



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MACHAKOS

Civil Suit 19 of 2006

INVESCO ASSURANCE CO. LTD.....1ST
APPLICANT/PLAINTIFF

JOSEPH MUTUNE2ND
APPLICANT/PLAINTIFF

VERSUS

JACINTA KOKI MUSUMBI & 29 OTHERS.....
RESPONDENTS/DEFENDANTS

R U L I N G

This suit was filed on 23.2.2006. It cites the 1st defendant, Jacinta Koki Musumbi and twenty – nine others as defendants. The plaintiff averred in the plaint that the defendants filed separate and individual civil suits against the plaintiffs at Machakos, Kangundo, Kitui and Yatta Law Courts, claiming compensation for injuries sustained in a motor accident involving motor vehicle registration No.KAH 618G which allegedly occurred along Machakos-Kitui road on 23.9.1999. It is further averred by the plaintiffs herein that they plaintiffs', acting on some representations from the defendants, compromised the said 30 individual suits by either recording consent judgements or admitting authenticity of documents produced in evidence by the plaintiffs in the said cases, or failed to call the makers of those documents during the trials that took place in relation thereof. As a result the 30 defendants/respondents' herein, are said to be at various stages of executing most of the said judgements obtained against the plaintiffs herein.

In their final prayers in this suit the applicants/plaintiffs seek:-

- (a) A declaration that the said 30 suits listed in this plaint in paragraph 7 are fundamentally and materially defective and void ab initio.
- (b) A declaration that the plaintiffs should not be compelled to pay the decretal sums awarded in the said 30 suits.
- (c) A declaration that the plaintiffs herein be freed from any and all liability in those 30 suits.
- (d) General damages

- (e) Rescission of proceedings, judgments and awards and all consequential orders in the said 30 suits.
- (f) Costs and interest of this suit.

By an application dated 20.2.2006 brought by the plaintiffs, plaintiffs sought among other prayers, a stay of proceedings in the 24 named suits out of the said 30 suits aforementioned. In the same application the plaintiffs also sought a stay of execution in the same 24 stated suits although some of them had not reached judgements that would be executed. This court to preserve the subject matter however, made stay orders in only 9 of the said lower court cases and fixed the hearing interpartes on 26.4.2006 of the application for stay of proceedings and stay of execution, in respect of all the 24 cases of the 30 cases.

In the meantime the 30 defendants who are also the respondents in the application set down for a hearing on 26.4.2006, filed through the firm of L.M. Wambua & Company, representing defendants No's 2, 3, 4, 6, 7, 8, 11, 12, 21, 22, 26, and 30, a Notice of Preliminary Objection on a point of law. They raised the following points-

- a) That the issues raised in this application dated 20.2.2006 and this entire suit, are Res Judicata.
- b) That the entire suit herein against the 30 defendants is an abuse of the process of court as it amounts to a compound appeal against the said 30 suits, a procedure unknown to the law.
- c) That the entire suit against the 30 defendants in this suit is bad in law for want of a cause of action.
- d) That the issues raised in this application and the entire suit in respect of the defendant No. 6 is bad in law by virtue of Section 6 of the Civil Procedure Act as CMCC No.854 of 200 is still pending before a court of competent Jurisdiction.

The defendants argued their Preliminary points on 26.4.2006 as fixed. Mr. Wambua pointed out that the various judgments entered in the several lower court cases cited in the plaint and this application, were so entered after due process and according to the law. Most of them were duly heard and judgment entered in accordance with the law basing it on evidence adduced before the court or by consent judgment entered with the participation and full knowledge of the plaintiffs herein who were the defendants in the said 30 suits. Mr. Wambua contended that no appeals were preferred against those Judgments nor was any attempt made to review the judgments or set them aside, if indeed the plaintiffs' believed that the 30 suits were defective or had no cause of action. He accordingly thought that the process used by the plaintiff to file this suit is unknown in our law and abuses the principle of Res Judicata in all the concluded cases, and Res Subjudice in relation to **Machakos CMCC No. 854 of 2000**. He also submitted that the process is an abuse of court process.

Mrs Nzei who had joined the fray on behalf of the defendant in Machakos **CMCC NO.855 of 2000**, added her voice to that of Mr. Wambua. She said that the applicants/plaintiffs have no cause of action and that their suit is a non-starter.

Then came the turn of Doris M. Thangei of Muriu, Mungai & Company representing the plaintiffs/applicants, to respond to these Preliminary Objection on points of law. The plaintiffs had filed this suit under a lengthy plaint. They had also filed this application for stay of proceedings and stay of execution under an elaborate certificate of urgency with a similar supporting affidavit. The court may be excused for having expected fireworks from Doris M. Thangei. However when she stood up to reply, all she offered is a no contest. She said she did not wish to respond and left everything to court.

I have perused the pleadings as contained in the plaint. I also have perused the two affidavits supporting this application seeking orders of stay, sworn by one Paul Gichui, the Claims Manager of the 1st plaintiff/applicant. He admits in the affidavits, that many of the defendants have obtained Judgments against the first plaintiff in the lower court cases enumerated in the plaint and in the application. He also admits that the plaintiffs compromised what might have been their defences by making admissions to various documents presented in the said cases and admits accepting liability in most of them. In several

others judgment is shown to have been entered for the individual defendants against the plaintiffs after a hearing. There is no doubt now that the plaintiffs later discovered that the claims against them might have been based on what they now believe were false and fraudulent facts and circumstances. That might be so or not. What the plaintiffs did not deny is that the complained-about- judgments, were entered regularly and in most of those cases, after proper hearings or with the consent of the plaintiffs and thus making the judgements executable as decrees of the courts that passed them. The defendants argued that the plaintiffs did not appeal against those judgments if they were indeed aggrieved by their existence. Nor did the plaintiffs apply for reviews to set aside or modify the judgments which they claim were based on fraud or misrepresentations. It is not necessary to guess what the court might have done if such appeals or reviews were filed and pursued by the plaintiffs. That, however, is left to rest at that.

Moving back to the matters before the court, the situation being demonstrated by the facts before me, is that the individual defendants/respondents, obtained their various judgments after presenting adequate evidence before the trial court. In cases where judgments were entered with the consent of the plaintiff, it is presumed that the facts and evidence before the courts was such that it was adequate to convince the court that the defendants were entitled to have those judgments. It is of-course noted from the material before the court that the plaintiffs had hired a private investigator to find out whether the defendants' individual claims were genuine. The firm so hired appears to have confirmed that the claims were genuine and that that finding influenced the plaintiff to compromise their stand in favour of the defendants. However, considering the fact that the plaintiffs later realised that the investigator's report was incompetent or misleading means, in my view, that the plaintiffs or their agents, were either negligent, inadvertent or even reckless in the approach in the cases. This in my understanding means that the plaintiffs could have discovered the defendants' fraud in good time to file relevant defences and avoid comprising their rights. This is demonstrated by the fact that later they discovered what they allege was the truth – that the accident may not have taken place or if it took place, the defendants did not sustain the injuries upon which their court claims were based. The plaintiffs on the other hand, appear to have first entered defences in the cases against the majority or all of the defendants' cases. Later however, they appear to have compromised all the defences they had filed on the basis that the claims were genuine.

In my view, whether the judgments entered in all the lower court suits cited herein were entered by consent or through full hearings, the fact remains that they were final and conclusive proofs of the matters adjudged upon, therein, on the grounds on which they were based. Furthermore in view, those judgments were not based on fraud or misrepresentation which are the substance of this case. Also, they are final judgments of the inferior court(s) from which there could have been appeals to this court, even though no appeals were preferred. (see **Cross on Evidence (6th Edition, ButterWorths (1985) at Page 78**. And yet if I understand the plaintiffs case adequately, they have filed this suit in this court to directly challenge the Subordinate Courts' findings in the judgments in the suits cited herein.

It can be questioned whether the plaintiffs herein who had a right to file appeals or reviews to set aside the cited judgements but did not do so, are not in this suit, trying to appeal, but through the back door? In my view, and finding, the cited judgements and decrees could only be challenged through appeals to the next superior court of law. They could also be challenged in the same courts that passed the judgments, by a formal application for review under O.44 of the Civil Procedure Rules provided the conditions for review would be met. A third possible way for challenging the judgements would have been by an application to set aside under order 9A of the Civil Procedure Rules where judgements would have been entered in default of appearance or defence. Unless they are so defeated, the cited judgements in my view, remain valid and not fraudulent as claimed by the plaintiffs, who are bound by them.

In reference to such judgements and decrees it was succinctly put thus in **Hadkinson vs Hakinson [1952] AC 285:-**

“ A party who knows of an order whether null or void, regular or irregular, cannot be permitted to disobey it.... It would be most dangerous to hold that the suitors or their solicitors could themselves judge whether an order was null and void and whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question: that the course of a party knowing of an order which was null and void irregular and who might be

affected by it is plain. He should apply to the court that it might be discharged.”

What then are the plaintiffs in this suit after? In my opinion, they are attempting to appeal or to get review or to set aside the cited judgements, through the back door. That is a process which **Visram, J.** termed as “compound appeal” in the case of **United Insurance Co. Ltd vs. Lawrence Musyoka Wambua t/a L.M. Wambua & Co. Advocates Nairobi HCCC No. 1427 of 2000**. I repeat what His Lordship said in the said case, i.e. that our legal system does not know of any such procedure and that plainly, no suit using such procedure should be entertained in our jurisdiction. I am in agreement with that finding of **Visram, J.** Moreover as provided by Section 34 (1) of the Civil Procedure Act, Cap 21 of the Laws of Kenya:-

“ All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate court.”

In this case before me the plaintiffs in my finding, are trying to use this court, which is a different court, to discharge decrees passed in separate suits in which the parties are the same. They in my opinion have no legal basis to do so. At the risk of repeating what I earlier stated, the plaintiffs/applicants herein, could only challenge the cited judgments and decrees by appeals, or by settings aside or by reviews of the same. The assumption that they took none of those three courses is borne out by the fact that they have not attempted to say that they tried any of those options. Nor does the fact that they are using this fresh case to achieve the said purpose alone suggest that they attempted those other methods. If however they did so but failed, trying to use this complicated method in this suit to achieve their aim now, would not take them anywhere..

The above conclusion by this court would alone in my opinion justify a finding to the effect that this suit shows no cause of action and is incompetent and liable for striking out. However, Mr. Wambua also argued that this suit is res judicata each of subordinate suits cited herein within the definition provided under Section 7 of the Civil Procedure Act aforementioned, which provides thus:-

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

The above principle forbids a party from raising matters in subsequent proceedings which could and should have been raised in earlier proceedings. **Wigram, V.C.** put it as follows in the case of **Henderson vrs Henderson** (1843) 3 Hare, 100, at 115:-

“ Where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case and will not(except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case....”

The plea of res judicata thus applies except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgement, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time. Thus res judicata, is not, for this purpose, confined to the issues which the court is actually asked to decide. It instead covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised, that it would be an abuse of the process of the court to allow a new proceedings to be started in respect of them.

In the cited cases in the subordinate courts the herein defendants sought compensation in form of

damages against the plaintiffs herein, arising from a motor accident in which the plaintiff's therein who are defendants herein sustained injuries. The plaintiffs herein proved negligence and obtained damages. The defendants in those cases who are the plaintiffs in this suit, could have and probably raised the following possible defences:-

- a) that the accident did not occur at all or
- b) that if the accident occurred then it was not caused by the defendants or their driver but by the driver who was driving the motor vehicle carrying the plaintiffs or
- c) that the plaintiffs were not passengers in the accident motor vehicles at the material time or
- d) that the plaintiffs did not sustain the injuries they claimed to have sustained or
- e) that the facts forming the basis of the therein plaintiffs' cases i.e. that the accident took place and the plaintiffs therein sustained the injuries alleged, were false or a misrepresentation.

Indeed in my further understanding, had the defendants in the subordinate court cases in good time obtained, through the private investigating firm, the so called fraud or misrepresentations which they rely on in this case, the same could have formed their defences. The issue could have therefore clearly have formed part of the subject matter of the lower court litigations. As it stands now, the mere fact that the defendants in those cases, who are plaintiffs here, did not put forward the fraud or misrepresentation as their defences (probably due to negligence, inadvertence or even accident), cannot save them from the requirements of the principle of res judicata, if other requirements are otherwise met.

In this case as earlier found the plaintiffs are seeking to re-open cases properly concluded in the lower courts judgements. They are even seeking that those cases be dismissed or be struck out or that there be a rescission of proceedings, judgments or awards of all the cited cases. They seek such orders despite the fact that the basis of their prayer for such remedies i.e fraud and/or misrepresentation, could and should have been raised as possible defences in all those cases. In my view they are barred under the principle of res judicata, to do so, in view of the fact that the parties are the same and the issues are the same.

The end result therefore is that the points of preliminary objection raised herein, have merit and should be upheld by this court. Mr. Wambua sought that the court should strike out the plaint and dismiss the main suit and the application dated 20.2.2006. In view of the conclusions reached herein by this court, this suit and the application are hereby struck out and dismissed. The costs are to the defendants.

Orders accordingly.

Dated and delivered at Machakos on the **16th** day of **June, 2006**.

D.A. ONYANCHA

JUDGE

12/5/2006