REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D.K. Kemei - J

MISC CIVIL APPL NO. 544 OF 2019

YH WHOLESALERS.....1ST APPLICANT

KIFARU HAULIERS.....2ND APPLICANT

-VERSUS-

KENYA ORIENT INSURANCE CO LTD.....1st RESPONDENT

AFRICAN MERCHANT ASSURANCE

COMPANY LIMITED.....2ND RESPONDENT

AND

POETH KAVINDU MUTINDA (*Suing as the Legal Representative of the estate of*

NZYOKI MUTINDA.....INTERESTED PARTY

RULING

1. The background of this application is that the interested party herein, **POETH KAVINDU MUTINDA,** filed **Mavoko Senior Principal Magistrate's Civil Case No. 356 of 2017** as personal representative of the estate of **NZYOKI MUTINDA** who allegedly died as a result of an accident that occurred on 8.2.2016 involving the applicants' motor vehicle registration number KBE 758V/ZC 2267. The judgement in the suit was entered against the applicants jointly and severally for the sum of Kshs 1,546,500/- with costs of the suit plus interest. The suit vehicle was insured by **Kenya Orient Insurance Limited,** the 1st respondent**.**

2. A decree for Kshs. 1,798,990/= was eventually drawn. A proclamation was issued to attach movable properties of the applicants and hence the instant application.

3. The applicants approached the court vide certificate of urgency as well as a notice of motion dated 28.11.2019, that was brought under section 1A (1) (2) (3), 3 and 3A of the Civil Procedure Act, Order 51 Rule 1 and Order 54 Rule 2(a) of the Civil Procedure Rules; Section 4(1) and 10(1) of the Insurance (Motor Vehicle Third Party Risks) Act CAP 405. The applicants sought the following orders;

a) Spent

b) That the honorable judge do give leave for the applicants herein to file the attached plaint under certificate of urgency and upon payment of the requisite fees same be deemed as duly filed

c) Spent

d) That there be a stay of execution of the judgement entered on 26th May, 2019 against the applicants in ***Mavoko Senior Principal Magistrate's Civil Case No. 356 of 2017 Poeth Kavindu Mutinda (Suing as legal representative of the Estate of Nzyoki Mutinda-Deceased) v YH Wholesalers & Another*** *pending the heading and determination of the intended suit filed under this certificate;*

e) That the Honorable court do direct the Respondents to jointly and severally comply with the statutory provision of section 10 of

the Insurance (Motor Vehicle Third Party Risks) CAP 405 to satisfy the decretal amount in ***Mavoko Senior Principal Magistrate's Civil Case No. 356 of 2017 Poeth Kavindu Mutinda (Suing as legal representative of the Estate of Nzyoki Mutinda-Deceased) v YH Wholesalers & Another;***

f) That the honorable judge to revoke and or cancel the consent dated 23.9.2019

g) That the honorable judge do direct the respondents to jointly and severally refund the decretal amount so far paid by the applicants towards the decretal amount Kshs 1,399,326 and Kshs 250,000/- to vintage auctioneers

h) That the honorable judge do give other relief as it deems fit for the interest of justice;

i) That the costs of this application be provided for.

4. In support of the application was an affidavit deponed on 25.11.2019 by Mahmud Khalif, indicated as the director of the applicants group of companies and with authority to make the affidavit. It was averred that the motor vehicle KBE 758V/ZC 2267 was involved in a motor accident and that the respondents had insured the suit vehicle make prime mover and trailer vide policy numbers ELD/0800/089142/2015 and AMN/080/1/001312/2013. The deponent averred that the applicants were sued in Mavoko CMCC 356 of 2017 in which judgement was entered against the applicants for a total of Kshs 1,798,990/- whereupon the respondents were notified of the judgement but however they failed to satisfy the judgement in terms of section 10 of the Insurance (Motor Vehicle Third Party Risks) Act CAP 405 and as a result the applicants' property was proclaimed on 12.9.2019. It was averred that the applicants were forced to enter into a consent by the interested party on 23.9.2019 to pay the decretal amount and so far the applicants had paid Kshs 1,399,326/- for the decretal amount and Kshs 250,000/- for the auctioneers. According to the deponent, at the time of the accident the suit vehicle had valid insurance covers in compliance with section 4(1) of the **Insurance (Motor Vehicle Third Party Risks) Act CAP 405**. It was pointed out that the applicants' movable property had been proclaimed. Copies of the abstract, insurance policy of the suit vehicle, judgement in Mavoko CMCC 356 of 2017, copy of warrants from Vintage Auctioneers, consent dated 23.9.2019, copies of cheques, draft plaint for declaratory suit and the proclamations for the applicants' movable property were annexed to the affidavit.

5. In reply to the application was a replying affidavit deponed on 10.12.2019 by Catherine Kendi Kaburu who is stated to be the legal officer with the 1st respondent and with authority to swear the affidavit. It was averred upon advice from her counsel on record that the application was brought under the wrong provisions of the law; that it was contrary to section 25, 30, 31 and 34 of the Civil Procedure Act and Order 22 of the Civil Procedure Rules. It was averred that the applicants ought to have filed a declaratory suit and not a miscellaneous application. According to the deponent, under section ii clause 4 of the contract between the 1st applicant and the 1st respondent, the 1st applicant was obligated to notify the respondent of any claim filed for purposes of an indemnity and yet the 1st applicant did not notify the 1st respondent of the filing and service of Mavoko CMCC 356 of 2018(sic). The deponent averred that the 1st respondent was notified of the claim in the accident that occurred on 8.11.2016 being Mavoko CMCC 69 of 2018 hence the same was in the process of being settled. It was averred that the 1st respondent is a stranger to the 2nd respondent and that the 2nd respondent had no contractual relationship with the 1st respondent; that the policy number ELD/008/089142/2015 was taken out by the 1st applicant with the 1st respondent only.

6. There is no indication of any response by the 2nd respondent.

7. Directions were taken to the effect that the application be disposed of by way of written submissions. Counsel for the applicants in appreciating the provisions of section 10(1) of the (Motor Vehicle Third Party Risks) Act CAP 405 as well as the case of **Joseph Mwangi Gitundu v Gateway Insurance Co Ltd (2015) eKLR** submitted that the applicants had proved their case and are deserving of the orders sought. It was pointed out that the respondents had not repudiated the claim and that they had failed to settle the judgement sum.

8. Learned counsel for the 1st respondent vide undated submissions framed two issues for determination; Firstly, whether the application is competent and secondly whether the applicants are entitled to the prayers sought. In respect of the 1st issue, it was submitted that for liability to accrue under section 10 of the Insurance (Motor Vehicle Third Party Risks) Act CAP 405, there is a 4-fold test to be met. Firstly, that the motor vehicle in question was insured by the respondent; Secondly, that the applicant has a judgement in his favour against the insured; Thirdly, that statutory notice was issued to the insurer either at least 30 days before the filing of the suit wherein judgement has been obtained or within 30 days of filing the suit where judgement has been obtained and finally that the applicant was a person covered by the insurance policy. It was pointed out that the law required the applicant to file a declaratory suit. Reliance was placed on the cases of **Roseline Violet Akinyi v Celestine Opiyo Wangwau (2020) eKLR** and **Stephen Kiarie Chege v Insurance Regulatory Authority & Another (2009) eKLR.**

9. It was the strong argument of counsel that the applicant was not entitled to the prayers sought as they have not met the 4-fold test set out in paragraph 8 above. Learned counsel reiterated that under section ii clause 4 of the contract between the 1st applicant and the 1st respondent, the 1st applicant was obligated to notify the respondent of any claim filed for purposes of an indemnity and yet the 1st applicant did not notify the 1st respondent of the filing and service of Mavoko CMCC 356 of 2018(sic). Counsel pointed out that the 1st respondent was notified of the claim in the accident that occurred on 8.11.2016 being Mavoko CMCC 69 of 2018 hence the same was settled. The court was urged to dismiss the application

10. I have carefully and keenly read and understood the application, affidavits and annextures, the submissions and the decisions referred thereto. Should the respondents be compelled to pay the decretal amount in Mavoko SPMCC 356 of 2017?

11. It is imperative that I first deal with the law on the subject. Section 10 of the **Insurance (Motor Vehicles Third Party Risks) Act**, Chapter 405 of the Laws of Kenya (hereinafter referred to as '**the Act**' is *inter alia* what the notice of motion was hinged upon and it provides as follows -

"Duty of insurer to satisfy judgments against persons insured:

> ***(1) If, after a policy of insurance has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of Section 5 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.***
>
> ***(2) No sum shall be payable by an insurer under the foregoing provisions of this section –***
>
> > ***(a) in respect of any judgment, unless before or within fourteen days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings; or***
> >
> > ***(b) in respect of any judgment, so long as execution thereon is stayed pending an appeal; or***
> >
> > ***(c) in connexion with any liability if, before the happening of the event which was the cause of the death or bodily injury giving rise to the liability, the policy was cancelled by mutual consent or by virtue of any provisions contained therein, and either***
> >
> > > ***(i) before the happening of the event the certificate was surrendered to the insurer, or the person to whom the certificate was issued made a statutory declaration stating that the certificate had been lost or destroyed; or***
> > >
> > > ***(ii) after the happening of the event, but before the expiration of a period of fourteen days from the taking effect of the cancellation of the policy, the certificate was surrendered to the insurer, or the person to whom the certificate was issued made such a statutory declaration as aforesaid; or***
> > >
> > > ***(iii) either before or after the happening of the event, but within a period of twenty – eight days from the taking effect of the cancellation of the policy, the insurer has notified the Registrar of Motor Vehicles and the Commissioner of Police in writing of the failure to surrender the certificate.***
>
> ***(3) ……***
>
> ***(4) No sum shall be payable by an insurer under the foregoing provisions of this section if in an action commenced before, or within three months after, the commencement of the proceedings in which the judgment was given, he has obtained a declaration that, apart from any provision contained in the policy he is entitled to avoid it on the ground that it was obtained by the non-disclosure of a material fact, or by a representation of fact which was false in some material particular, or, if he has avoided the policy on that ground, that he was entitled so to do apart from any provisions contained in it:***
>
> ***Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not thereby become entitled to the benefit of this subsection as respects any judgment obtained in proceedings commenced before the commencement of that action, unless before or within fourteen days after the commencement of that action he has given notice thereof to the person who is the plaintiff in the said proceedings specifying the non-disclosure or false representation on which he proposes to rely, and any person to whim notice of such action is so given shall be entitled, if he thinks fit, to be made a party thereto.***

12. The 1st respondent has taken issue with the failure of the applicants to file a declaratory suit and instead opted to file a miscellaneous application.

13. Declaratory judgements and orders are covered under Order 3 Rule 9 of the Civil Procedure Rules that state as follows;

[Order 3, rule 9.] Declaratory judgment.

> *9. No suit shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make a binding declaration of right whether any consequential relief is or could be claimed or not.*

14. The import of the provision is that the applicant is entitled to bring a suit to declare their right to payment of monies accruing on a judgement entered against the applicants.

15. In **Guaranty Trust Company of New York versus Hannay and Company Limited [1915] 2 KB 536**, Pickford LJ held at page 562 that the rule that is in *pari materia* with our Order 3 Rule 9 imposed no limitations once it is established that a declaration can be made where no consequential relief can be given. He stated that

> "*The effect of the rule is to give general power to make a declaration whether there be a cause of action or not, and at the instance of any party who is interested in the subject matter of the declaration. It does not extend to enable a stranger to the transaction to go and ask the court to express an opinion in order to help him in other transactions*.

16. Bankes L.J. at page 572 in the same case held that a suit for declaratory orders should not be defeated merely because the plaintiff has no

legal cause of action. He stated thus;

> "*In every action there must be a plaintiff who is the person seeking relief (Judicature Statute Act, 1873, s. 100), or to use the language of order XVI, r. 1, a person in whom a right of relief is alleged to exists, whose application to the Court is not to be defeated because he applies merely for a judgment or order, and whose application for declaration of his right is not to be refused merely because, he cannot establish a legal cause of action. It is essential, however, that a person who seeks to take advantage of the rule must be claiming relief. What is meant by this word relief? When once it is established, as I think it is established, that a relief is not confined to a relief in respect of a cause of action it seems to follow that the word itself must be given its fullest meaning. There, is, however one limitation which must always be attached to it, that is to say, the relief claimed must not be something unlawful or unconstitutional or inequitable for the court to grant or contrary to the accepted principles upon which it exercises jurisdiction. Subject to this limitation, I see nothing to fetter the discretion of the Court in exercising a jurisdiction under the rule to grant relief, and having regard to the general business convenience and the importance of adapting the machinery of the Courts to the needs of suitors I think the rule should receive as liberal a construction as possible*."

17. From the notice of motion and the affidavit in support of the applicants' application, and considering the case of **Roseline Violet Akinyi v Celestine Opiyo Wangwau (2020) eKLR** and **Stephen Kiarie Chege v Insurance Regulatory Authority & Another (2009) eKLR** there was nothing that stopped the applicant from filing a declaratory suit against the respondents. Prayer 2 in the application was not necessary in the circumstances. The challenge with the route taken by the applicant is that there had been no proof of the existence of an insurance contract between the applicant and the respondents; there would be need to prove liability as well as to tender documents in court so that the court may have the benefit of seeing the documents in support of the applicants' claim. There ought to have been more evidence on record on the part of the applicant that quite unfortunately does not exist.

18. The 1st respondent's case is that under section ii clause 4 of the contract between the 1st applicant and the 1st respondent, the 1st applicant was obligated to notify the respondent of any claim filed for purposes of an indemnity and yet the 1st applicant did not notify the 1st respondent of the filing and service of Mavoko CMCC 356 of 2018(sic). The applicants seemed not to have challenged this fact and I have seen the mentioned clause. Be that as it may, the issues raised pertaining to the Insurance Clause are those that merit a full hearing where parties may tender evidence and their existence or non-existence cannot be dispensed with by way of an application or proved via affidavit evidence.

19. The upshot is that the evidence on record does not convince me to grant prayer No.5 in the instant application as it would be unfair to compel the respondents to meet obligations yet the applicants are yet to file the requisite declaratory suit and tender evidence in that regard.

20. Looking at the prayer 4 of the application, I am unable to see any reason in granting the same. In the case of **Legal Brains Trust (LBT) Limited vs Attorney General, Civil Appeal No. 4 of 2012 of the Appellate Division court in the East African Court of Justice**, it was held that *a court of law will not adjudicate hypothetical questions*. A court will not hear a case in the abstract, or one which is purely academic and speculative in nature, where no underlying facts in contention exist. For this court to indulge in a hypothetical and speculative suit that is yet to be filed by the applicant would amount to an abuse of court process. It was proper for the applicants to first file the declaratory suit from where they can get the legitimacy to seek for such an order once the court receives the necessary evidence. Hence, I find the prayer lacks merit and I decline to grant the same.

21. In prayer No.6, the applicants seek that the consent they entered into be set aside. The issue for determination is whether as per the evidence on record, the consent judgment was obtained under duress. The consent judgment MK6 does not indicate where it was executed. The applicants have not indicated when and where the consent was signed. I wonder why the applicant did not approach the court that adopted the consent to have the same set aside and instead opted to approach this court with the said prayer.

22. A consent judgment is a contract between the parties and can only be set aside on limited grounds. A consent judgment can only be set aside on limited grounds and they are the only grounds which the court may consider. The only averment by the Applicant is that the consent was signed or procured by force and that is all to it; there is nothing else to assist the court.

23. The consent judgment can be considered as a fresh agreement on its own merits and the Civil Procedure Rules allow compromise of a suit.

24. **Order 25 Rule 5 of the Civil Procedure Rules** that states that

> ***"Where it is proved to the satisfaction of the court, and the court after hearing the parties directs, that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the court shall, on the application of any party, order that such agreement, compromise or satisfaction be recorded and enter judgment in accordance therewith"***

25. I opine that the circumstances of the record of the consent and the validity of the same ought to have been handled by the trial court. It is trite law that a consent is a contract between the parties and can only be set aside on the same grounds that would vitiate an agreement between the parties or a contract between the parties. For instance where there is misapprehension or mistake of fact or law. In the case of **Brooke Bond Liebig (T) Ltd v Mallya [1975] 1 EA 266** the East African Court of Appeal at Dar es Salaam in the judgment read by Law Ag P at page 269 followed the earlier case of **Hirani v. Kassam (1952), 19 E.A.C.A. 131**, on the grounds for setting aside a consent judgment that a consent judgment:

> "*...cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court . . . or if consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement*."

26. Furthermore the East African Court of Appeal held that the court cannot interfere with a consent judgment except where good grounds exist for "varying or rescinding a contract between the parties". In **Purcell v F C Trigell Ltd (trading as Southern Window and General Cleaning Co) and another [1970] 3 All ER 671** at page 677 Buckley LJ held that a consent order has "a binding contractual effect on which the Plaintiff was perfectly entitled to insist."

27. The consent judgment has to be considered on its own merits. That is whether there are any grounds for varying or rescinding the consent judgment executed between the parties. I would therefore confine myself to whether the consent judgment was procured by duress. The first difficulty presented in this ground set out by the applicant is the fact that none of the witnesses/deponents who gave the relevant evidential data on the question of duress was cross examined and neither of them has appeared in court. In addition, the affidavit is too scanty for this court to make out whether there was indeed duress/force. The court would find it difficult from the deposition alone without other corroborating evidence to establish how the consent was obtained by fraud.

28. In the premises I see no reason to believe the deposition of the Applicant on the balance of probabilities. There is nothing to convince me that the deponent was compelled by fear to sign the consent judgment and therefore I decline to grant prayer 6 of the application.

29. Prayer No. 7 seems to seek that under the doctrine of subrogation, that the respondents indemnify the applicants. The issue would be whether the respondents are liable.

30. In the case of **Patrick Muturi vs Kenindia Associate Co. Ltd (1993) eKLR** the court rendered itself thus:-

> "*The very foundation of every rule which has been promulgated, applied and acted upon by the Courts with regards to insurance law is the fundamental principle of insurance, that the contract of insurance in an insurance policy is a contract of indemnity. It is a contract giving security from damage or loss. It is not that it ensures that no damage or loss shall occur; rather, it is an agreement by an insurer to make good a loss, to pay compensation for loss or injury which may occur within the terms of the agreement, the insured keeping his part of the bargain. It means that the assured fulfilling his undertaking under the contract, in case of a loss against which the policy has been made, shall be fully indemnified*.
>
> *In general the liability of the insurers is to make good the loss under the policy by a payment in money*."

31. The claim for indemnity would necessitate proof that a contract was entered into, that there was a valid insurance policy that was executed between the parties and what I see on record is an incomplete policy that is marked MK 2 and 3.

32. It served to cite the provisions of section 97 and 98 of the Evidence Act that states as follows;

97. Written contracts and grants

> *(1) When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions of this Act.*
>
> *(2) Notwithstanding the provisions of subsection (1) of this section—*
>
> > *(a) wills admitted to probate in Kenya may be proved by the probate;*
> >
> > *(b) when a public officer is required by law to be appointed in writing, and when it is shown that any particular person has acted as such officer, the writing by which he is appointed need not be proved.*
>
> *(3) Subsection (1) of this section applies equally to cases in which contracts, grants or dispositions of property referred to are contained in one document, and to cases in which they are contained in more documents than one.*
>
> *(4) Where there are more originals than one, one original only need be proved.*
>
> *(5) The statement, in any document whatever, of a fact other than the facts referred to in subsection (1) of this section, shall not preclude the admission of oral evidence as to the same fact.*

98. Evidence of oral agreement

> *When the terms of any contract or grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 97 of this Act, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to or subtracting from its terms:*
>
> *Provided that—*
>
> *(i) any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration, or mistake in fact or law;*

(ii) the existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved, and in considering whether or not this paragraph of this proviso applies, the court shall have regard to the degree of formality of the document;

(iii) the existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property may be proved;

(iv) the existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of such documents;

(v) any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description may be proved, if the annexing of such incident would not be repugnant to, or inconsistent with, the express terms of the contract;

(vi) any fact may be proved which shows in what manner the language of a document is related to existing facts.

33. The applicants have not met the threshold for proof of the contract and thus this court cannot speak with certainty about the existence or non-existence of the insurance contract. In any case these issues could have been properly dealt with in a declaratory suit where the court would be presented with the rival evidence. Prayer 7 fails for want of proof.

34. In the upshot, the applicants' application dated 25.11.2019 lacks merit. The same is dismissed with costs to the 1st respondent and interested party.

It is so ordered.

Dated and delivered at **Machakos** this **8th** day of **October 2020**.

D. K. Kemei

Judge