



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION**  
**CIVIL SUIT NO. 462 OF 2007**

**MILLY GLASS WORKS LIMITED.....PLAINTIFF**

**- VERSUS -**

**STARLIT INSURANCE BROKERS LIMITED.....1<sup>ST</sup> DEFENDANT**

**JUBILEE INSURANCE COMPANY OF KENYA LIMITED.....2<sup>ND</sup> DEFENDANT**

**KENINDIA ASSURANCE COMPANY LIMITED.....THIRD PARTY**

**CONSOLIDATED WITH HCCC NO. 103 OF 2007**

**MILLY GLASS WORKS LIMITED .....PLAINTIFF**

**VERSUS**

**STARLIT INSURANCE BROKERS LIMITED.....DEFENDANT**

**KENINDIA ASSURANCE COMPANY LIMITED.....THIRD PARTY**

**RULING**

1. The 1<sup>st</sup> defendant, **STARLIT INSURANCE BROKERS LIMITED**, have asked the court to strike out the suits on the grounds that the said actions are an abuse of the process of the court.
2. It is common ground that in **HCCC No. 462 of 2007**, the plaintiff's claim was against the 2 defendants jointly and severally, for Kshs. 11,407,960/-, in respect to Special Damages payable under the **MACHINERY BREAKDOWN POLICY**.
3. The said claim is said to constitute the loss suffered by the plaintiff, **MILLY GLASS WORKS, LIMITED**, after the **STARLIT INSURANCE BROKERS LIMITED** failed to enhance the insured value from Kshs. 79,400,000/- to Kshs. 296,600,000/-.
4. **MILLY GLASS WORKS LIMITED** (hereinafter "**MILLY GLASS**") had taken out a policy of insurance with **JUBILEE INSURANCE COMPANY OF KENYA LIMITED**. Under that

- policy **MILLY GLASS** had insured its Furnace and accessories for a total sum of Kshs. 79,400,000/-.
5. That original policy is said to have lapsed on 31<sup>st</sup> March 2006.
  6. Thereafter, **MILLY GLASS** says that it instructed **STARLIT INSURANCE BROKERS LIMITED** (hereinafter “Starlit”) to renew the policy for one year, with effect from 1<sup>st</sup> April 2006.
  7. However, in respect to the renewal, **MILLY GLASS** wished to insure the Furnace and accessories for the sum of Kshs. 296,600,000/-.
  8. On 11<sup>th</sup> May 2006, there occurred a breakdown at the throat of the Furnace of the Plant. Temporary repairs were carried out to stop the leakage of the molten glass. Those repairs enabled **MILLY GLASS** to continue with production, whilst waiting for the re-building of the Furnace.
  9. In August and again in September 2006, the Furnace broke down again. Following those 2 breakdowns, the Furnace was repaired, and thereafter production went on.
  10. On 19<sup>th</sup> October 2006, the Furnace was shut down, to allow for major repairs to be undertaken. The repairs were completed in November 2006, and on 10<sup>th</sup> November 2006 the Furnace was re-heated.
  11. Jubilee Insurance instructed messrs **CUNNINGHAM LINDSEY**, as the Loss Adjusters, who then assessed the losses which the plaintiff had suffered, as amounting to Kshs. 18,233,746/-.
  12. It would appear that if the policy of insurance was for property valued at Kshs. 296,600,000/-, Jubilee Insurance may have been obliged to pay to **MILLY GLASS**, the sum of Kshs. 18,233,746/-.
  13. However, because Jubilee only had information that the insured property was worth Kshs. 79,400,000/-, the said Jubilee Insurance, the insured was paid Kshs. 6,825,786/-.
  14. As a consequence, the insured claimed Kshs. 11,407,960/- from the Insurance Broker and the Insurer. The insured has also claimed a further sum of Kshs. 6,825,786: this latter amount has been claimed from the Insurance Broker, Starlit.
  15. When Starlit learnt of the payments which Jubilee Insurance had made, and when Starlit became aware of the terms upon which the payments were made, Starlit concluded that the plaintiff could not continue to, thereafter, pursue their claim against Starlit.
  16. After **MILLY GLASS** was paid by Jubilee Insurance, they withdrew the case against Jubilee Insurance.
  17. It was for that reason that Starlit have now come to court requesting that the case against them be struck out, as it constitutes an abuse of the process of the court.

Why does Starlit consider the claim an abuse of the process of the court?

18. The applicant says that it is because the insured already accepted payment in full and final settlement in respect to the loss and damage which arose from the breakdown of the **HEYER MELTER OF FURNACE II**, on or about 11<sup>th</sup> May 2006.
19. The applicant submitted that when a claim is made against two or more persons, who are said to be “*jointly and severally liable*”, the claimant may recover the sums claimed from any one of the defendants or from a number of such defendants or from all the defendants.
20. However, as soon as the claimant had recovered the money from any of the defendants, the claim against all the defendants was extinguished.
21. It is the understanding of the applicant that when the plaintiff herein accepted the money which Jubilee Insurance offered to it in full and final settlement, that constituted an **ACCORD AND SATISFACTION**.
22. According to Starlit, the accord was the Agreement between **MILLY GLASS** and **JUBILEE INSURANCE**, which was in the form of the Discharge Voucher signed by the plaintiff.
23. The alleged accord and satisfaction is said to constitute a **RELEASE** of Starlit from the claims which the plaintiff had made against them.
24. Although the Discharge was signed between the Insurer and the Insured, the applicant, who was the Insurance Broker, also asserted that they too were released, as the claims against the Broker was the same one that gave rise to the claim which the Insurer had settled.
25. Furthermore, the wording of the Discharge Voucher did not, in the opinion of the Broker, leave any room for doubt about the finality of the settlement. The Broker emphasized the fact that the

Insured had acknowledged that the payment was;

*“in full and final settlement of the plaintiff’s claims past, present and future, arising from the breakdown of its Furnace II on 11<sup>th</sup> May 2006”.*

- 26.If all such claims had been settled, to the satisfaction of the plaintiff, the Broker submitted that there cannot have remained any other claims arising from the same incident.
- 27.If the plaintiff had wished to reserve any portion of its claim, the Broker believes that it would have been easy enough for the plaintiff to do so. But because the plaintiff had not reserved any such rights, to claim anything further, arising from the incident which gave rise to the case herein, the Broker argued that all claims in these 2 cases were extinguished.
- 28.It was for those reasons that the Broker urged the court to strike out the claim against it.
- 29.But the plaintiff reasoned that the Broker owed it a fiduciary duty of care, and that the Broker breached that duty.
- 30.The plaintiff pointed out that the Broker appeared to have failed to remit to the Insurer the fact that the renewed policy of insurance was for a value which was much higher than that which the first policy of insurance covered.
- 31.According to the plaintiff, it did remit to the Broker the premiums which were commensurate with the enhanced value of the renewed policy.
- 32.Having met its obligations to the Broker, the plaintiff would have expected the Insurer to pay out compensation calculated on the basis of the enhanced value of the renewed policy of insurance.
- 33.However, the Insurer only paid out compensation calculated on the basis of the original value.
- 34.As the plaintiff was of the view that the sums paid to it by Jubilee Insurance constituted only a partial compensation, the plaintiff insisted that it was entitled to look to the Broker for the balance of the compensation which the plaintiff would have received if the Broker had forwarded the enhanced premiums to the Insurer.
- 35.The failure by the Broker to renew the policy for an enhanced sum; and the failure by the Broker to forward to the Insurer, the enhanced premiums were construed, (by the plaintiff) as constituting a proper foundation for sustaining the claim against the Broker.
- 36.Having given due consideration to the application, I note that the claims against the Insurer and the Broker were joint and several. That implies that there was always a possibility that the court could hold the 2 defendants liable jointly or severally for the claims of Kshs. 11,407,960/- in HCCC No. 462 of 2007.
- 37.If the court had made a finding that the two defendants were jointly and severally liable, the plaintiff could only recover the decretal sum once. It would then be barred from seeking to recover anything more from the other party.
- 38.Even if there had been a settlement involving all the 3 parties, the plaintiff could only be entitled to recover the settlement amount, regardless of whether it was from one party or both the parties.
- 39.Meanwhile, in HCCC No. 103 of 2008, the plaintiff’s claim against the defendants asserted that they were severally liable.
- 40.Of course, even when parties are held to be severally liable, the plaintiff cannot recover more than the total amount claimed.
- 41.The Broker is not asserting that the plaintiff was trying to recover more money than was claimed. The Broker’s argument was that when the Insured and the Insurer settled the claims for a sum that was less than the amount claimed in the Plaint; and after the Insured thereafter executed a Discharge Voucher, the Insured was barred from further pursuing the claims against the Broker.
- 42.It is understandable that when a party confirms that he was satisfied with the amount of money he was paid, in relation to his claim; and that he would have no other or further claims, the party should not thereafter be allowed to pursue further or other claims emanating from the same cause of action.
- 43.It would therefore follow that the plaintiff herein cannot be permitted to pursue any other or further claims against Jubilee Insurance Company of Kenya Limited.
- 44.However, the question that then arises is whether or not the Discharge Voucher executed between Jubilee Insurance and Milly Glass Works Limited, would also constitute a bar to the plaintiff pursuing its claims against Starlit Insurance Brokers Limited.
- 45.First, it is clear that the Broker is not a party to the Discharge Voucher. But it cannot also be

overlooked that the payment received from Jubilee Insurance was said to be;

*“...in full and final settlement of all our claims past, present and future in respect of the **MACHINERY BREAKDOWN LOSS OF PROFITS CLAIM FOLLOWING DAMAGE TO FURNACE II** on or about 11/05/2006”.*

46. Does the failure to limit the voucher to only such claims as the Insured would otherwise have against the Insurer, imply that the Discharge Voucher would be valid against the whole world?
47. In my considered view, the answer stems from the fact that the Discharge Voucher is an agreement between the parties cited in it. Ordinarily, when two parties execute an agreement, they would not purport to bind a third party.
48. The Discharge Voucher did not name the Broker. Therefore, on its face, it cannot be said to apply to the said Broker. But then, the Broker herein is not just any person; it is the party who brought together the Insured and the Insurer. The Broker was an agent in the transaction which gave rise to the Insurance Policy between the Insurer and the Insured.
49. If the Broker's liability was premised solely on the fact that it was an agent of the Insurer, who was a disclosed principal, it is conceivable that the actions of the Insurer would have bound the Broker.
50. But the plaintiff's claims herein are directed at the Broker for its alleged failure to discharge its fiduciary duty to the Insured. In effect, the claim against the Broker, in so far as it is perceived to be joint and several against both the Insured and the Broker, cannot be said to only flow from the agency position of the Broker.
51. In **BRITISH RUSSIA GAZETTE & TRADE OUTLOOK LTD VS ASSOCIATED NEWSPAPERS LTD (1933) 2 K.B 616**, at page 643, Scrutton L.J. expressed himself thus;

*“Accord and satisfaction is the purchase of a release from an obligation whether arising under contract or tort by means of any valuable consideration, not being the actual performance of the obligation itself. The accord is the agreement by which the obligation is discharged. The satisfaction is the consideration which makes the agreement operative”.*

52. In effect, for there to be accord and satisfaction there has to be an agreement and consideration which makes the agreement operative.
53. In **JAMES WALLACE PROPERTY LTD VS WILLIAM CABLE LTD (1980) 2 NZLR 187**, the Court of Appeal for New Zealand stated as follows concerning Accord and Satisfaction;

*“In that it involves the acceptance of something less than the carrying out of the contract itself, accord and satisfaction differs from a Discharge by performance. It is a new agreement under which the party in default is relieved from his former liability by a promise to do something other than what he was obliged to do by his former contract. It is the essence of an accord that there must be an agreement. Whether or not there is an agreement is a question of fact, not law, to be determined from the circumstances of each case”.*

54. In this case, the Broker is not saying that there was an agreement between the Insured and the said Broker, from where the alleged Accord and Satisfaction flow.
55. The only agreement which the Broker appears to peg its contention, is between the Insured and the Insurer. Therefore, it does appear that the Broker has failed to discharge the onus of demonstrating the existence of the agreement between it and the Insured.
56. Secondly, the Broker has not demonstrated to the court that it provided any consideration to the Insured. In my understanding, it was only the Insurer who provided consideration to the Insured.
57. Thirdly, the consideration flowing from the Insurer to the Insured does not appear to be less than what the Insurer was liable to pay under the policy of Insurance. I say so because the Insurer appears to have been meeting its full obligation under the policy of Insurance in which the insured value was Kshs. 79,400,000/-. Therefore, it cannot be said that the case between the Insurer and the Insured was settled for a sum that was less than that which the Insured would have been

- entitled to under the policy of Insurance which the Insurer was a party to.
58. In the result, there is no merit in the application by Starlit Insurance Brokers Limited, who had sought the striking out of the plaint.
59. If the Broker failed to notify the Insurer of the enhanced sum for which the policy of insurance was being renewed, or if the Broker failed to remit the enhanced premiums to the Insurer, those are issues for which the Insurer is unlikely to be held accountable. Therefore, there still remain claims which the plaintiff could pursue against the Broker, even after the claim against the Insurer was settled.
60. Therefore, the application dated 8<sup>th</sup> August 2014 is dismissed, with costs to the plaintiff.

**DATED, SIGNED and DELIVERED at NAIROBI this 26<sup>th</sup> day of May 2015.**

**FRED A. OCHIENG**

**JUDGE**

***Ruling read in open court in the presence of***

.....for the Plaintiff

.....for the 1<sup>st</sup> Defendant

.....for the 2<sup>nd</sup> Defendant

Collins Odhiambo – Court clerk