



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO. 34 OF 2014

BRIAN MUCHIRI WAIHENYA.....PLAINTIFF

-VERSUS-

JUBILEE HAULIERS LTD.....1ST RESPONDENT

VIPUL PATEL.....2ND RESPONDENT

GEMINIA INSURANCE CO. LTD.....INTENDED INTERESTED PARTY

RULING

1. Background to the Application dated 14th February 2018

In a judgment upon full hearing interpartes in this suit was delivered on the 4th May 2017.

The defendants were held wholly liable for the accident that occurred on the 8th February 2014 involving the Defendants vehicle No. KBR 566 N/ZD 5367 and another KAU 325B. The plaintiff was seriously injured, and the court awarded him by way of damages the sum of Kshs.28,925,844/= under different heads and costs.

2. The defendants preferred an Appeal to the Court of Appeal on the 5th May 2017 vide Nakuru CACA No. 88/2017.

By a court order dated 27th July 2017 the court ordered a stay of execution pending finalisation of the Appeal on condition that the judgment defendants pay to the decree holder Kshs.10M and the balance of Kshs.18,925,844/= to be secured by a bank guarantee which was done, pending hearing and determination of the appeal.

3. The court orders on payment to the plaintiff were not complied leading to execution proceedings against the defendants.

4. It is upon that when on the 10th October 2017 the parties on their own arrangements and volition drew and executed a **partial consent** that was filed on the 11th October 2017 where they apportioned liability between the insurance companies that had co-insured the accident motor vehicle KBR 566 N ZD 5367 – being First Assurance Co. Ltd and Geminia Insurance Co. Ltd at 50% basis.

5. I have looked at the **partial consent**. At paragraph 1 (d) thereof, it is stated that upon each party paying Kshs.5 Million (50%) to the plaintiff, there shall be a stay pending the hearing and determination of **Nakuru Court of Appeal Civil Appeal No. 88 of 2017**.

6. Though filed, I have not seen any record where the said partial consent was adopted as a court order by the court.

At all times, the firm Mukite Musangi & Co. Advocate acted for the plaintiff.

The partial consent was executed by Advocates for the respective parties ostensibly under their clients authority and instructions.

7. The Application

By a Notice of **Motion Application dated 14th February 2018**, brought under provisions of Order 51 rule 1, 45 rule 1 (b) of the Civil

Procedure Rules, and Sections 1A, 3A of the Civil Procedure Act, the applicant seeks the following orders

1. Spend

2. Leave be granted to M/S Geminia Insurance Co. Ltd to be enjoined as an interested party in this suit.

3. That there be a stay of execution of the partial consent order dated 10th October 2017 pending hearing and determination of this application.

4. That Paragraph (c) of the partial consent order dated 10th October 2017 be reviewed to remove the name of M/S Geminia Insurance co. Ltd from the consent.

5. The cost of the application be provided for.

8. Nelly Mwathi Head of Legal and Corporate Affairs of the applicant swore the supporting affidavit on the 14th February 2018 to the effect that there is a mistake and or error apparent on the inclusion of Geminia Insurance Co. Ltd in the consent, and that the said company did not consent to the partial consent.

9. The application is opposed by the defendants as well as the plaintiff by their respective Replying affidavits and written submissions.

I have carefully considered the arguments by the parties as averred in the Replying Affidavits, grounds for and against the application and the submissions. From the onset up to the conclusion of the case the applicant was not a party to the suit.

10. Interlocutory applications following the delivery of judgment were urged between the parties in the suit and a stay of execution orders and terms of the stay stated by the court. It is only after the terms of the stay orders were not complied with, leading to the defendants attachment of their movable properties that the applicant decided to approach the court to be enjoined in the already concluded case as an interested party and specifically for purposes of removing itself from the **partial consent** order dated 10th October 2017 – where the co-insurers of the accident vehicle are mentioned and their agreed share of liability stated by their respective advocates. This was not an issue in the case.

11. The Partial Consent

It is worth noting that the court was not involved in the crafting or in the agreement of the terms in the partial consent. I have also stated that there is no evidence on the court record that the said partial consent was adopted as an order of the court. As such the partial consent remains a consent between the parties, but not a court order.

12. In the case **Edward Acholla -vs- Sogea Satom Kenya Branch & 2 Others (2014) e KLR** the court held that

“A consent becomes a judgment or order of the court once adopted as such. Once adopted, it automatically changes character and becomes a consent judgment or order with contractual effect and can only be set aside on grounds which would justify setting aside, or if certain conditions remain unfilled, which are not carried out.”

13. See also **John Waruinge Kamau -vs- Phoenix Aviation Ltd (2015) e KLR** where the above was reiterated, and added that

“---- the court will not interfere with the freedom of contract and will not, merely because a man has made an improvident contract,relieve himself from its consequences.”

14. Under the provisions of **Order 45 CPR** an order of Review may be granted whenever the court considers it necessary to correct an apparent error or omission on the part of the court, that such error must be self-evident and ought not require elaborate arguments to be established -

National Bank of Kenya Ltd -vs- Ndungu Njau – Civil Appeal No. 211/1996.

15. What the applicant wants this court to do, and which is admittedly within its powers under **Order 45 CPR**, is to review the terms of the partial consent and remove its name therefrom. I have stated that as the said partial consent is not a court order, therefore it is unenforceable by the court.

16. Being a contract between the parties it is the parties themselves that ought to interfere with their freedom of contract and change its terms and conditions.

See **John Waruinge Kamau case (Supra)**. Further it is to be understood and noted that the applicant Geminia Insurance Co. Ltd is not a party to this suit which then creates a challenge unless the court allows its enjoinder – prayer 2 of the application which I shall deal with here below.

17. Having rendered as above on the partial consent that the implicant seeks to set aside, does this court have jurisdiction to entertain the application?

Issues

1. *Whether the court has jurisdiction to hear and determine the application.*

2. *Whether the court is functus officio*

18. In the celebrated case on court's jurisdiction – **Owners of the Motor Vessel “Lillian S” -vs- Caltex Oil (Kenya) Ltd (1989) KLR 1**, and cited in numerous decisions, it was held that it is plain that a question of jurisdiction ought to be raised and determined in the earliest possible opportunity for the courts determination as jurisdiction is everything, and without it, a court has no power to make one more step in the matter.

19. The **Supreme Court of Kenya in Raila Odinga and 2 Others – vs- IEBC and 3 Others (2013) e KLR** cited with approval the case **Samuel Kamau Macharia KCB & 2 Others (2072) e KLR**, the holding that

“---- where a court of law has no jurisdiction to entertain a matter before it, is not one of mere procedural technicality, it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings.”

20. This case is already escalated to the Court of Appeal.

The applicant who was not a party now seeks to be enjoined into the matter now pending before the Court of Appeal.

Section 6 Civil Procedure Act is specific that no court shall proceed with trial of any suit or proceedings that are directly and live or pending before another court as it would be against the principle of *subjudice* that requires the court to stay consideration of any suit or application where previous suit or application is pending determination by another court of competent jurisdiction - See **HCCA NO. 142 “B” of 2015 – Heritage Insurance Co. Ltd -vs- Patrick Kasina Kisilu (2015) e KLR**.

21. There is no dispute as to the above facts and the applicant is well aware of the same.

22. So would this court be in order to hear the applicants application? Is this court barred from doing so by the principle that it is *functus officio*? The doctrine of *functus officio* was well stated by the **Court of Appeal in Telkom Kenya Ltd -s- John Ochanda** (suing on his behalf and on behalf of 996 former Employees of **Telcom Kenya Ltd. (2014 e KLR** that

“Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon--

The general rule that final decision of a court cannot be re-opened derives from the decision of the English Court of Appeal in re-St Nazaire Co, (1879), 12 Ch.D 88. The basis for it was that the power to rehear was transferred by the Judicature Acts of the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions.---”

23. I agree with the applicants submission that the doctrine does not bar a court from entertaining a case it has already decided but is so barred from revisiting the matter in a merit-based re-engagement with the case once final judgment has been entered and a decree issued, meaning procedural interlocutory applications only.

24. It is plain and clear that this court having pronounced the final judgment and a decree drawn, being asked to re-engage itself and to interrogate whether or not the applicant ought to be enjoined in the suit at the late hour which is already pending before the Court of Appeal would in my very considered view be against the law and laid down principles of *functus officio*.

However, if it was a matter of correcting a clerical error or an incidental consequence of the final decision like execution proceedings or contempt of court proceedings that would be possible under the Civil Procedure Rules.

25. The matter of the applicant having been included by the plaintiff and the defendants in **“a partial consent,”** which the applicant thinks was without its consent, and therefore the need to have it enjoined into the suit cannot to defend it - in my mind can not be a plausible reason to have this case re-opened. In any event the case is already outside this court's jurisdiction.

26. Once a court has determined a case to finality and has performed all its duties it can not review or alter its judgment and any challenge thereto must be taken up by the higher Court, the Court of Appeal in this matter. I do not think that this court's inherent jurisdiction under Section 1A, 1B and 3A of the Civil Procedure Act can save the situation as presented by the applicant.

27. **Order 1 of the Civil Procedure Rules** deals with the matter of parties to suits and sets out in detail who may be joined as plaintiffs defendants substitutions and additional parties including interested parties. Had the applicant taken advantage of the provisions above during the pendency of the suit in the High Court it would not be in the predicament it finds itself into.

28. On the twin issues framed for determination, I come to a finding that this court has no jurisdiction to hear and determine the application dated 14th February 2018 as doing so would be against the principles of *subjudice* and *functus officio*.

29. In line with the holding in the **Owners of Motor Vessel “Lillian S”**, I lay down my tools as I have no jurisdiction to continue to hear the

application before me.

That having been said, I proceed to dismiss the application dated 14th February 2014 with costs to the plaintiff and the defendants payable by the intended interested party.

Dated, signed and delivered this 20th day of December 2018

J.N. MULWA

JUDGE