REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Suit 1385 of 1995

DUNCAN GIKERI NJUGUNA ……..……..PLAINTIFF/APPLICANT

-VERSUS –

P. M. G. KAMAU ……..….1ST DEFENDANT/RESPONDENT

PETER KARU ……..…….2ND DEFENDANT/RESPONDENT

RULING

The plaintiff vide Notice of Motion dated 31st October, 2008 premised under Order XII Rule 6 of Civil Procedure Rule and Sec. 3A of Civil Procedure Act, prayed for an order:

> *"That the Judgment on liability be entered as admission, and this cause do proceed to hearing on assessment of general and special damages".*

The application is supported by grounds set forth on its face as well as by a supporting affidavit sworn on 31st October 2008 by Ngugi B. Gachogu – the learned counsel for the plaintiff.

In short, the plaintiff relies on Judgment delivered in HCCS No. 1386/1998 on 30th September, 1999. The defendants in the said case were the same as all the defendants in the present suit. The cause of action in the said suit also arose from the road accident as is averred in the present suit. The plaintiffs are different in both cases.

In the said case, the consent judgment on liability was recorded by the counsel presenting both parties. I may point out that the Advocate for the Defendants in the said case was M/s Mereka & Co. Advocates who were, as is the common ground, appointed by the Defendants' Insurance company namely Stallion Insurance Company. It is also the common ground that the said Insurance Company was placed under statutory management in the year 2000.

The above are the material facts involving the application on hand.

Mr. Njogi, the learned counsel for the Plaintiff/Applicant, simply stated that in view of the facts of the matter, and in view of the fact that in respect of a co-passenger of the plaintiff, the defendants had conceded 100% liability and thus in view of the similar circumstances in the present suit, they are estopped from denying the liability conceded earlier on.

The affidavit in support sworn by the learned counsel reiterates the above facts. Although Mr. Machira, the learned counsel for the Defendants/Respondents has raised an issue on such mode of supporting affidavit, I shall not place any aspersion on its contents or the mode

of filing because, the facts averred are mainly the facts which are as per the record of the court and a legal point of estoppel. I further note that the principle which abhors an Advocates swearing an affidavit on behalf of the client is in respect of averrements which are contentious and may force the Advocate filing the affidavit to be cross examined.

Mr. Machira, the learned counsel for the Defendants opposed the application and made the submissions in law and also on facts averred in replying affidavit sworn by the 1st defendant on 20th April, 2009.

It is averred in the said affidavit that the consent entered into five cases enumerated in paragraph 3 of the replying affidavit were so entered by Stallion Insurance without his knowledge, authority or consultations. The firm of Advocates were also appointed by the insurance company and he was unaware of any negotiations which went in those cases. The several actions and proceedings taken and filed in the present case were detailed upto filing of the present application. I may point out that the application dated 30th September, 2002 made by the Plaintiff to strike out the defence filed in the present case was dismissed on 21st November, 2002 by Hon. Kuloba J. and not by Lady Justice Ang'awa as contended in the affidavit. The reason for such dismissal was simply that plaintiffs in those cases are different and different considerations might arise. I also note that the said application was made on the basis of the Judgment made in HCCS No. 1386/1995 and on the same grounds. I took liberty to note these facts as they are from the record of this case as well as are very relevant and material in respect of this application.

Mr. Machira further contended that the application deserves to be dismissed as it does not satisfy the requirements of law stipulated in order XII Rule 6:-

> *"Any party 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 fit."*

It is stressed that no admission either in writing or otherwise is made by the Defendants, that the Plaintiff in the Judgment relied upon is different, that the admission must be unequivocal, in writing and be borne out either from pleadings or any documents as per Notice to Produce. (See Order XII Rule 7).

I do tend to agree that the consent entered into in another Judgment even if the cause of action may be same but with another Plaintiff cannot automatically be transferred into this case where there is denial of liability in the Statement of Defence. Moreover, I do frown upon the second attempt in disguise to achieve the same result when the earlier application to strike out the Defence was dismissed.

In short, I do not find that there is merit in the application on hand and thus the same is dismissed with costs.

Orders, accordingly.

Dated, signed and delivered in Nairobi this 16th day of February, 2010.

K. H. RAWAL

JUDGE