



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MACHAKOS

(Coram: Odunga, J)

CIVIL SUIT NO. 9 OF 2019

**JULIAH WAMBUI NGARUYIA (Suing as the Administrator of the Estate of the deceased
SAMUEL MBUGUA MUNGAI)..... PLAINTIFF/RESPONDENT**

VERSUS

KASSAM HAULIERS LIMITED.....DEFENDANT/APPLICANT

AND

TAKAFUL HAULIERS LIMITED.....INTERESTED PARTY

RULING

1. On 6th February, 2020, this Court delivered a judgement in this suit in which the Plaintiff/Respondent herein, **Juliah Wambui Ngaruyia**, was awarded a net award of Kshs 38,775,682.50 with costs and interests.
2. The suit arose from a road traffic accident which occurred on or about the 17th December 2018 around 9.30 PM at Mwamba Hills along the Nairobi-Mombasa Road. The said award was as a result of an assessment of damages since on 17th July, 2019, the parties herein recorded a consent on liability by which judgement was entered for the plaintiff against the Defendant in the ration of 90:10 and the matter proceeded to formal proof.
3. By a Notice of Motion dated 25th September, 2020, the Defendant herein sought an order that pending the determination of the intended appeal filed by the Defendant against the said judgment there be a stay of execution of the decree herein on such terms as appear just and proper. After hearing the said application, this court on 1st December, 2020 granted a stay of execution of the decree herein on condition that the Applicant deposits half of the decretal sum in joint interest earning account(s) in the names of the advocates for the parties herein in Kenya Commercial Bank, Machakos within 30 days from the date of the ruling and in default the application would be deemed to have been dismissed with costs and the Respondent would be at liberty to execute.
4. By the motion the subject of this ruling dated 20th April, 2021, the Defendant now seeks the following reliefs:

- 1) **THAT** the instant application be certified urgent and heard *ex-parte* at the first instance.
- 2) **THAT** there be a stay of execution in this suit pending the hearing and determination of the instant application.
- 3) **THAT** the Interested Party (**TAKAFUL INSURANCE OF AFRICA LTD**) herein do provide security in this matter as per the ruling of the court on 1st December 2020
- 4) **THAT** there be a stay of execution in this suit pending the hearing and determination of the declaratory suit (**HCCC E9 of 2020 (KASSAM HAULIERS LTD –v- TAKAFUL INSURANCE OF AFRICA LTD)**)
- 5) **THAT** the costs be provided for.

5. According to the Applicant, vide a Policy of Insurance (**P/MSA/2017/102/103865**) issued by **Takaful Insurance of Africa**, the Interested Party herein, to the Defendant, 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 one **Samuel Mbugua Mungai** unfortunately passed on. Consequently, this suit was instituted by his widow and the Interested Party duly instructed the firm of **Macharia Burugu Advocates** representing it in this suit.

6. By a letter dated 27th June 2019, the Interested Party wrote to the Defendant informing it that owing to the nature of the claim, the amount payable to the deceased's estate was likely to exceed Kshs. 3,000,000.00 which amount was allegedly beyond the limit of the policy. On 7th July 2019 and unbeknownst to the Defendant, the firm of Advocates appointed by the Interested Party entered into consent with the Plaintiff/Respondent on liability at 90%:10%. Thereafter, the Interested Party paid a sum of Kshs. 3,000,000.00 being the alleged maximum policy limit and asked the Defendant to appoint its own Advocate to takeover further conduct of the matter.

7. It was deposed that the trial court was not shown the Policy of Insurance that limited the Interested Party's liability to Kshs. 3,000,000.00. However, on 6th February 2020, judgment was entered against the Applicant for a sum of Kshs. 38,775,682.50 together with costs and interest and the sum due stood at Kshs. 42,767,257.02. It was deposed that contrary to the assertion by the Defendant/Respondent that the maximum liability covered by the policy (P/MSA/2017/102/103865) was Kshs. 3,000,000.00, it is evident from the policy document that the liability to Third Parties.

8. It was confirmed that vide a ruling delivered on 1st December 2020, the court granted the Defendant stay of execution on condition that it deposits half of the decretal sum (Kshs. 42,767,257.02) in a joint interest earning account within 30 days. However, the Defendant was not in a position to deposit this huge amount. It instead filed a declaratory suit (**HCCC E9 of 2020 (Kassam Hauliers Ltd –v- Takaful Insurance of Africa Ltd)**) to compel the Interested Party to honour the terms of the Policy of Insurance. In the Defendant's view, since the Interested Party had yet to file a Defence to that claim, the claim therefore has a high likelihood of success. Based on the statutory obligation of the Interested Party to satisfy the judgment herein pursuant to the provision of Section 10 (1) of the **Insurance (Motor Vehicle Third Party Risks) Act** and the failure to put up a defence to the declaratory suit, the deponent was of the view that it is imperative that in the interim, the Interested Party be compelled to provide security for stay of execution.

9. According to the Defendant, it stands to suffer irreparably in the event execution is levied as the proclaimed items constitute the entire assets of the Applicant which assets amount to about Kshs. 40,000,000.00 and their sale will mean the liquidation of the Defendant/Applicant. It was disclosed that the court in HCCC E9 of 2020 (**Kassam Hauliers Ltd –vs- Takaful Insurance of Africa Ltd**) in declining to grant stay orders, directed the Defendant to seek to comply with the orders of the court issued on 1st December 2020. As a result, the Plaintiff/Respondent moved with speed to renew the Warrants of

Attachment and execution. It was noted that the Interested Party had not repudiated the Policy of Insurance.

Interested Party's Case

10. In response to the Application, the interested party gave a Notice of Preliminary Objection raising the following grounds:

1) The Application and the Notice of Appointment of Advocates both dated 20th April 2021 are filed in violation of Order 9 Rule 9 and Order 9 Rule 10 of the Civil Procedure Rules 2010, in that they were filed without leave of Court for the firm of J.Mbugua Mburu & Associates Advocates to come on record for the Defendant.

2) The result of those violations is that the firm of J. Mbugua Mburu & Associates Advocates is not properly on record and the Application and Notice of Appointment are consequently incompetent.

3) In any event, where there has been a previous firm of Advocates on record for the Defendant, an incoming firm of Advocates can only file a Notice of Change of Advocates and not a Notice of Appointment of Advocates. The Notice of Appointment of Advocates is therefore defective and of no effect and violates Order 9 Rule 5 of the Civil Procedure Rules 2010 and anything done by J. Mbugua Mburu & Associates Advocates in this suit is of no legal effect or consequence. The Application filed by the said firm is therefore incompetent.

4) The Application is in the ultimate frivolous and vexatious.

11. Apart from the said grounds it also filed a replying affidavit in which it was deposed that the Application is incompetent as it has been filed contrary to Order 9 Rule 9 and 10 of the **Civil Procedure Rules 2010** in that the firm of **J. Mbugua Mburu and Associates** have not sought and been granted leave through an Order of this Court allowing them to come on record for the Defendant/Applicant post the Judgement delivered in this matter on 6th February 2020. According to the interested party, the firm on Record for the Defendant/Applicant is **Wandai Matheka & Company Advocates**. Similarly, the firm of J.Mbugua Mburu and Associates has filed a Notice of Appointment of Advocates instead of a Notice of Change of Advocates yet there is another firm on record in violation of Order 9 Rule 5 of the **Civil Procedure Rules 2010**.

12. It was further averred that the Application is **res judicata** in that it requires the same Court in a second Application and within the same cause to decide on a concluded issue of stay of execution. According to the interested party, this Court had on 1st December 2020 granted an order of stay of execution in this matter on conditions which the Defendant/Applicant failed to comply with. The said orders, in the interested party's view, have similar effect to the orders sought herein. Apart from that this Application is also an abuse of process of Court and vexatious for the reason that a similar Application filed in Machakos HCCC E009 of 2020 was dismissed on 13th April 2021 by this Court when it held that the Defendant/Applicant could achieve stay of execution by simply complying with the conditions granted in the Ruling of 1st December 2020 in which conditional stay of execution was granted in this matter. It was noted that the Defendant/Applicant has not complied with the Court Ruling and Orders of 1st December 2020 and is therefore abusing the process of Court by bringing a similar application in which similar conditional stay of execution could eventually be granted and which it has clearly indicated it would not comply with.

13. The Interested Party averred that 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 stated that both the substantive insurance policy document and the policy schedule are modeled on the standardized documents prepared by the **Insurance Regulatory Authority (IRA)** and that there is nothing special or unique about the policy and schedule. The standardized documents, it was

deposed, were prepared by the IRA with their full knowledge of the insurer's liability limit of Kshs 3,000,000.00 for single person third party bodily injury as set out in the law. It was further averred that the wording in the policy and schedule by the Interested Party does not differ materially from what other insurer's use for their policies of insurance and policy schedules.

14. Arising from the said accident, and as is the normal procedure as permitted under the policy of insurance at *inter alia* clause 4 thereof the interested party averred that this suit was instituted against the Defendant/Applicant and as its insurer, the Interested Party instructed one of the firms in its panel of Advocates that is Macharia Burugu and Company to deal with the matter and defend the Defendant/Applicant. Consequently, and as was within its mandate, the Interested Party assessed the likelihood of success in this suit and the potential quantum of damages and opted to engage in out of Court negotiations with the Plaintiff herein. The Interested Party noted that the potential damages would exceed Kshs 3,000,000 which is the insurer's limit under Section 5 (b) (iv) of the **Insurance (Motor Vehicles Third Party Risks) Act** Cap 405 as read with the policy of insurance and policy schedule.

15. Accordingly, it was averred that the Interested Party instructed the firm of Macharia Burugu and Company who had been instructed to defend the Defendant/Applicant to negotiate liability in the ratio 90:10 in favour of the Plaintiff herein and the Court was to thereafter assess damages. Consequently, the Interested Party then paid the Plaintiff a sum of Kshs 3,000,000 thereby discharging the Interested Party from all obligations to the Defendant/Applicant under the law and the insurance policy. The Interested Party also advised the Defendant/Applicant to directly appoint a fresh firm of lawyers to defend it in the remaining portion of the proceedings.

16. According to the interested party, the Defendant/Applicant has never challenged or applied to set aside the consent entered into on its behalf by the Interested Party through its appointed lawyers. It instead instructed the firm of **Wandai Matheka and Company Advocates** to take over defence of this matter which said firm curiously filed a fresh Memorandum of Appearance and Defence instead of a Notice of Change of Advocates and Amended Defence yet there was already an Appearance and Defence on record. The said firm represented the Defendant/Applicant at the hearing of this matter and even cross examined the Plaintiff. It was noted that the Statement of Defence they filed did not differ materially from the Statement of Defence which the firm instructed by the Interested Party (Macharia Burugu & Company Advocates had earlier filed.

17. Upon hearing and determination of this matter, the Defendant/Applicant herein was on 6th February 2020 found liable for damages to the tune of Kshs 38,775,682.50 after deducting Kshs 3 million already paid to the Plaintiff by the Defendant/Applicant's insurer, that is the Interested Party herein. In the interested party's view, the amount would have been much higher had the Interested Party not negotiated for a 10% concession on liability.

18. According to the Interested Party, it is not obligated to settle a sum of more than Kshs 3,000,000.00 in this matter and that any sum in excess of that should be settled by the insured, the Defendant/Applicant herein. It was averred that at no time did the Interested Party represent to the Defendant/Applicant that liability to any Single Third Party under the policy of insurance was unlimited. In its view, the Defendant has by design or otherwise failed to read and understand clause 3 of the policy document which states that the limits of liability in the policy schedule only kick in or apply when there is an accident involving compensation to more than one person and that for a Single Person Third Party bodily injury, the liability limit is set in law at Kshs 3,000,000/= pursuant to clause 3 of the policy document which when read with the policy schedule, should lead to the conclusion that what the policy and policy schedule provide is that the policy limit when an accident involves bodily injury to more than one Third Party (who are not passengers because that is addressed at points 1 and 2 of the policy schedule which addresses Passenger Liability) is not a limit for each injured party but is an aggregate limit that applies only when several third parties are compensated arising from one accident. What that means, according to the interested party, is that the TOTAL amount of compensation to the "more than one" third party claimants will be unlimited. But for each sole third party, the policy is actually silent and the law is what applies and the law is section 5 (b) (iv) of the **Insurance (Motor Vehicles Third Party Risks) Act** Cap 405 which provides for a limit of Kshs 3,000,000 per person. It was averred that the Defendant/Applicant did not agree with the Interested

Party on any special or additional insurance cover exceeding Kshs 3,000,000/= for bodily injury to a Single Third Party and neither did the Defendant/Applicant make any proposal for such a cover and neither did the Defendant/Applicant pay any higher premiums to the Interested Party so as to be entitled to such a higher cover.

19. It was averred that from the foregoing the Defendant/Applicant's suit in HCCC E009 of 2020 is not an arguable case and it does not stand a chance of success because the case is only about interpretation of the insurance policy and schedule and Defendant/Applicant's entire case is based on a misinterpretation of the two documents as read with the law. Having its sole foundation on a frivolous suit, the Defendant/Applicant's Application, it was contended, is equally frivolous and vexatious in addition to being *res judicata* and an abuse of process.

20. While admitting that the Court did not need to see the policy document before adopting the consent on liability in this matter, the interested party averred that this is because the policy document did not have any bearing on the recording of the consent.

21. To the interested party, once it, as the insurer of the Defendant/Applicant paid the insurer's limit of Kshs 3 million to the Plaintiff, the Interested Party or firms in its panel of Advocates could not have any further impetus or obligation to take conduct of the hearing of this matter and hence the Interested Party properly advised the Defendant/Applicant to appoint another firm of Advocates to defend it in this matter. According to it, it did not repudiate the policy of insurance and there was no need to do so because the Interested Party settled the full amount required as per the policy and the law and was thereby discharged from its obligations to the Defendant/Applicant.

22. The interested party denied that it failed to file a Statement of Defence in Machakos HCCC E009 of 2020 and averred that the Statement of Defence is clearly on record and that its case stands good chances of success. Since the Plaintiff does not have a Judgment and Decree of Court against it in any proceedings, the interested party averred that the Defendant/Applicant's prayer that the Interested Party should give security in Machakos HCCC E009 of 2020 is a crafty attempt by the Defendant/Applicant to transfer its obligations under the decree herein to the Interested Party yet the Defendant/Applicant has already demonstrated an unwillingness to offer security itself in this suit.

Defendant/Applicant's Submissions

Determination

23. I have carefully considered the application, the affidavits filed, submissions made as well as authorities cited by counsel for both parties.

24. The matter for determination before me is whether this Court should direct the interested party to furnish the security that the Defendant herein was directed to furnish pending the hearing and determination of the intended appeal.

25. It was contended that the Application is *res judicata* in that it requires the same Court in a second Application and within the same cause to decide on a concluded issue of stay of execution. According to the interested party, this Court had on 1st December 2020 granted an order of stay of execution in this matter on conditions which the Defendant/Applicant failed to comply with. The said orders, in the interested party's view, have similar effect to the orders sought herein.

26. 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.”

27. The rationale for the doctrine of *res judicata* was restated by the Court of Appeal in **Independent Electoral & Boundaries Commission –vs- Maina Kiai & 5 Others (2017) eKLR** in the following terms:

“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.”

28. In **Independent Electoral & Boundaries Commission –vs- Maina Kiai & 5 Others (2017) eKLR**, 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 injunction, from entertaining such suit.”

29. 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.”

30. The former East African Court of Appeal in **Gurbachan Singh Kalsi vs. Yowani Ekori Civil Appeal No. 62 of 1958** 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.”

31. On his part, Waki, JA in Apondi vs. Canuald Metal Packaging [2005] 1 EA 12 Waki, JA was of the view that:

“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.”

32. 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.

33. It was therefore explained in the cases of Mburu Kinyua vs. Gachini Tuti [1978] KLR 69; [1976-80] 1 KLR 790 and Churanji Lal & Co vs. Bhajjee (1932) 14 KLR 28 that:

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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.”

34. 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 court, then I do not see the use of the doctrine of *res judicata*.....’

35. What comes out from above is 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.

36. In this case, it is clear that the Plaintiff and the Defendant are the same. However, the interested party herein was not a party to the application for stay pending appeal and it has not been contended that any of the said parties was either suing and being sued as its representative. As regard the cause of action, the former application sought stay pending appeal while the instant application seeks and order that the security that ordered to be furnished by the Defendant be instead be furnished by the interested party in light of the provisions of 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.

37. It is therefore clear that the claim against the interested party herein arose after the order made by this court on 1st December, 2020. It is not the kind of a relief that could have been made in the earlier application since it arose after the court delivered its said ruling. In those premises, this application cannot be termed as being *res judicata* that doctrine cannot be successfully invoked to defeat this suit.

38. However, in that ruling the Court granted specific orders directed to the Defendant. The Defendant, by this application is seeking to have the same transferred to the shoulders of the interested party based on the fact that the Defendant has sued the interested party. In effect the Defendant is seeking an order that the order issued against it be executed against the interested party based on the alleged contractual and statutory liability of the interested party to the Defendant. It is however clear that that liability is yet to crystallise since the said claim is yet to be determined.

39. What the Defendant is asking this court is, in my view, speculative. If the Court was to accede to it, it would amount to this Court making a finding as regards the interested party's liability in these proceedings when there is no claim against it here and when the proceedings in which its liability is sought to be determined are still pending. That would amount to jumping the gun and short circuiting the law.

40. In addition, this court having directed its orders against the Defendant by granting the orders sought in the present application, the Applicant would have reviewed this Court's decision through the backdoor.

To do so would, in my respectful view, amount to a grave abuse of the process of the Court.

41. The Defendant has raised a number of issues touching on the merits of its case against the interested party. With due respect this is not the right forum in which the matters should be dealt with. Accordingly, in order to avoid prejudicing the outcome of that suit, I will refrain from dealing with those issues. Similarly, it is no longer necessary for me to deal with the issues raised in the preliminary objection in light of my finding herein.

42. In the premises, I find no merit in the Motion dated 20th April, 2021 which I hereby dismiss with costs.

43. It is so ordered.

Ruling read, signed and delivered at Machakos this 26th day of July, 2021.

G V ODUNGA

JUDGE

In the presence of:

Ms Karwitha for Mr Makumi for the Respondent

Mr Macharia for Mr Burugu for the Interested Party

CA Simon