



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL APPEAL NO. 111 OF 2019

FIDELITY SHIELD INSURANCE CO. LTD....APPELLANT

VERSUS

GABRIEL NGARUHA KABUE.....RESPONDENT

(Being an appeal from the judgment of the Chief Magistrate's Court at Thika, **J.M. Nangea, CM** Court Civil Case No. 10 of 2019 delivered on 16<sup>th</sup> March, 2020)

**RULING**

**1. FIDELITY SHIELD INSURANCE COMPANY LIMITED (Fidelity)** is, as the name suggests, is an insurance company. **GABRIEL NGARUIYA KABUE (Gabriel)** filed a suit before the Chief Magistrate Court Thika being Civil Case No. 10 of 2019. Gabriel by that action sought a declaration that Fidelity was liable, as provided under **Section 10** of the **Insurance (Motor Vehicle Third Party Risk) Act** to pay the decretal sum awarded against its insured. Fidelity did not file an appearance and default judgment was entered against it on 15<sup>th</sup> March, 2019. By Notice of Motion application, dated 24<sup>th</sup> April, 2019, Fidelity sought to set aside that default judgment. The Thika court delivered its Ruling on 16<sup>th</sup> July, 2019 and dismissed that application.

2. Fidelity being aggrieved by that dismissal filed before this Court this appeal on 19<sup>th</sup> July, 2019.

3. A preliminary objection has been filed before this Court by Gabriel. The preliminary objection is directed towards Fidelity's application before this Court dated 19<sup>th</sup> July, 2019 for stay of execution of the Thika Court judgment pending appeal. The preliminary objection is in the following terms:-

**PRELIMINARY OBJECTION**

TAKE NOTICE that the respondent shall raise a Preliminary Objection on a point of law to the application dated 19<sup>th</sup> July, 2019 by the appellant.

1. The application is defective and bad in law.

2. Thika CMCC No. 10 of 2019 Gabriel Ngaruiya Kabue (suing thro' his father and next friend Isaac Kabue Miringu) versus Fidelity Shield Insurance Company Limited which is the subject matter of this appeal has been settled though a consent judgment dated 19<sup>th</sup> July, 2019.

3. The consent judgment has not been vacated or set aside.

4. The application is an abuse and a waste of the court's judicial time and is solely meant to defeat the overriding objective of the court as per the provisions of Sections 1A & B of the Civil Procedure Act.

And shall pray that the application be dismissed forthwith.

4. The consent referred to in the preliminary objection is dated 19<sup>th</sup> July, 2019. There is need to reproduce that consent as follows:-

**"Our Ref. THK/PKK/0082/2015 Date:19<sup>th</sup> July, 2019**

The Executive Officer

Chief Magistrate's Court at Thika

THIKA

Dear Sir/Madam,

RE: THIKA CMCC NO. 10 OF 2019

GABRIEL NGARUIYA KABUE (suing through his father and next friend ISAAC KABUE MIRINGU) VS. FIDELITY INSURANCE COMPANY LIMITED

Kindly record the following Consent on behalf of the parties herein:-

THAT BY CONSENT OF THE PARTIES:-

Judgment be and is hereby entered in favour of the plaintiff against the defendant in the following terms:-

1. That the judgment debt is Kenya shillings 2,600,000/= all inclusive to be paid to the plaintiff by the defendant as follows:-
  - i. Kenya shillings 1,000,000/= on 19<sup>th</sup> July, 2019.
  - ii. Kenya shillings 1,600,000 on or before 19<sup>th</sup> September, 2019.
2. That in the event of default on the part of the defendant, the plaintiff shall be at liberty to execute the consent judgment.
3. The claim shall be deemed as fully settled upon the payment of the full judgment debt and in accordance with the terms herein.

Yours faithfully,

P. KIIRU KAMAU & COMPANY                      SAMMY KAMAU  
ADVOCATES    for:- MANAGING DIRECTOR  
  
VIEW PARK TOWERS, 15<sup>TH</sup> FL.      FIDELITY INSURANCE  
UTALII LANE    COMPANY LIMITED  
P.O. BOX 7198-00100                      FIDELITY INSURANCE  
NAIROBI    CENTRE, WESTLANDS

ADVOCATES FOR THE PLAINTIFF WARIDI LANE OFF

WAIYAKI WAY

P.O. BOX 47435

NAIROBI

THE DEFENDANT".

5. That consent was signed by the advocate representing Gabriel and on behalf of Managing Director of Fidelity, it was signed by *Sammy Kamau*. Next to the signature of *Sammy Kamau* there is a *Fidelity Shield Insurance Co. Ltd* stamp. That consent was filed before the Thika Court on 7<sup>th</sup> August, 2019. I could not find adoption of that consent by the Thika court.

6. Fidelity in defence of the preliminary objection cited *Order 9 Rule 9* of the Civil Procedure Rules. This is the Rule that provides that when there is a change of advocates in a matter after judgment, such change can only be effected by an order of the court. That Rule provides as follows:-

**“When there is a change of Advocate, or when a party decides to act in person having previously engaged an Advocate, after**

judgment has been passed, such change or intention to act in person shall not be effected without an order of the Court:-

(a) Upon an application with notice to all the parties; or

(b) Upon a consent filed between the outgoing Advocate and the proposed incoming Advocate or party intending to act in person as the case may be.”

7. What I understand Fidelity to argue is that at the time when the above reproduced consent was drawn and signed Fidelity was represented by the law firm *Ombonya & Company Advocates*. Fidelity further seeks to argue that judgment having been entered by the Thika Court against Fidelity, **Order 9 Rule 9** of the Civil Procedure Rules (hereinafter the Rules) came into play and accordingly **Sammy Kamau**, without an order of the court had no authority to sign the consent on behalf of Fidelity. The jurisprudence relating to the interpretation of **Rule 9 of the Rules** is that the mischief addressed by that enactment by Parliament was to protect advocates who would act for a client and when judgment is entered the client withdraws instructions from that advocate and instructs another. That jurisprudence was captured in the case ***MOMBASA HIGHWAY TRANSPORT LIMITED VS. GULF AFRICA BANK LIMITED (2019) eKLR*** as follows:-

**“7. Order 9 rule 9 of the Civil Procedure Rules is applicable in instances where a party changes the advocate after judgment has already been entered in the suit. The reasoning behind the provision was well articulated in the case of *S. K. TARWADI VS VERONICA MUEHLMANN [2019] eKLR* where the judge observed as follows:-**

**‘...In my view, the essence of the order 9 rule 9 of the CPR was to protect advocates from the mischievous clients who will wait until a judgment is delivered and then sack the advocate and either replace him...’”**

8. It follows that **Order 9 Rule 9** of the Rules is a sword to be used by such advocates referred to above, but it is not intended to be a shield to be used by a party who takes an action to later disclaim such an action on the basis that **Order 9 Rule 9** of the Rules had not been complied with. It is because of this finding I reject the entire argument raised by Fidelity.

9. The consent signed on behalf of Gabriel and by Sammy Kamau on behalf of Fidelity is therefore valid. It will be seen from that consent reproduced above in the opening paragraph that the parties requested the court (Thika court), to record, that is adopt, the consent. In my perusal of the Thika court file, I found that, that court by the time the file was brought to this Court, because of this appeal, the consent of the parties had not been adopted as an order of the Thika court. What then should this Court do with that consent which is found to be valid?

10. That question is answered by the Supreme Court’s decision in the case of ***GEOFFREY M. ASANYO & 3 OTHERS VS. ATTORNEY GENERAL (2018) eKLR***. The Supreme Court in that case was persuaded by a case of Nigeria Supreme Court where the Nigeria Supreme Court faulted its appeal court for striking out an appeal where parties had consented to resolve the dispute, although terms of that settlement had not been adopted by the High Court. The Supreme Court of Kenya in discussing the provisions of **Article 159(2)(c)** of the Constitution which Article sets out the principles that guide anyone exercising delegated judicial authority to consider alternative dispute resolution in exercise of such authority, was persuaded by the Nigerian Supreme court’s decision. Before going further, let me reproduce what the Supreme Court of Kenya in the case of ***GEOFFREY M. ASANYO & 3 OTHERS VS. ATTORNEY GENERAL*** (supra) stated:-

**“[93] Further to the above, we note that in *STAR PAPER MILL LTD & ANOR V. BASHIRU ADETUNJI & ORS (2009) 7 iLAW/SC.292/2002*, the Supreme Court of Nigeria was called upon to determine whether the Court of Appeal was right in striking out an appeal when the parties had amicably resolved the dispute between them. The Respondents (Plaintiffs) before the Court of Appeal had moved the High Court seeking a declaration that a lease granted had been determined by reason of forfeiture for failure to pay rent, which order was granted. The defendants were adjudged trespassers and a perpetual injunction against issued. Aggrieved, the defendants appealed to the Court of Appeal. Before the Respondents could file their brief of argument, the parties agreed to resolve the matter amicably and as a result ‘a terms of settlement’ (*akin to a consent*) was filed in the Court of Appeal.**

**[94] However, rather than adopt the terms of settlement on the day of hearing, the Court of Appeal struck out the appeal, hence the subsequent appeal to the Supreme Court. In its Judgment, the Supreme Court of Nigeria rendered itself as follows regarding the rationale for consent Judgments:-**

**‘It must be pointed out that it is one of the cardinal principles of our judicial system to allow parties to amicably resolve the disputes between them. By doing so, the otherwise hostile relationship between the parties would be amicably resolved and cemented. It is this amicable resolution of disputes by the parties that is called settlement. When the terms of such settlements are reduced into writing, it is now called ‘terms of settlement’, when the terms of settlement are filed they are called, and made the judgment of the court. It is then crystallised into ‘consent judgment’. When consent judgment is given, none of the parties has the right of appeal, except with the leave, of court. Hence, consent judgment, is a contract between the parties whereby rights are created between them in substitution for order of consideration of the abandonment of the claim or claims pending before the court. This is intended to put a stop to litigation between the parties just as such as a judgment which results from the decision of the court.’**

**[95] The Supreme Court of Nigeria further observed that the Court has discretion in recording the ‘terms of settlement’ to ensure that the same is not vague. It also found that in the circumstances of the matter before it, the Court of Appeal was right in not recording the terms of settlement as they were vague, ambiguous and un-ascertainable. However, the Supreme Court noted that as the parties were inclined to settle the matter amicably, it referred the matter back to the Court of Appeal to adopt a new ‘terms of settlement’ to be filed by the parties and stated thus:**

**‘However, since parties have shown their intention to resolve this matter amicably and in order to put an end to litigation I hereby order that this matter be sent back to the Court of Appeal, Lagos Division (court below) for hearing, and the parties shall put before that court terms of settlement that are capable of being enforced, with the acquired and abandoned rights clearly set out. Consequently, I set aside the court below order which struck out the appeal before it and in its place order that the appeal be retried before another panel of the lower court. Costs shall be in the cause.’**

**[96] The above finding therefore fortifies our position (in a persuasive context), that appellate courts can also adopt duly entered into consents between parties and it therefore emerges that there should be no rule of procedure that precludes a Court of law from allowing a withdrawal of a matter (as correctly stated by the Court of Appeal) or recording a consent between parties before delivery of Judgment and making the Judgment moot. It is also trite that Rules of Court are handmaidens of the Court in its delivery of justice. The epitome of justice between parties before a Court of law is when parties finally, voluntarily, come to an amicable settlement of the dispute between them. The Court only comes in as an impartial arbiter where parties have failed to agree amongst themselves. It is the parties that go to Court seeking it to arbitrate the matter between them and once the Court is so invited, it should not close the door for parties to continue negotiating to reach an amicable settlement. Parties must remain at liberty to withdraw or consent to terms of settlement of the matter before the Court, as was correctly stated by the Supreme Court of Nigeria and which position settles well with our constitutional imperatives.”**

11. In view of the fact that Fidelity does not dispute the validity of the consent but disowned it in the ground it was signed by one of its officers and not its advocate, and because the terms of that consent are clear it follows this Court can adopt that consent as the judgment of the trial court’s case (Thika court). The Supreme Court in the **GEOFFREY M. ASANYO CASE** (supra) rendered itself thus in considering whether the Court of Appeal should have delivered judgment in the light of parties’ consent:-

**“[100] Contrary to the Court of Appeal finding that this consent does not indicate that the judgment of the Court of Appeal should not be delivered, we find that a holistic appreciation of the letter and spirit of the consent is to render the subject matter before the Court ‘settled’. Should a Court of law proceed to deliver a judgment in a matter that the parties have settled and have informed the Court so? The answer is in the negative. Courts of law are not academic institutions to engage in abstract deliberations. They resolve legal issues emanating from live disputes between parties. Where parties consent to the settlement of their dispute in light on Article 159(2)(c) of the Constitution, the court reserves no right to insist on determining the ‘matter’.**

**[101] Consequently, it is our finding that the Court of Appeal should have paid due regard to the principle in Article 159 (2) (e) of the Constitution while interpreting its Rules. It should in that case have adopted the consent as filed in Court and thereafter if need be, it could have invoked its Rules, particularly Rule 96 and marked the appeal as withdrawn.”**

12. This Court, in recognition that parties are entitled to resolve their dispute by use of alternative dispute resolution mechanism, in this case by a consent, the court will proceed to adopt that consent. In adopting that consent there will be no basis to hear the appeal nor even the application for stay of execution pending appeal. The appeal will be rendered of no effect by the adoption of that consent.

#### **DETERMINATION**

13. It follows that the preliminary objection dated 10<sup>th</sup> September, 2019 has merit and consequently the orders of this Court are as follows:-

- a. The preliminary objection dated 19<sup>th</sup> July, 2019 is allowed with costs.
- b. The parties consent dated 19<sup>th</sup> July, 2019 filed by Thika Chief Magistrate’s Court in Civil Case No. 10 of 2019 is adopted as an order of that Court.
- c. That consent having been adopted hereof, this appeal is hereby struck out with costs and the stay of execution order of this Court 22<sup>nd</sup> July, 2019 is hereby vacated.

**RULING DATED AND DELIVERED AT KIAMBU THIS 27<sup>TH</sup> DAY OF MAY, 2021**

**MARY KASANGO**

**JUDGE**

Coram:

Court Assistant .....Ndege

For the appellant.....Mr. Muma

For the Respondent.....Mr. Kamau

**COURT**

Ruling delivered virtually.

**MARY KASANGO**

**JUDGE**