



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL CASE NO.473 OF 2016

VICTORIA INSURANCE BROKERS.....PLAINTIFF

VERSUS

BRITISH AMERICAN INSURANCE CO.LTD.....1ST DEFENDANT

SWINNS INSURANCE AGENCY.....2ND DEFENDANT

RULING

(1) Before this Court for determination is the Preliminary Objection dated **14th January 2019** in which **VICTORIA INSURANCE BROKERS** (the Plaintiff herein) prays that the court strike out **“in limine”** the Notice of Motion dated **31st December 2018** filed by **SWINNS INSURANCE AGENCY** (the 2nd Defendant herein). The Preliminary Objection was opposed.

(2) The Court directed that the Preliminary Objection be heard first and further directed that the same be canvassed by way of written submissions. The Plaintiff filed their written submissions on **15th February 2019**, whilst the 2nd Defendant filed their submissions on **11th March 2019**.

BACKGROUND

(3) The Plaintiff in this matter filed a suit by way of the Plaint dated **22nd November 2016** seeking judgment as against the 1st and 2nd Defendants jointly and severally for:

“(a) special damages of Kshs.23,834, 791.15

(b) Costs of this suit

(c) Interest on (a) and (b) above

(d) Such other relief this court may deem just.”

(4) The matter was referred to Court Annexed Mediation and the parties reached a settlement encapsulated in the Mediation Settlement Agreement filed in Court on **26th February 2018**. The said Mediation Agreement was adopted by the court on **13th March 2018**. The Mediation Agreement provided for the mode of payment of the sum of **Kshs.3,000,000/=** due from the 2nd Defendant to the Plaintiff, vide Clause 3 of the Agreement under the heading **“Financial claim”** which provided as follows:-

“Financial Claim

3.1 Victoria Insurance Brokers Limited agrees to withdraw in its entirety, its claim of Kshs.22,000,000(Twenty two Million shillings) together with interest and agrees and accepts Kshs.3,000,000 (three Million shillings) as full and final settlement for its financial claim on British American Insurance Company Limited and Swinns Insurance agency.

3.2 Victoria Insurance Brokers Limited acknowledges that prior to this mediation proceedings it had received Kshs.2,000,000/= (Two Million shillings) from Swinns Insurance Limited upon signing.

(5) On **26th February 2018** the **2nd** Defendant made a payment of **Kshs.1,000,000/=** to the Plaintiff which payment is acknowledged by the Plaintiff. However instead of proceeding to settle the balance of **Kshs.2,000,000/=** in accordance with the terms of the Mediation Settlement Agreement, the **2nd** Defendant filed the Notice of Motion dated **31st December 2018** seeking orders that:-

“(a) SPENT

(b) SPENT

(c) THAT this Honourable court be pleased to grant leave to the Defendant to liquidate the outstanding decretal sum of Kshs.2,000,000/= by paying a lump sum of Kshs.500,000/= and the balance of Kshs.1,500,000/= by making 15 monthly installments of Kshs.100,000/= payable by the 5th of each month.

(d) THAT the Plaintiff/Respondent be restrained from levying execution as long as the Defendant pays the proposed monthly instalments.

(e) THAT the cost of this Application be in the cause.”

(6) Before the above application could be heard the Plaintiff filed this Notice of preliminary Objection dated **14th January 2019** seeking to have the same struck out on the following grounds:-

There was a negotiated Mediation Agreement which provided for payment by installments.

(i) This Court lacks jurisdiction to entertain an application for review or appeal from the agreement.

(ii) The mediation agreement was entered by the 2nd Defendant with the full knowledge of the circumstances.

(iii) The Contract giving rise to the claim were entered into by Ricardo Nyantika in 2016 long after the demise of his partner.

(iv) The goods attached do not form any description of “tools of trade” and are attachable to settle the decretal sum.”

The Court directed that this Preliminary Objection be disposed first.

Analysis and Determination

(7) The Plaintiff submitted that the Court had no jurisdiction to review or amend a Mediation Settlement Agreement as once such an agreement is adopted by the Court it becomes like a consent and is enforceable as a judgment of the court. They submit that the **2nd** Defendant cannot now seek to appeal against the terms of Mediation Agreement. That there is no evidence that the **2nd** Defendant was coerced into executing the Mediation Agreement and there is no evidence of mistake or misrepresentation.

(8) On its part the **2nd** Defendant does not dispute the existence of the Mediation Agreement or the terms thereof. The **2nd** Defendant submits that they are not seeking to review or to appeal against that Mediation Agreement but are merely asking to be allowed to settle the outstanding sum of **Kshs.2,000,000/=** in installments. They submit that by virtue of **Order 21 Rule 6** of the **Civil Procedure Rules 2010**, the Court does have the jurisdiction to hear and determine the application dated **31st December 2018**.

(9) In the case of **MUKHISA BISCUIT MANU-FACTURING COMPANY –VS- WEST END DISTRIBUTORS [1969] E.A 696** it was held:-

“A preliminary Objection is in the nature of what used to be a demurrer it raises a pure point of law which is argued on assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

(10) Does the Objection raised by the Plaintiff meet the threshold set out in the **Mukhisa Biscuit Case**. From the submissions made by the parties in this matter two issues arise for determination as follows;-

(i) Does the court have jurisdiction to consider and determine the Notice of Motion dated **13th December 2018**.

(ii) Should execution of the Decree proceed

(i) Jurisdiction

(11) In submitting that this court does not have the jurisdiction to consider the Notice of Motion dated **13th December 2018**, the Plaintiff posits that the said application amounts to nothing more than an attempt to review and/or appeal against the Mediation Settlement Agreement filed on **26th February 2018**. The Plaintiff cites **Rule 14(2)** of the **Mediation Rules 2015** which provides:-

“Any Agreement filed with the Mediation Deputy Registrar shall be adopted by the Court and shall be enforceable as a judgment or order of the Court.”

(12) It was further submitted that the **Mediation Settlement Agreement** having been filed on **26th February 2018**, the same qualifies as a judgment of the court and is enforceable as such. The Plaintiff relied on **Rule 16** of the Mediation Rules which provides that:-

“No appeal shall be against a Judgment or order of the court arising from mediation.”

(13) According to the Plaintiff the Mediation Settlement Agreement is akin to a consent judgment and therefore can only be set aside where mistake, mis-representation, coercion or undue influence have been proved [see **TRANSPORT WORKERS UNION –VS- CONSOLE BASE LTD [2015]eKLR**]

(14) On their part the 2nd Defendant readily concedes to the existence of a duly executed **Mediation Settlement Agreement** and readily concedes that the same was filed in court on **26th February 2018**. However the 2nd Defendant contends that their Notice of Motion dated **13th December 2018** is **NOT** an attempt to review or appeal against the Mediation Settlement Agreement. They submit that they are only seeking to be allowed to pay the decretal sum in installments and rely on **Order 21 Rule 12** of the **Civil Procedure Rules 2010**, which the 2nd Defendant submits authorizes the court to grant the orders sought. The 2nd Defendant submits that the existence of the Mediation Settlement Agreement does not oust the discretion granted to the court under **Order 21 Rule 12**.

(15) Having considered the opposing position of the Plaintiff and the 2nd Defendant I find that this is not a matter that can strictly be determined as a preliminary point. The court in my view does have the jurisdiction in light of the provisions of **Order 21 Rule (2)** to consider and determine the application to pay the decretal sum by instalment. For this reason I find that the Preliminary Objection must fail.

(16) Additionally I have perused the Mediation Settlement Agreement which was filed in court on **26th February 2018**. Clause 4 of the Agreement under the heading **“Dispute Settlement”** provides as follows:-

“4.1 Where a dispute arises out of or relating to this agreement, the parties to this agreement agree to refer the matter to other modes of dispute agreement.”

(17) The clause clearly provided for **“other modes of dispute resolution”** in the event of a dispute between the parties. The Court process is certainly a **“mode of dispute resolution.”** The Plaintiff having executed the Settlement Agreement which included the jurisdiction this court cannot now seek to oust the court’s jurisdiction in the dispute between the parties. The Agreement itself specifically provided for the court’s intervention by virtue of Clause 4.1 and this buttresses my finding that this court has full jurisdiction to determine the dispute between the parties.

(ii) Execution

(18) The 2nd defendant submitted that the Plaintiff has proclaimed his office furniture equipment and motor vehicle. He pleads that if the said items are carried away he will suffer irreparable loss, damage and harm. At this point the court was only dealing with the Preliminary Objection being the question of jurisdiction. The ruling on this issue will await the ruling on the substantial Notice of Motion. In the meantime I direct that the status quo be maintained.

Costs of this Preliminary Objection shall be in the cause.

Dated in **Nairobi** this ...5thday of **August, 2019**.

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Justice Maureen A. Odera