



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL CASE NO. 2522 OF 1996

PHILIP KIPCHIRCHIR MURGOR.....1ST PLAINTIFF/RESPONDENT

GILBERT KIPTOO MURGOR.....2ND PLAINTIFF/RESPONDENT

MARGARET CHEMUTAI MURGOR STUHL.....3RD PLAINTIFF/RESPONDENT

(Administrators of the estate of the late ROBERT KIPROTICH MURGOR)

VERSUS

JOSIAH NYAWARA OGINA.....1ST DEFENDANT/APPLICANT

VINCENT ACHUKA.....2ND DEFENDANT/APPLICANT

CATHOLIC DIOCESE OF ELDORET.....RD THIRD PARTY/RESPONDENT

RULING

1. The application dated 6th June 2019 principally seeks orders that this honourable court do adopt the consent judgment on liability between the parties as per the consent filed in Eldoret SPMCC No. 1799 of 1996 where the parties were the same as in present suit.

2. It is stated in the affidavit in support of the application filed by the Applicants/Defendants 1 & 2 that the accident the subject matter of this suit involved three motor vehicles. That in a suit filed before the SPM’s Court in Eldoret, all the parties agreed on liability as follows:

- (a) Plaintiff -15%
- (b) 1st Defendant -15%
- (c) 2nd Defendant – 70%

3. It is contended herein that the consent on liability was adopted by the court as judgment of the court and should be applied herein for expeditious disposal of the suit herein. That the said consent reflects the intention and commitment of the parties to resolve the issue of liability wholly and with finality.

4. The Plaintiffs are not objected to the application and did file any papers in opposition to the same.

5. The Third Party is opposed to the application and filed the grounds of opposition dated 17th September, 2019 which state as follows:

- 1. The application is bad in law, incompetent, mischievous and as such must not be entertained.**
- 2. Indeed, a suit was filed in Eldoret being SPMCC No.1799 of 1996 by the Third Party, for recovery of material damages and the Judgment therein clearly hold the Defendants liable for the accident.**
- 3. However, the concession of fifteen percent liability was purely for purposes of reaching a settlement to expedite compensation to the Third Party herein for a claim for material damage to the motor vehicle, and was not admission of**

liability for the personal injury occasioned to the Plaintiff. It is obvious that the two issues are distinctly different.

4. Further, the Third Party was not blamed for the Accident. On the other hand, the 1st Defendant was found guilty for negligent driving. The outcome of the traffic case against the 1st Defendant who was ordered to pay Ksh.40,000/= should be conclusive proof of liability against the 1st Defendant and the 2nd Defendant vicariously.

5. The settlement proposal is therefore unreasonable and unsupported.

6. The Third Party herein should not be punished for the delay of the matter as this would be unjust.

6. The Third Party also filed a replying affidavit. It is averred that the suit herein and **Eldoret SPMCC No. 1799 of 1996 Catholic Diocese of Eldoret v Brooke Bond (K) Ltd & International Organization for Immigration** have different parties. That the additional parties herein have changed the nature of the suit and that the circumstances leading to the recording of a consent in the Eldoret suit are different. That allowing the application at hand would condemn the Third Party unheard. The court was urged to allow each party to ventilate their case.

7. I have considered the application, the response to the same and the submissions filed by counsel for the Defendants and for the Third Party.

8. The recording of the consent order in Eldoret case is not denied by the parties. The said consent was adopted as an order of the court and has not been set aside. However, the parties in the Eldoret case and the parties herein are not the same. The Plaintiff's herein, Philip Kipchirchir Murgor, Gilbert Kiptoo Murgor and Margaret Chemutai Murgor Stuhi (Administrators of the estate of the Late Gilbert Kiprotich Murgor) were not parties in the Eldoret case and were therefore not party to the consent recorded therein.

9. As stated in the case of **Agriculture Finance Corporation v Lengeta Ltd 1985 KLR 765**:

“As a general rule, a contract affects only the parties to it, and cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit or purports to give him the right to sue or to make him liable upon it. Needless to state, that the plaintiff cannot rely on that consent.”

10. The law on consent orders as stated by the Court of Appeal in the case of **Flora Wasike v Destimo Wamboko [1988] IKAR 625** is as follows:

“It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out.”

11. It has been submitted on behalf of the Applicants that a consent is an admission by the parties therein of the position taken therein and is in essence an agreement between the parties. That in the premises Order 13 rule 2 Civil Procedure Rules ought to be invoked and the Third party held 15% liable.

12. Order 13 rule 2 Civil Procedure Rules states as follows:

“Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the court may upon such application make such order, or give such judgment, as the court may think just.” Under the Civil Procedure Rules Order 14 rule 6, gives power to any

“The court may of its own motion, and may in its discretion upon the application of any of the parties to a suit, send for, either from its own records, or from any other court, the record of any other suit or proceeding and inspect the same”

13. The question herein is whether the Third Party by recording the consent admitted liability against the Plaintiffs. The Plaintiff's herein were not parties in the Eldoret case. The Eldoret case was a material damage claim between the Third Party herein (**Catholic diocese of Eldoret**) and **Brooke Bond Kenya Ltd & International organization for Immigration**. The deceased in the case at hand is stated to have been the driver of the motor vehicle registration No. KAD 328E belonging to Brooke Bond (K) Ltd. The claim herein is fatal accident claim.

14. With the parties herein being different from the Eldoret case and the nature of the claim being different, the Respondent cannot be said to have admitted liability in two totally different cases although the accident the subject matter of the claim is said to be one and the same.

15. The recording of a consent/compromise on liability is a matter between the parties therein and the court would normally not go behind the consent/settlement by the parties to question the reasons behind the recording of the consent. It may as well be, as submitted by the Respondent, that a party can choose to adopt a position detrimental to it just for the sake of entering into an amicable settlement.

16. With the foregoing, I find no merits in this application and dismiss the same with costs.

Date, signed and delivered at Nairobi this 16th day of Dec., 2020

B. THURANIRA JADEN

JUDGE