REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI COMMERCIAL DIVISION, MILIMANI

CIVIL CASE NO. 412 OF 2004

JOHN KAGIRI KARUMBA.....PLAINTIFF

VERSUS

UNITED INSURANCE COMPANY LTD.....DEFENDANT

R U L I N G

The main order sought in this application **(by notice of motion dated 14th March, 2005**) is that judgment and decree herein and all consequential orders be set aside. There is an alternative prayer for an order to review the judgment and decree. The application is brought by the Defendant and is expressed to be brought under sections 3A and 80 of the Civil Procedure Act, Cap. 21 (the Act), Order 44, Rules 1 and 2 and Order 21, Rule 22 of the Civil Procedure Rules (the Rules) and also under all (unstated) enabling provisions of the law. The main ground for the application stated on the face thereof is that the court had no jurisdiction to enter interlocutory or final judgment in the matter and that therefore the judgment entered on 26th (not 20th as stated) August, 2004 was null and void ***ab initio***. The supporting affidavit sworn by one **MWIKALI MUTHOKA,** the legal officer of the Defendant, advances that argument, ***inter alia.***

The Plaintiff has opposed the application upon the main ground, as stated in the grounds of opposition dated 30th March, 2005, that it is ***res judicata*** on account of a previous application dated 10th September, 2004 heard and dismissed in a ruling thereon of 25th February, 2005.

I have considered the submissions of the learned counsels appearing. I have also perused the court record. Indeed the Defendant had applied by chamber summons dated 10th September, 2004 for the setting aside of the same interlocutory judgment. The Plaintiff opposed the application and the same was heard inter partes on 20th January, 2005. In a considered ruling dated 23rd and delivered on 25th February, 2005 this court (Waweru, J) dismissed the application. The principle of ***res judicata*** must surely apply to applications as it does to substantive suits. That principle is set out in section 7 of the Act which provides:-

> ***"No court shall try any suit or issue on 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 principle is elaborated by some six (6) explanations in the same section. Explanation No. 4 is in the following words:-

> **"Any matter which might and ought to have been made a ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit."**

I t is argued in the present application that interlocutory judgment was not available under the relevant rules of procedure, and that therefore the Deputy Registrar of the court had no jurisdiction to enter it on 26th August, 2004. But this is indeed a matter which might and ought to have been made a ground for the

earlier application to set aside. It must therefore, under the aforesaid explanation, be deemed to have been a matter directly and substantially in issue in the earlier application. The present application therefore, in so far as it seeks an order to set aside the interlocutory judgment (prayer No. 3 of application), is res judicata, notwithstanding that it has not been expressed to be brought under Order 9A, Rule 10 of the Rules as the earlier application. I so hold.

But the alternative prayer (No. 4) is for an order of review under Order 44, Rules 1 and 2 of the Rules upon the same ground that the Deputy Registrar had no jurisdiction to enter interlocutory judgment under the Rules. There has not been a previous application for review under Order 44 heard and determined on the merits. I note that in the aforesaid ruling dated 23rd and delivered on 25th February, 2005 the court did make a finding that the interlocutory judgment was regularly and properly entered. Although the issue of jurisdiction to enter the interlocutory judgment was not specifically pleaded in the earlier application it was touched upon by the learned counsels in their arguments. I will therefore not consider the issue a second time, notwithstanding that learned counsels have now made further arguments on the issue. There is thus no sufficient reason to review the interlocutory judgment.

In the premises I find no merit in this application. It is hereby dismissed with costs. Order accordingly.

DATED AND SIGNED THIS 9TH DAY OF JUNE, 2005 AT NAIROBI.

H.P.G. WAWERU

JUDGE

DELIVERED THIS 10TH DAY OF JUNE, 2005.