the Court of Appeal in **Muchanga Investments Limited vs. Safaris Unlimited (Africa) Ltd & 2 Others Civil Appeal No. 25 of 2002 [2009] KLR 229**:

"A court of law would not be entitled in our view to abdicate its cardinal role of making a determination. Section 57(8) contemplates a speedy process to have the rights of both the caveator and caveatee determined and not a protracted trial. In our view, the often quoted principle that a party should have his day in court should not be taken literally. He should have his day only when there is something to hear. No party should have a right to squander judicial time. Hearing time should be allocated by the court on a need basis and not as a matter of routine.

Judicial time is the only resource the courts have at their disposal and its management does positively or adversely affect the entire system of the administration of justice.

We have no doubt that what is before us is a matter that could have been determined summarily and the matter finalized. We are certain this is what is contemplated by section 57 of the Registration of Titles Act cap 281 and also Order 36 of the Civil Procedure Rules.

We approve and adopt the principles so ably expressed by both *Lord Roskil* and *Lord Templeman* in the case of *ASHMORE v CORP OF LLOYDS [1992] 2 ALL E.R 486* at page 488 where *Lord Roskil* states:

"It is the trial judge who has control of the proceedings. It is part of his duty to identify crucial issues and to see they are tried as expeditiously and as inexpensively as possible. It is the duty of the advisers of the parties to assist the trial judge in carrying out his duty. Litigants are not entitled to the uncontrolled use of a trial judge's time. Other litigants await their turn. Litigants are only entitled to so much of the trial judges' time as is necessary for the proper determination of the relevant issues."

At page 493 of the same case *Lord Templeman* delivered himself thus:

…"an expectation that the trial would proceed to a conclusion upon the evidence to be produced is not a legitimate expectation. The only legitimate expectation of any plaintiff is to receive justice. Justice can only be achieved by assisting the judge."

To underscore the point that the learned judge should not have dismissed the application to strike out, it is important to touch on the law relating to Originating Summons.

This Court, in the case of *MUCHERU v MUCHERU [2002] 2 EA 455* held that the procedure of Originating Summons is intended to enable simple matters to be dealt with in a quick and summary manner. Surely an inquiry of rights pertaining to caveat is not a complicated matter. This Court has also in a stream of authorities, approved *Sir Ralph Windham CJ"s* holding in *SALEH MOHAMMED MOHAMED v PH SALDANHA 3 KENYA SUPREME COURT (MOMBASA) Civil Case Number 243 of 1953 (UR)* where his Lordship said:-

"Such procedure is primarily designed for the summary and "ad hoc" determination of points of law construction or of certain questions of fact, or for the obtaining of specific directions of the court such as trustee administrators, or (as here) the courts own executive officer. That dispatch is an object of the proceedings is shown by Order XXXVI, which provides that they shall be listed as soon as possible *and be heard in chambers unless adjourned by a judge into court."*

In the case of *FREMAR CONSTRUCTION CO LTD v MWAKISITI NAVI SHAH 2005 e KLR* at page 6 where the Court said:-

"Trials are not merely held to glorify the hallowed principle that disputes ought to be heard and determined on oral evidence in open court. Unless a trial is on discernable issues it would be farcical to waste judicial time on it."

Finally, the *third point is*, whether in the circumstances the respondents had abused the process of the court. We must therefore determine if, in the circumstances the Originating Summon as framed, constituted an abuse of the court process. In this connection, we are greatly concerned that even after *Mr Church* had admitted that his occupation or possession was based on a tenancy he still did use the 1st respondent company to file an Originating Summons and claim a purchasers interest and also claim as an adverse possessor. In our view he, knowingly and dishonestly used the legal process to accomplish an ulterior purpose to that of the court process, which is to protect the interests of justice. We are of course aware that we cannot comprehensively list all possible forms of abuse of court process and that we cannot formulate any hard and fast rule to determine whether in any given facts, abuse is to be found or not, but in the circumstances of this case we do think that since the Originating Summons was instituted in the face of the admission of tenancy, this, in our view, does constitute an abuse of the court process. The 1st respondent and *Mr Church* did manifestly exploit the process whereas it was in our view clear to them that they lacked good faith in instituting the Originating Summons thereby causing prejudice and delay. The action was also wanting in bona fides and was oppressive to the appellant. All these in our view constitute abuse of process.

To re-inforce the point, abuse of process has been defined in *WIKIPEDIA*, the free encyclopedia:

"The person who abuses process is interested only in accomplishing some improper purpose that is collateral to the proper object of the process, and that offends justice."

In *BEINOSI v WIYLEY 1973 SA 721 [SCA]* at page 734F-G a South African case heard by the Appeal Court of South Africa, *Mohomad CJ*, set out the applicable legal principle as follows:-

"What does constitute an abuse of process of the court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept of "abuse of process." It can be said in general terms, however, that an abuse of process takes place where the proceedings permitted by the rules of court to facilitate the pursuit of the truth are used for purposes extraneous, to that objective."

Again the Court of Appeal in Abuja, Nigeria in the case of *ATTAHIRO v BAGUDO 1998 3 NWLL pt 545 page 656*, stated that the term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding which is wanting in bona fides and is frivolous, vexatious or oppressive. The term abuse of process has an element of malice in it.

In the Nigerian Case of *KARIBU-WHYTIE J Sc* in *SARAK v KOTOYE (1992) 9 NWLR 9pt 264) 156 at 188-189 (e)* the concept of abuse of judicial process was defined:-

"*The concept of abuse of judicial process is imprecise, it implies circumstances and situations of infinite variety and conditions. Its one feature is the improper use of the judicial powers by a party in litigation to interfere with the administration of justice …"*

The same Court went on to give the understated circumstances, as examples or illustrations of the abuse of the judicial process:-

(a) "Instituting multiplicity of actions on the same subject matter against the same opponent on the same issues or a multiplicity of action on the same matter between the same parties even where there exists a right to begin the action.

(b) Instituting different actions between the same parties simultaneously in different courts even though on different grounds.

(c) Where two similar processes are used in respect of the exercise of the same right for example, a cross appeal and a respondent's notice.

(d) (sic) meaning not clear))

(e) Where there is no iota of law supporting a Court process or where it is premised on frivolity or recklessness."

53. In dealing with the issue of abuse of the process of the Court **Kimaru, J** in **Stephen Somek Takwenyi & Another vs. David Mbuthia Githare & 2 Others Nairobi (Milimani) HCCC No. 363 of 2009** expressed himself as follows:

> **"This is a power inherent in the court, but one which should only be used in cases which bring conviction to the mind of the court that it has been deceived. The court has an inherent jurisdiction to preserve the integrity of the judicial process. When the matter is expressed in negative tenor it is said that there is inherent power to prevent abuse of the process of the court. In the civilised legal process it is the machinery used in the courts of law to vindicate a man's rights or to enforce his duties. It can be used properly but can also be used improperly, and so abused. An instance of this is when it is diverted from its proper purpose, and is used with some ulterior motive for some collateral one or to gain some collateral advantage, which the law does not recognise as a legitimate use of the process. But the circumstances in which abuse of the process can arise are varied and incapable of exhaustive listing. Sometimes it can be shown by the very steps taken and sometimes on the extrinsic evidence only. But if and when it is shown to have happened, it would be wrong to allow the misuse of that process to continue. Rules of court may and usually do provide for its frustration in some instances. Others attract *res judicata* rule. But apart from and independent of these there is the inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty to intervene and stop the proceedings, or put an end to it."**

54. Similarly, **Kimaru, J** in **Rev. Madara Evans Okanga Dondo vs. Housing Finance Company of Kenya Nakuru HCCC No. 262 of 2005** held:

> **"The court will always invoke its inherent jurisdiction to prevent the abuse of the due process of the court. The jurisdiction of the court, which is comprised within the term "inherent", is that which enables it to fulfil itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of the substantive law; it is exercisable by summary process, without plenary trial, it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of the court. The inherent jurisdiction of the court enables the court to exercise control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process. In sum, it may be said that the inherent jurisdiction of the court is virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them."**

55. In **Re Jokai Tea Holdings Ltd. (1993) 1 ALL ER 630** it was held that:

> **"Where the Court has to decide what consequences should follow from non-compliance with an order that a pleading be struck out unless further and better particulars are served within a specified time, the relevant question is whether such failure to comply with the "unless" order is intentional and contumacious…The court should not be astute to find excuses for such failure since obedience to such peremptory orders is the foundation of its authority, but if the non-complying party can clearly demonstrate that there was no intention to ignore or flout the order and that the failure to obey was due to extraneous circumstances, the failure ought not be treated as contumacious and ought not to disentitle him to the rights which he would otherwise have enjoyed."**

56. The applicant herein can still obtain the orders it seeks herein by seeking to comply with the conditions for stay orders granted in the primary suit.

57. In the premises, I find no merit in the Notice of Motion dated 29th December, 2020 which I hereby dismiss with costs.

58. It is so ordered.

RULING READ, SIGNED AND DELIVERED ONLINE AT MACHAKOS THIS 13TH DAY OF APRIL, 2021.

G V ODUNGA

JUDGE

In the presence of:

Mr Burugu for the Defendant

Mr Makumi for the interested party

CA Geoffrey