



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL APPEAL NO. 11 OF 2020

BETWEEN

KENYA ORIENT INSURANCE CO. LTD.....APPELLANT

VERSUS

MARGARET WAMBUI NJENGA

ELIZABETH WAIRIMU GICHUHI (*suing as the administrators of the Estate of*

MUKORA KINYANJUI (DECEASED).....RESPONDENTS

RULING

1. KENYA ORIENT INSURANCE CO. LTD (hereinafter the Insurance Company) filed this appeal against the judgment of Limuru Magistrate's Court being SPMCC No. 213 of 2018. That suit before Limuru Court was a declaratory suit against the Insurance Company. By a Ruling of this Court dated 18th March, 2021, a conditional stay of execution of the Limuru Magistrate's Court case was granted. The condition of that stay was that the Insurance Company would provide security of Kshs.3 million to be deposited in an interest earning account in the names of the advocates for the parties hereof.

2. The Insurance Company has filed a Notice of Motion application dated 26th May, 2021. By that application the following orders are hereby sought.

a. THAT this honourable court be pleased to adopt the consent of the parties dated 16/3/2021 and filed in court on the 13/4/2021 and enter the same as judgment of this Court.

b. THAT this Court be pleased to order that any payment made in excess of Kshs. 3 million paid to the respondent be immediately refunded/returned to the application by the respondent and his advocate (Messr. J.M. Njenga & Co. Advocates).

c. THAT this Court be pleased to declare that full payment have been made to the respondent and the matter therefore is fully settled.

d. THAT this Court be pleased to cite and refer J.M. Njenga Advocates, the proprietor in J.M. Njenga Advocates to the Advocates Disciplinary Tribunal for disciplinary proceedings arising out of his conduct (section 53 & 60 Advocates Act Cap 16).

e. THAT this Court be pleased to direct that the auctioneer herein Messr Daystar Auctioneers be referred to the Auctioneer Disciplinary process for the illegal/irregular execution. (Section 19(1(a), (b), (c), 24(1-6) Auctioneers Act No. 5 of 1996).

f. THAT the order of exemplary costs be issued in favour of the applicant to be paid in person by the advocate.

3. The background to those prayers is that prior to the Ruling of this Court of 18th March, 2021, parties in this appeal commenced negotiations which culminated with a consent dated 25th March, 2021. It is the contention of the Insurance Company that the respondents had executed the trial court's judgment, despite that consent, where amongst other agreements parties consented to the payment by the Insurance Company of Kshs.3 million in full and final payment and for the marking of this appeal as settled.

ANALYSIS

4. I have considered the affidavit evidence, the grounds of opposition and the submissions made before me.

5. My first finding is that the parties consent was not adopted as an order of the court. It was required that it be adopted as provided under **Order 25 Rule 5(1)** of the Civil Procedure Rules which is in the following terms:-

“Where it is proved to the satisfaction of the Court and the Court after hearing the parties directs that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the Defendant satisfies the Plaintiff in respect of the whole or any subject matter of the suit, the Court shall on the application of any party order that such agreement, compromise of satisfaction be recorded and enter judgment in accordance therewith.”

6. The Insurance Company cannot be heard to seek the refund of amount paid to the respondent in excess of Kshs.3 million. Most importantly, this Court cannot cite the firm of *J.M. Njenga Advocates* nor report that firm to the Advocate’s Disciplinary Tribunal because the order that the firm is alleged to have acted in contempt of is not an order of this Court. The consent was not adopted and therefore it is not an order of this Court. Such a situation was amplified in the case **MOHAMED BARE & 48 OTHERS VS. KENYA RURAL ROADS AUTHORITY ELC CAUSE NO. 915 OF 2015** as follows:-

“In this case even through the consent agreement was received as filed on 19th April 2016, the same is not reduced as an order of the Court to be binding upon the Claimants in compromise of their claims. A record of the Court should follow such filing of the consent agreement, for the Judge to adopt and confirm the same in its terms and conditions ...”

7. Further, the Insurance Company has sought adverse orders against an auctioneer who has not been made a party in this case and was accordingly not heard.

8. The respondents’ learned counsel *Mr. J.M. Njenga*, in submissions assented to the granting of prayer for declaration that full payment had been made to the respondent and for the appeal to be marked as settled.

9. That being so, and because this Court has found that the consent not having been adopted by the court, it was not an enforceable order, the prayer sought, except the one the respondents concurred to, are not merited.

DISPOSITION

10. The prayers Nos. 2,3,5,6,7,8 and 9 of the Notice of Motion dated 26th may, 2021 are hereby dismissed.

11. By consent, this Court does hereby declare the respondent has received full payment and this appeal is hereby marked as fully settled.

12. This file shall henceforth be closed.

RULING DATED AND DELIVERED AT KIAMBU THIS 21ST DAY OF OCTOBER, 2021

MARY KASANGO

JUDGE

Coram:

Court Assistant : Ndege

For the Appellant: No appearance

For the Respondents : Miss Kimani holding brief for Ms Wachanga

COURT

Ruling delivered virtually.

MARY KASANGO

JUDGE