



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCA NO. 1 OF 2018

TASSAM LOGISTICS LTD.....APPELLANT

-VERSUS-

DAVID MACHARIA KANG'ETHE.....1ST RESPONDENT

WARSAME ALI.....2ND RESPONDENT

RULING

INTRODUCTION

1. The Application for determination is dated 29/05/2018. It is brought under Article 159, 165(b), (7) of the Constitution of Kenya, sections 1A, 1B, 3, 3A & 80 of the Civil Procedure Act, Order 45 & 50 of the Civil Procedure Rules and all enabling provisions of the law. It seeks the following orders;

a) Spent.

b) Spent.

c) That there be a review by vacating forthwith the Court Orders of 09/05/2018 requiring payment of Kshs. 1 million herein and Kshs. 300,000/= in HCCA No. 2 of 2018 to the 1st Respondent and the depositing of the Decretal Sum balance in the joint names of the Advocates on record.

2. The Application is premised on the grounds on the face thereof, a Supporting Affidavit dated 29/05/2018 and a Supplementary Affidavit dated 14/06/2018 all sworn by Abdirizak Adan Osman.

3. The Application is opposed through a Preliminary Objection (P.O) and Replying Affidavit from the 1st Respondent as well as a Replying Affidavit from the 2nd Respondent.

THE PRELIMINARY OBJECTION

4. For obvious reasons, the P.O takes precedence. It is dated 05/06/2018 and relies on the following grounds:-

a) That the firm of Mogaka Omwenga & Mabeya Advocates is not properly on record for the Appellant.

b) That the Application herein is therefore bad in law and fatally defective.

c) That the Application herein is frivolous, vexatious, scandalous and an abuse of the Court process.

5. Directions were given that the P.O and main motion be canvassed by way of written submissions. The parties complied and filed their respective submissions.

6. To support the P.O, the 1st Respondent submits that there is a valid judgment which was delivered at a time when the firm of Morara Apiemi & Nyangito Advocates was duly on record.

7. As such, Order 9 Rule 9 of the Civil Procedure Rules dictates that the Applicant should have either sought leave to come on record or filed a consent with the outgoing Advocates to take over the matter.

8. The 2nd Respondent supports the P.O. In his submissions, he reiterated the provisions of Order 9 Rule 9 and relied on **Nairobi HCCA No. 141 of 2007, Aggrey Ndombi & Anor-Vs-Grace Ombara** where the Court stated as follows;

“This remains my position. In this case, the Appellant filed a notice of change of Advocate without leave of Court contrary to Order III Rule 9A of the Civil Procedure Rules. I concur with the advocates for the Respondent that Ombachi Moriasi & Co. Advocates are improperly on record. Their notice of change of Advocates must accordingly be struck out. Those shall be the orders of this Court.”

9. On whether the firm of Morara Apiemi & Nyangito Advocates was properly on record, the 2nd Respondent relied on the affidavit sworn by Mr. Philemon Morara on 05/06/2018 where he deposed that;

a) The firm was instructed by Africa Merchant Assurance Co. (AMACO) Ltd to enter appearance and defend the matters on behalf of the defendants in Makindu PMCC No.s 149, 152, 153, 494 & 500 of 2016.

b) The instructing client (AMACO) was the insurer of the offending motor vehicle.

c) That his firm was expressly instructed to engage the plaintiffs in negotiations with a view to avoid a 100% finding on liability against the defendants.

10. Further, he submits that in paragraph 16 of the Appellant’s submissions, there is an admission that the offending motor vehicle was insured by AMACO and in paragraph 17, he acknowledges that the said insurer instructed the firm. The Respondents urged the Court to dismiss the Application.

11. In opposing the P.O, the Appellant cited the celebrated case of **Mukhisa Biscuit Manufacturing Co. Ltd –Vs- West End Distributors Ltd (1969) EA 698** where it was asserted that;

“Preliminary Objection must be confined to a pure point of law which may be argued before the Courts on the assumption that all the facts are correct.”

12. He also relied on **Nairobi HCCC No. 85 of 1992; George Oraro –vs- Barak Eston Mbaja** where Justice J.B Ojwang’ expressed himself as follows;

“I think the principle is abundantly clear. A preliminary objection correctly understood is now well identified as and declared to be point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be preliminary objection and yet it bears factual aspects calling for proof or seeks to adduce evidence for it’s authentication is not as a matter of legal principle, a true Preliminary objection which Court should allow to proceed. I am in agreement that where a Court needs to investigate facts, a matter cannot be raised as a preliminary point.”

13. It is clear that the firm of Mogaka Omwenga & Mabeya Advocates did not comply with the requisite law when coming on record for the Appellant. However, there is a contestation as to whether the firm of Morara, Apiemi & Nyangito Advocates was properly on record from the start.

14. This issue is blurred with details which need a deeper interrogation. I therefore fully associate myself with the sentiments of Justice J.B Ojwang’ in **Oraro –Vs- Barak (supra)** and such, the P.O by the 1st Respondent is thus disallowed.

THE MOTION

15. The Appellant was represented by learned Counsel Mr. Mogaka. To support the motion, the Appellant submits that it was wrongly sued and contends that it is neither the registered owner nor does it have a beneficial or insurable interest in motor vehicle registration No. KAX 643E/ZC 5598 (*the motor vehicle*) which was involved in the accident subject of the suits that led to the present appeals.

16. As such, the Appellant further submits that, the mandate of the insurer, in exercise of insurance subrogation rights, was limited to instruct the firm of Morara, Apiemi & Nyangito Advocates specifically on behalf of their insured ‘Ali Abdi Warsame’ with whom there was privity of contract. They rely on *inter alia* **Nakuru Court of Appeal Civil Appeal No. 185 of 1991; Octagon Private Investigation Security Services –vs- Lion of Kenya Insurance Co.** where the Court of Appeal held;

“The right of subrogation in a contract of insurance cannot create privity of contract between the insurance company and third parties. All that it gives an insurance company is the right to take over the rights and privileges of the insured under an insurance policy but if the insurance company wishes to exercise against third parties the rights and privileges so taken over from the insured, then it (the insurance company) can only do so on behalf of and in the name of the insured. We think Mr. J.B Byamughisha in his book “Elements of Insurance Law in East Africa” correctly states the law when he says at pg 109 under the heading “More on subrogation”

The insurance company is not given rights against third parties. The rights must and can only be enforced by the insured personally (to whom they are actually owed). Normally, the insurance company will use it’s rich resources to prosecute the claims, but even then, it will do so on behalf of and in the name of the insured person...”

17. Further, the Appellant submits that there is no affidavit from AMACO to contradict the insurance policy that was in force with respect to the motor vehicle and that the representation undertaken by the firm of Morara, Apiemi & Nyangito Advocates on behalf of Ali Abdi Warsame was within the law, valid and binding against him since he was the owner of the motor vehicle and it was insured by AMACO.

18. The Appellant submits that the firm of Morara, Apiemi & Nyangito Advocates acted without the Appellant's instructions and any purported representation was on account of an error and mistake of the insurer. That the requirement in Order 9 of the Civil Procedure Rules with regard to change of Advocates after entry of judgment presupposes proper, legally sanctioned representation of a party in litigation. That consequently, all the steps taken by the said law firm in Makindu PMCC No.s 149 & 152 of 2016 were illegal, null and void *ab initio*.

19. The Appellant relies on *inter alia* the case of **Macfoy –Vs- United Africa Co. Ltd (1961)3 All E.R 1172** where Lord Denning stated as follows;

“...if an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado. Though it is sometimes convenient to have the Court declare it to be so and everything which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse, so will this judgment collapse if the statement of claim was a nullity...”

20. According to the Appellant, it shall be contrary to public interest and policy as well as abuse of statutory provisions to require a litigant to seek permission of a stranger so as to safeguard own rights in litigation. That it amounts to sanctioning an illegality and abdication of the wide judicial powers to lean on technicalities even in situations where it is abundantly clear that there was no privity of contract of insurance.

21. The Appellant also submits that the 1st Respondent will not be prejudiced by a review as he can execute against the 2nd Respondent who is the registered owner of the motor vehicle. That he can also file a declaratory suit against the insurer.

22. The Appellant asserts that the required payment of the substantial amount to the decree holder is prejudicial in that it shall paralyze the going concern of his company.

23. In opposition of the Application, the 1st Respondent submits that the Appellant's hands are soiled and is therefore not entitled to the orders sought. That he is estopped from withdrawing from his own assertion in the Application for stay where he expressed willingness, readiness and ability to do equity.

24. On the issue of being wrongly sued, the 1st Respondent submits that the Appellant is being dishonest and untruthful and relies on the police abstracts and a copy of the company's directors' particulars attached to the Appellant's supporting affidavit in the Application for stay. He contends that the same postal address, i.e. P.O. Box 97409 Mombasa, has been used in all the 3 annexures.

25. He wonders whether the same address could have been used and shared without any relationship between the Appellant and the 2nd Respondent. According to him, there is a presumption that the motor vehicle was being used for the benefit and interest of both Appellant and 2nd Respondent hence jointly liable.

26. Further, the 1st Respondent wonders how the police could have inserted the Appellant's name in the abstract to the exclusion of all other names in the world.

27. He contends that the police abstract was produced without any objection and cannot be challenged at this stage.

28. The 1st Respondent submits that, vacating the orders issued on 09/05/2018 via an Application will be a draconian measure without hearing *viva voce* evidence. Further, he submits that litigation must come to an end and the Appellant seems to be deliberately frustrating that philosophy.

29. The 1st Respondent contends that if indeed the firm of Morara, Apiemi & Nyangito Advocates had acted without instructions, the Appellant should have lodged a complaint with the LSK disciplinary committee. That in the absence of such a complaint, the Application herein is an afterthought and should be dismissed.

30. The 2nd Respondent's submissions in oppositions of the motion are basically as highlighted herein above in support of the P.O. The gist of their opposition is that the Application is not properly on record for want of compliance with Order 9 of the Civil Procedure Rules.

ISSUES ANALYSIS AND DETERMINATION

31. Having looked at the Application, the replying affidavits, the rival submissions and the authorities cited, it is my considered view that the following issues arise for determination.

a) Whether the firm of Morara, Apiemi & Nyangito Advocates was properly on record for the Appellant.

b) Whether the orders issued by this Court on 09/05/2018 should be reviewed.

WHETHER THE FIRM OF MORARA, APIEMI & NYANGITO ADVOCATES (THE FIRM) WAS PROPERLY ON RECORD FOR THE APPELLANT.

32. A client-Advocate relationship starts when instructions are issued in a legally acceptable way. Like in many relationships, consent of both parties is a vital element. Ordinarily, insurance companies retain the so called external counsels to represent their insured whenever the need arises.

33. In our case, I have looked at the annexure marked 'PM-1', the letter of instructions issued to the firm by AMACO and it is unequivocal that the firm was instructed to represent AMACO in Makindu PMCC No.s 149 and 152 among others. The question which begs is whether there existed a contract of insurance between AMACO and the Appellant to entitle AMACO to issue such instructions.

34. The Appellant has ably demonstrated that the offending motor vehicle is registered in the name of the 2nd Respondent. Indeed, paragraph 5 of the plaints acknowledge as much. The Appellant has also exhibited certificates of insurance (AA0-5) showing that at the time of the accident, the 2nd Respondent was the insured.

35. If there was a contrary position, nothing would have been easier than a rebuttal from AMACO in form of an affidavit. As rightly submitted by the Appellant, no such affidavit was filed.

36. Evidently, there was no contract of insurance between AMACO and the Appellant. On the other hand, it is clear that such a contract existed between AMACO and the 2nd Respondent. However, in line with the holding of the Court of Appeal in the **Octagon case (supra)**, AMACO's right of subrogation could not create privity of contract between the Appellant and AMACO. The Appellant was a third party.

37. It therefore follows that the instructions given to the firm by AMACO, to represent the Appellant, were erroneous, null and void. The trickledown effect is that the representation undertaken by the firm on behalf of the Appellant was also null and void.

38. At this juncture, it is important to point out that, from the materials before Court, the firm's 'representation' of the Appellant was in good faith as it had received clear instructions from its client (AMACO).

39. In my view, it would be asking for too much to expect external counsels to conduct investigations to ascertain whether there is a contract of insurance between a party to a suit and an insurance company.

40. Once instructions have been given, external counsels are entitled to presume that a contract of insurance exists. In our case, I believe it was even harder for the firm to notice that the contract of insurance was nonexistent because paragraph 5 of the plaint specifically states that; **".....the 2nd defendant (Appellant) was the beneficial owner in control, possession and insured of the said motor vehicle."**

41. I have noted from the materials before Court that the Appellant has consistently maintained that he was wrongly sued. I have also noted that there are two conflicting police abstracts. The one issued on 08/09/2015 indicates the owner of the motor vehicle as Tasam Mohamed Abdile of P.O. Box 97409 Mombasa. The other one was issued on 16/09/2015 and indicates the owner of the motor vehicle as Tassam Logistics Ltd of P.O Box 97409-80112 Mombasa.

42. The 1st Respondent advanced an argument about similarity of addresses in the police abstracts and the Appellant's CR-12. He contends that due to the similarity, there is a presumption that this is the same person, individual an entity.

43. With respect, this argument does not hold in light of the corporate personality principle enunciated in, **Salomon -Vs- Salomon & Co. Ltd (1897) AC 22**. The Appellant, as demonstrated by the certificate of incorporation (AAO-1), is a corporate entity which can own and hold property.

44. If indeed it was the owner of the offending motor vehicle, the certificates of insurance should have indicated as much. The 1st Respondent further contended that the police abstract was produced without objection and it was too late for the Appellant to complain about it at this stage.

45. Again, it is quite obvious that the Appellant did not participate in the proceedings before the lower Court. Had the Appellant been aware of the proceedings, I don't see why it wouldn't have gone to great lengths, like it has done here, to distance itself from the same.

46. The upshot of the foregoing is that the firm was not properly on record for the Appellant and any actions purported to have been done on behalf of the Appellant cannot be binding on it.

47. I am in agreement with the Appellant's counsel that the requirement in Order 9 of the Civil Procedure Rules with regard to change of Advocate after entry of judgment presupposes proper legally sanctioned representation of a party in litigation.

WHETHER THE ORDERS ISSUED BY THIS COURT ON 09/05/2018 SHOULD BE REVIEWED

48. The basis for review is order 45 Rule (1) of the Civil Procedure Rules which provides as follows;

(1)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; or

(b) By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence, which after the exercise of due diligence, was not within his knowledge and could not be produced by him at the time

when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the Court which passed the decree or made the order without unreasonable delay.

49. The important considerations that can be discerned from the above provision are;

a) That there has been a discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the Applicant's knowledge or could not be produced by him at the time when the decree was passed or the order made; or,

b) That there was some mistake or error apparent on the face of the record; or

c) For any other sufficient reason.

50. Having found that the actions of the firm of Morara, Apiemi & Nyangito Advocates are not binding on the Appellant, there is really no justification to require it to comply with the orders issued on 09/05/2018.

51. I am aware that the Appellant had expressed willingness to furnish sufficient security in its Application for stay but I think that is a normal and expected statement in such Applications. Furthermore, furnishing of security is a pre-requisite for grant of stay orders.

52. It is my considered view that the demonstration by the Appellant that it had neither a registered, beneficial nor insurable interest in the motor vehicle constitutes sufficient reason to warrant review of the orders issued by this Court on 09/05/2018. Indeed, the Court has unfettered discretion to review its own decrees or orders for any sufficient reason.

53. In **Official Receiver and Liquidator –Vs- Freight Forwarders Kenya Ltd; Civil Appeal No. 235 of 1997**, the Court of Appeal adopted the holding in **Wangechi Kimita –Vs- Wakiburu (1982-1988)1 KAR 977** where Nyarangi J.A expressed himself as follows;

“I see no reason why any other sufficient reason need to be analogous with the other grounds in the order because clearly, section 80 of the Civil Procedure Act confers an unfettered right to apply for a review and so the words need not be analogous with the other grounds specified in the order.”

54. I agree with the Appellant that the review will not prejudice the 1st Respondent because he can still attach the motor vehicle in execution. In fact, it was among the goods that had been proclaimed.

CONCLUSION

55. In sum, the Application is meritorious and is thus allowed in the following terms;

i. A review order be and is hereby issued vacating forthwith the Court Orders of 09/05/2018 requiring payment of Kshs. 1 million herein and Kshs. 300,000/= in HCCA No. 2 of 2018 to the 1st Respondent and the depositing of the decretal sum balance in the joint names of the Advocates on record.

ii. This ruling to apply in HCCA No 1 of 2018.

iii. Costs to the Applicant.

SIGNED, DATED AND DELIVERED THIS 3RD DAY OF OCTOBER, 2018 IN OPEN COURT.

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C. KARIUKI

JUDGE