



REPUBLIC OF KENYA
IN THE HIGH OF KENYA
AT MOMBASA
CIVIL CASE 86 OF 1999

GLADYS MERCY OSORO.....PLAINTIFF

VERSUS

MOSES M. OSORO.....DEFENDANT

RULING

1. By a Plaintiff dated 9th April, 1999, the Plaintiff sued the Defendant for compensation for dispossessing her of motor vehicle registration number KZU 544, Isuzu *matatu*. The Defendant filed a defence dated 28th January, 2000, denying the allegations. At paragraph 6 of the Defence he indicated he would crave leave to file Third Party proceedings against Mrs. Helen Moige Osoro as a Third party to the suit.

2. The Defendant filed and served Third party proceedings on the said Helen Moige Osoro. The Defendant sought:

"...Indemnity and/or contribution on the grounds that any activity done herein in respect of the suit motor vehicle was by yourself, servants or agents under your express authority or knowledge and and you are fully liable for actions and those of your servants or agents."

3. The Third Party filed her Defence on 12th July, 2000. She denied the allegations in the Plaintiff and asserted that the Log Book of the suit vehicle had been transferred to her by the Plaintiff on or about 10th September, 1993. She also admitted the court's jurisdiction.

4. On 2nd August, 2000 the Defendant filed a notice of motion seeking the following orders:

- "1. That judgment on admission be entered for the Defendant against the Third Party.***
- 2. That the third Party be condemned to indemnify the Plaintiff as prayed in the Plaintiff.***
- 3. That the Third Party be condemned to meet the costs of the application."***

This application was listed for hearing on 8th November, 2000.

5. On that date, the Plaintiff and the Third Party appeared before Hon. Justice P.N. Waki, through their respective counsel, Mr. Gikandi and Mr. Gichana. There was no appearance for the Defendant. The record of proceedings shows that the following transpired: Mr. Gichana for Third Party referring to the application dated 1st August, 2000 stated:

"Judgment may be entered against the third party in the Notice of Motion dated 1st August, 2000 may the matter be heard together with the application."

The hearing was fixed for 3.30 p.m.

6. Mr. Ole Kina held brief for Mr. Gikandi for the Plaintiff, Mr. Mogaka held brief for Nyamboye for the Defendant and Mr. Gichana appeared for the Third Party. The following consent was recorded and signed for by all counsel and the judge:

"By consent the application dated 1st August, 2000 be and is hereby allowed. Costs in the cause."

7. Subsequently, on 7th March, 2012 during the hearing of the suit, there was a dispute concerning the interpretation of the consent entered into on 8th November, 2000. The court asked parties to discuss and report back their agreement. Upon failure to agree, the court directed the parties to file submissions on the disagreement, which they did.

8. The Plaintiff's position is, in a nutshell, that a consent order operates like a court order. It is binding on all parties and cannot be set aside unless obtained by fraud, collusion or an agreement contrary to the policy of the court. The consent brought the suit to an end and the Plaintiff seeks judgment. They rely on the case of **Kenya Commercial Bank vs Specialised Engineering Co. Ltd.**[1982] KLR, cited with approval in **Peter G. Nganga vs Standard Chartered Bank of Kenya Ltd & Another** [2006] e KLR.

9. The Defendant argues that pursuant to Order 1 Rule 22 (Order 1 Rule 18 Old Civil Procedure Rules), where a Third Party has entered appearance, the Defendant giving notice may apply for directions and the court will order the question of liability as between the Third party and Defendant to be tried in such manner at or after the trial of the suit, or may order such judgment as the nature of the case may require to be entered in favour of the Defendant. Thus, argues the Defendant, the import of the consent was that any judgment after trial that would be entered in favour of the Plaintiff, should the Plaintiff prove its case, would be borne by the Third Party. Accordingly, the matter should proceed to hearing as the issue of liability between the Defendant and Third Party has been dealt with. The Plaintiff must, however, prove its case, and if successful the Third Party takes responsibility.

10. On his part, the Third Party submits that prayer (a) of the consent affects only the Defendant and not the Third Party, and the Third Party must now litigate his case as between himself and the Plaintiff. The consent means that the Defendant's case was absolved by the consent and there remain only issues between the Plaintiff and Third Party which should be resolved by a full trial.

11. Having considered the background to this matter and the parties' submissions herein, my view of the consent is as follows: The application on which the consent was premised and subsequently entered was grounded on, and invoked, Order XII Rule 6 and Sections 3A and 63(e) of the Civil Procedure Act and Rules. Order XII Rule 6 provides:

"6. 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."(underlining mine)

12. The Defendant/Applicant clearly did not seek directions, as suggested by the Defendant, pursuant to Order 1 Rule 18 (now Order 1 rule 22). He sought judgment on admissions without waiting for the determination of any other question between the parties.

13. The first step in understanding the consent order, therefore, is to identify the admissions of fact made by the Third Party, which entitled the Defendant to such orders or judgment.

14. The Third Party Defence was filed on 12th July, 2000. There are two levels of admission in it: those directed as to the Plaintiff; and those as to the Defence.

The admission to the Plaintiff are:

- By paragraph 1 - as to the description of parties

- By paragraph 2 - as to the fact that:

"(Admits that)...Motor Vehicle Registration Number KZU 544 was registered in the name of the Plaintiff as alleged in paragraph 4 of the Plaintiff but avers that the Log Book and Transfer had been effected by the Plaintiff in favour of the Third party on or about 10th September, 1993."

- By paragraph 6 - the contents of the Defence are admitted

- By paragraph 7 - the jurisdiction of the court is admitted.

So, as between the Third Party and the Plaintiff, orders were capable of being given on the above stated admitted facts. Since, however, the whole Defence is admitted, it is also necessary to identify the facts in it that are consequentially admitted.

15. The Third Party's admission of the Defence as a whole must be treated in relation to each paragraph of the Defence The admissions are:

· Under Defence paragraph 2 - The Third Party admits the contents of the descriptive paragraphs of the Plaintiff that is, paragraphs 1 and 2.

· Under paragraph 3-The Third Party admits that the Defendant is a stranger to the contents of paragraph 3 of the Plaintiff thus denying that the Plaintiff was at all material times the lawful owner of the vehicle Registration Number KZU 544.

· Under paragraph 4 - that the Defendant denied paragraph 4 of the Plaintiff is admitted by the Third party.

· Under paragraph 5 - that the Defendant denied paragraph 5 and 6 of the Plaintiff is admitted by the Third Party.

· Under paragraph 6 - that the Defendant would seek leave to file third party proceedings is admitted by Third Party.

· Under Defence paragraph 7 - the jurisdiction of the court admitted by the Defendant is equally thereby admitted by the Third Party.

16. In the result, the consent order entered into between the parties pursuant to the notice of motion dated 1st August, 2000, gave judgment in terms of paragraph 2 of the Third Party Defence as to admitted facts on the pleadings. Now, Order XII Rule 6 also provides for orders where there is admission of facts:

"... either on the pleadings (as abovestated) or otherwise"

Since there had been no admission of facts "**otherwise**", that is, beyond or outside the pleadings, there was nothing further upon which an order or judgment under Order XII Rule 6 could be founded.

17. I therefore determine finally that, save for the admission in paragraph 2 of the Third Party defence, the consent orders recorded on 1st November, 2000 have no substantive effect on the suit as their effect is *in*

vacuo.

Consequently, the suit is to proceed in the usual way unless the parties or the Defendant and Third Party now enter into a subsequent consent that affects the proceedings.

Dated, signed and delivered this 27th day of September, 2012

R.M. MWONGO
JUDGE

Read in open court

Coram:

1. Judge: Hon. R.M. Mwongo
2. Court clerk: R. Mwadime

In Presence of Parties/Representative as follows:

- a).....
- b).....
- c).....
- d).....