REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL CASE NO. 164 OF 2000

TOIYOI INVESTMENT LIMITED...PLAINTIFF/RESPONDENT

-versus-

UCHUMI SUPERMARKET LTD...DEFENDANT/APPLICANT

KENINDIA ASSURANCE COMPANY LIMITED..........................1ST INTERESTED PARTY

UAP PROVISIONAL INSURANCE CO. LTD..........2ND PROPOSED INTERESTED PARTY

RULING

1. The Notice of Motion dated 16th August 2017 sought for orders that:

a) Leave be granted to UAP insurance Co. Ltd to be enjoined as 2nd interested party in this case

b) That this court reviews, sets aside and/or vary orders made on 27th July 2017 adopting consent order which allowed the defendants application dated 25th April 2017 in the absence of and without notice to the proposed 2nd interested party who has been condemned unheard. Further that the consent recorded on 27th July 2017 involving an application dated 25th April 2017 be struck out and/or expunged from the record as the same is bad in law and has occasioned error apparent from the face of the record inter alia with existence of sufficient grounds, mandating grants of orders herein.

c) That there be stay of enforcement of the said consent order recorded on 27th July 2017 and adopted on the same date pending hearing and determination of this application and/or pending further orders of the court

d) That the application dated 25th April 2017 be listed afresh for hearing in the presence of all parties including the proposed 2nd interested party so that the application be determined by merit

f) That costs be in the cause

2. The application is based on grounds that:

i) That on 27th July this Court adopted a consent by the plaintiff and the defendant herein to be an order of the court which consent unilaterally made UAP Insurance Company Limited to be a judgment debtor ex parte and or without service or their involvement to be heard on the same.

ii) That apart from service of the said application which was not done, Notice to Show cause ought to have been issued to UAP so they are heard prior to adverse orders being made against them.

iii) That consequently as an enforcement of the said consent the Plaintiff/ Respondent**(TOIYOI INVESTMENT LTD)** has proceeded to instruct **M/S Kiriiyu Merchant Auctioneers** to proclaim against the applicant for recovery of **25, 046,683/-** as against the proposed 2nd interested party who stands to lose unfairly unless heard.

iv) That it is in the interest of justice that the Applicant be enjoined as 2nd interested party as the same is made in good faith.

v) That it is crystal clear from the proceedings of the consent adopted on 27th July 2017 that the proposed 2nd Interested party has been bounded and condemned unheard.

vi) That the decree in existence pursuant to judgment of the High Court and subsequent judgment of the Court of Appeal is against **Uchumi Supermarkets Limited (Defendant)** but **UAP Insurance Company Limited** (the proposed 2nd Interested Party) will bear the actual burden of payment.

vii) That the said consent was procured in bad faith and without disclosure of full facts to the court in particular **by Uchumi Supermarkets Limited** who are aware of an undertaking they issued to settle the decretal amount as well as existence of a declaratory suit being **Eldoret High Court Civ. Suit No. 14 of 2016.**

viii) That no prejudice will be occasioned if the orders sought are granted since the plaintiff has a decree against the Defendant and the plaintiff is at liberty to pursue its right specifically against the Defendant or in the alternative the plaintiff is at liberty to lodge its own declaratory suit if it wishes to involve the interested party in the case.

ix) That there is an error apparent on the record and a blatant breach of the rules of natural justice, resulting in sufficient grounds and reasons to allow the prayers sought in this application.

3. The application was supported by the affidavit of J. Mwai, who deposed that the applicant (UAP) has never been a party to the suit since its inception in the year 2000. The applicant company were insurers of the defendant who issued an undertaking in their favor to settle the entire decretal sum on demand which they had failed to do after a demand notice on them. The defendant/applicant acted is accused of acting in bad faith and approached the court with unclean hands.

4. It is contended that had the applicant was not informed of the impugned consent recorded with the respondents on 27th July 2017 to the effect that the applicant is bound to satisfy the decree in the matter with interests and costs, yet service of this was never done.

5. This action is termed as bad in law and prejudicial to the applicant adding that it is in the interests of justice that the applicant be enjoined as a 2nd interested party to the suit as the rules of natural justice demand that he is not condemned unheard. Basically the proposed 2nd Interested Party was not a party to the suit in which the plaintiff/1st respondent and the defendant recorded a consent which gave rise to a decree that is now sought to be enforced against the 2nd Proposed Interested Party.

6. The plaintiff/respondent in a replying affidavit sworn by **Allan Kibet Kosgey (a director of the company) d**eposed that **Kenindia Assurance Co. Ltd** (1st Interested Party) had been the plaintiff's insurer while **UAP** had insured the defendant.

7. He states that although **Kenindia** participated in the case it was not expressly stated to be a party until the decision in **Eldoret Court of Appeal Civil Appeal No. 138 of 2013**where judgment was entered in favour of the plaintiff here but there was a stay of execution instituted.

8. He highlighted the consent order of 13th November 2013 which provided among other terms that UAP Insurance would issue an irrevocable undertaking guaranteeing payment of Ksh. 100,000,000/- which would serve as a bond and security for the stay of execution and which would remain in force until the appeal is heard and determined.

9. Further that the plaintiff and UAP went into negotiating a settlement of the claim between the defendant and plaintiff and a discharge voucher, duly executed by the UAP director was issued where UAP bound itself to pay Ksh. 59,632,900/- on behalf of Uchumi Supermarkets.

10. UAP failed to comply with the terms of the said consent and the plaintiff reported the matter to the **Insurance Regulatory Agency (IRA)** and sought to have UAP wound up. He stated that UAP, before IRA could address the complaint made against them filed **Eldoret HCC No. 24 of 2013** seeking an order restraining the court from winding up UAP.

11. It is contended that UAP had never been enjoined as a party based on the law on subrogation which requires that principals be party to a suit and not the insurers and this makes the application by UAP incompetent. He states that UAP's redress will come, not from being enjoined to the suit but pursuing a claim against the defendant by a substantive suit.

12. He points out that the plaintiff filed a claim against the defendant in **Eldoret Civil Suit No. 14 of 2016** seeking appropriate orders of indemnity and therefore, UAP, even though granted an opportunity to show cause would have no basis as there is already an existing suit.

13. The applicant is accused of being slack in taking action despite being fully aware of the judgment made at the Court of Appeal and have now sought to use electronic gadgets to ensure the auctioneers do not have access to the property.

14. The defendant's failure to satisfy the plaintiff's decree caused the consent to take effect and warrants of attachment were issued on 27th July 2017. It is further stated that **Kibichy & Co. Advocates** was party to the consent dated 13th November 2013 in respect to which at that point no attempt had been made to review, vary or set aside.

15. The seeking of joinder by the 2nd interested party arose from a disclosure by the defendant to them of their impending liability to the plaintiff which totalled to Ksh. 100,000,000. The 2nd interested party agreed to pay the said sum in the event that the defendant would be found liable for the suit and the defendant gave an irrevocable undertaking that they would indeed reimburse the amounts paid on their behalf by the 2nd interested party in relation to the suit.

16. The defendant/2nd respondent opposes the application stating that judgment has been issued and execution has commenced. It is argued that this matter has been heard and all questions and issues relating to the suit have been determined. That in any event the applicant has

already commenced proceedings against the defendant in **Eldoret High Court Civil Suit No. 14 of 2016, UAP –Vs. Uchumi Supermarkets Ltd**. Defendant also states that UAP has recourse in alternative remedies and the application sought is an attempt to escape from the guarantee issued to them.

17. The defendant points out that the law relied upon by the 2nd interested parties, outlined in **Order 1 Rule 10(2)** of the Civil Procedure rules is not applicable in the circumstances as it envisages joinder of a party before hearing.

18. The defendant also states that the 2nd proposed interested party cannot do anything to interfere with the consent signed between the plaintiff and the defendant as they were not even party to the consent.

19. The defendants submit that the court should make a determination of the mode of recovery of the judgement debt by the plaintiff where a guarantee was given. Counsel has posed a number of issues which he urges the court to take into account namely:

- The applicant has not disclosed that the consent was obtained through mistake of law, fraud, misrepresentation, ignorance or misapprehension of material facts and undue influence or error apparent on the face of the record
- What intention did the applicant have when it issued the unconditional guarantee fully aware that there was a judgment which required to be settled and it would pay at the conclusion of the subject proceedings.
- The court is urged to find that it is time for the applicant to honour the decree it undertook and any issues arising against the defendant ought to be addressed and resolved in a separate suit.
- The court is also urged to consider whether a party can directly execute against a guarantor
- Where the judgment creditor is the beneficiary of a guarantee or security should there be an application for a Notice to show cause against the guarantor or should another suit be filed to enforce the guarantee or security in satisfaction of the judgment debt

20. The matter was disposed of through written submissions where the applicant's counsel urged this court to find that the applicant is an interested party with a recognizable stake and therefore a legal standing in a matter. He states that it is imperative that applicant be joined as an interested party in the matter so that the court can settle all questions involved in the matter. Counsel referred to the Supreme Court decision in **Communications Commission of Kenya and 4 Others v Royal Media Services Ltd and 7 Others, Petition No 14 of 2014 [2014]eKLR** which held that:

> ***"In determining whether the applicant should be admitted into these proceedings as an interested party we are guided by this court's decision in the Mumo Matemo case where the court at Paragraphs 14 and 18 held; An interested party is one who has a stake in the proceedings , though he/she was not a party to the cause ab initio. He or she is one who will be affected by the decision of the court when it is made, either way. Such a person feels that his or her interests will not be articulated well unless he himself or she herself appears in the proceedings, and champion his/her cause."***

21. **UAP** says that the consent order of 27th July 2017, though unjust in nature cannot be enforced in its absence. Moreover, **UAP** declares that the subsequent decree that led to the execution and proclamation of their goods cannot amount to a consent order as known by law as it made the applicant a judgment debtor ***exparte,*** and if this is allowed, they stand to suffer damage/ irreparable loss.

22. Counsel for **UAP** also submits that there was failure on the part of the defendants to disclose all material facts. They state that there was an intentional omission by the defendant as a means to obtain a favorable conclusion from the court. It is pointed out that a consent order cannot bind persons who were neither present nor parties to the suit, and the applicant cannot be bound by that consent.

It is explained that the applicant was the recipient of an irrevocable undertaking dated 22nd November

23. The applicant confirms that there exists a declaratory suit between them and the defendant – **Uchumi Supermarket** but maintains that the continued subsistence of the consent orders adopted on 27th July 2017 renders **Eldoret HCCC No. 14 of 2016** nugatory because the orders sought in the declaratory suit have already been made against the plaintiff therein as per the impugned consent. In view of this, **UAP** seeks to be allowed to prosecute the case. The bone of contention in the declaratory suit is the irrevocable undertaking made by the **Uchumi Supermarket Ltd** insisting that the insurance bond was only to serve as security.

24. The plaintiffs/respondents maintain that they seek to recover the decretal sum from the applicant who is in complete disregard of the consent order and in abuse of the court process. It is contended that throughout the trial the defendant was represented by the firm of **Kibichy and Co Advocates** who at the same time acted for the applicant, and continues to act for it to date. Further that the claim was prosecuted by the plaintiff's advocates together with the Advocates for the 1st Interested Party where both the insurance companies were not mentioned in the suit on the basis of the doctrine of subrogation whose principles require that the insured be party to the suit for indemnity and not the insurer who would have no privity of contract with the adverse party.

25. It is emphasized that the consent which expressly incorporated the 2nd intended interested party into the suit, was by virtue of the applicant's own consent where it undertook to pay the plaintiff up to a maximum of Kshs. 100,000,000/- in the event that the appellate court found the defendant liable, and to that extent the plaintiff would be at liberty to execute the consent order.

26. The plaintiff/ respondents states that the prayer to review, set aside or vary the consent order is incompetent and has no merit because even if it is granted, another order dated 13th November 2013 would still be in force and would have the same effect as the order to be set aside.

27. Plaintiff/1st respondent's counsel further argues that the prayer to review/vary the orders is fatally misconceived based on Order 45 of the

Civil Procedure Rules 2010 and would be based on a demonstrable fraud.

28. Plaintiff submits that leave for the applicant to be enjoined to the suit is misconceived and an abuse of the process and the prayer for a fresh listing of the application dated 25th April 2017 is academic and cannot avail the applicant as it is in the same terms as the consent of 13th November 2013***

29. The 1st interested party points out that the 2nd interested party's relationship with the defendant is that of principal and agent. As regards the validity of the consent, the 1st interested party contends that there was no need for a further consent following the insurance bond signed by the 2nd interested party to pay off the defendant's liability.

30. The 1st interested party also avers that if the 2nd proposed interested party was not a party at the High Court or the appeal stage, then it would not be needful to be enjoined at this stage. Moreover, they need to show what prejudice will be suffered in the case of non-joinder and demonstrate this to the courts satisfaction.

31. Counsel argued that the 2nd interested party interest in the case does not stand alone and is not distinct from that of the defendant. Citing **TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE VS. MUMO MATEMO & 5 OTHERS, SUPREME COURT PETITION NO. 12 OF 2013** he states that the 2nd proposed interested party cannot sustain the application since their interest is not a stand- alone interest.

32. The 1st interested party urges that the 2nd interested party ought to first deposit the total judgment debt to the 1st interested party before the court before any orders adverse to the consent order is made. Counsel further submits that the 2nd interested party has colluded with the defendant to delay the payment to the plaintiff and the 1st interested party and therefore seek dismissal of the Notice of Motion application.

33. **Order 45 Rule 1(1) provides that:**

> **Any person considering himself aggrieved-**
>
> **(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred**
>
> **and who from the recovery of new and important matter or evidence, which after the exercise of due diligence, was not within his knowledge, or could not be produced by him at the time when the decree was passed, or the order made…or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgment to the court which passed the decree or made the order without unreasonable delay.**

The wording of this provision suggests that any person affected by the outcome of a court's decision is at liberty to seek review-it is not limited to the parties in the suit alone. Even with utmost magical diligence there is no way in which the applicants could have known of the brewing consent where it would be saddled with satisfying a decree from the judgment to which it was not an active party. The matter is therefore properly before this court.

34. On the issue of joinder, ***Order 1 Rule (10) (2)*** of the Civil Procedure Rules was highlighted in **J M K v M W M & another CIVIL APPEAL NO. 15 OF 2015** and empowers the court, at any stage of the proceedings, upon application by either party or ***suo motu***, to order the name of a person who ought to have been joined or whose presence before the court is necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit, to be added as a party.

35. The same case cited above makes reference to **Sarkar's Code of Civil Procedure (11th Ed. Reprint, 2011, Vol. 1 P. 887)**, state that:

> **"The section should be interpreted liberally and widely and should not be restricted merely to the parties involved in the suit, but all persons necessary for a complete adjudication should be made parties."**

36. **The case of CENTRAL KENYA LTD. V. TRUST BANK & 4 OTHER, CA NO. 222 OF 1998** was cited in **ATTORNEY GENERAL V KENYA BUREAU OF STANDARDS & ANOTHER CIVIL APPEAL (APPLICATION) NO. 132 OF 2017. The court stated that:**

> ***"Having thus set out the law applicable to the circumstances of this case, we stress that power of the court to add a party to proceedings can be exercised at any stage of the proceedings including at the appellate stage. Indeed, a party can be joined even without applying. We also bear in mind the principle that no suit shall be defeated by reason only of the misjoinder or non-joinder of a party; and that the Court may proceed to determine the matter in controversy so far as the rights and interests of the parties actually before it are concerned.***

37. Whereas the refrain that the horse has bolted and there is no place for the applicant to fit in may not necessarily hold, I am less inclined to the applicant's lament because from the correspondences which I have had occasion to peruse (including the letter dated 22nd September 2016), **UAP** was in the know and in fact the firm of **Kibichy Advocates** was at that time acting for the defendant before the applicant gave instructions that the defendant ought to get its own counsel. As a sign of good faith and in exercise of due diligence, I would expect that the applicant's counsel would have acted in the same manner as did the 1st Interested Party (Kenindia) and sought to be joined in the suit much earlier. To now claim that the applicant could not have known or been aware of the intended consent is to say the least, rather economical with the truth. The loud silence by the firm of Kibichy on this aspect is rather curious!

38. On the issue of the validity of the consent signed between plaintiff and defendant, it is trite law that a consent judgment or order can only be set aside on the same grounds as would justify the setting aside a contract, for example on grounds of fraud, mistake or misrepresentation. (See ***Brooke Bond Liebeg (T) Ltd v. Mallya*** ***[1975] EA 266; Flora Wasike v. Destimo Wamboko [1988] KLR 429,*** and ***Kenya Commercial Bank Ltd v. Benjoh Amalgamated & Another*****, *CA No. 276 of 1997).***

39. In ***Flora N. Wasike vs Destimo Wamboko*** ***[1988] eKLR*** this Court stated:

> ***"It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out: see the decision of this Court in J M Mwakio vs Kenya Commercial Bank Ltd Civil Appeals 28 of 1982 and 69 of 1983."***

40. In ***Kenya Commercial Bank Ltd vs Specialised Engineering Co. Ltd*** ***[1982] KLR 485*****,** Harris, J correctly held, *inter alia*, that -

> ***"1. A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or by an agreement contrary to the policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement."***

41. I acknowledge that the applicant was not an active party to the proceedings where the consent was entered into-yet the effect of that consent created a heavy load on it without having been informed of the intention to enter into the disputed. Were all the material facts disclosed to the court as regards who would carry the weight of that consent and whether the applicant had been made aware of the same? What was the effect and intention of the undertaking? In the **Brooke Bond Liebig** case (supra) the court emphasized at para 26 that:

> *"First matter of concern; a proper consent in the sense of the law is one which is made in the presence and with the consent of parties and or their counsel…"*

On account of what I have observed above, I am hesitant to find that the position akin to the **Brooke Bond** (supra) situation prevails here. Indeed as has been posed by the defendant what was the purpose of the irrevocable guarantee? What element of misrepresentation or fraud or even mistake has been disclosed as against the respondents? None that I can detect…what I can infer is that the applicant had offered to cushion the defendant in the matter in the hope that the appeal would be favourable to the defendant and to stem adverse action by the plaintiff pending hearing of the appeal, but the wind blew away those hopes. The applicant cannot breathe hot and cold at the same time.

42. In addition to this, it is on record that the applicant has already filed a declaratory suit against the defendant and a host of the issues posed by the defendant on how execution ought to proceed where the judgment debtor has a guarantee or security would be best addressed in that suit.

43. The upshot is that the application has no merit and is dismissed with costs to the respondents

DATED, SIGNED and **DELIVERED** at **ELDORET** this 5th day of September 2018.

H. A. OMONDI

JUDGE