REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 3586 of 1985

LOCHAB TRANSPORT LTD .....APPLICANT
VERSUS
KENYA ARAB ORIENT INSURANCE LTD.....DEFEDANT

JUDGMENT

The plaintiff motor vehicle KVC 655 was involved in an accident. The vehicle was insured against such an event with the defendant which as its name indicates is an insurance company. The plaintiff made a claim under the policy. The defendant agreed to settle the plaintiff claim which settlement is witnessed by discharge voucher dated the 26th February, 1985. The settlement provided for the payment to the defendant of a sum of Kshs 352,703/- but it is common case that the defendant has only paid the plaintiff a sum of Kshs 50,000/-. The plaintiff now claims the outstanding amount due under the settlement.

The defendant seeks to avoid payment of the sum due under the settlement by setting up a number of defences but I am satisfied that all these defences are based on a radically mistaken conception of the law. When a claim is compromised, the cause of action becomes merged and is supersedent by the compromise and a defence to the original cause of action is not a defence to an action brought to enforce the compromise. Thus is the present case, the defendant cannot rely as it has sought to do on the arbitration clause in the policy of insurance to stay the action founded on the compromise. On this point see *Green vs. Reson [1955] 1 W L R 741* and in particular the observations of Slade J. at p. 746 and *Conlon vs Conlas Ltd. 1952 2 TLR 343*.

The defendants alleged certain breaches of the policy by the plaintiff which are set out in paragraphs 3 and 4 of the defence and say in paragraph 6 that had they known these facts earlier they would have repudiated the plaintiff's claim from its inception. The defendant formally repudiated the claim (that is the claim under the policy) on the 14th day of October, 1986 almost 8 months after its agreement to settle the plaintiff's claim. I cannot envisage how the repudiation of the policy can assist the defendant in resisting a claim for the enforcement of a settlement already made of a claim made under that policy.

If the defendant wishes to resist the enforcement of the settlement of the plaintiff's claim, it must attack the settlement itself by seeking to show that the settlement was procured by some fraud or fraudulent misrepresentation by the plaintiff or that it was concluded. There are no pleas in the defence that would enable the Court to grant such relief.

The plaintiff has asked for summary judgment on his claim. The defendant in his notice of objection has stated that the defence raise substantial issues for trial and that the case should proceed to hearing and determined on merit.

The issues raised are:

(1) that the plaintiff has been in breach of some of the conditions of the policy.

These for the reason I have stated might be a substantial ground of defence were this an action to enforce a claim under the policy. It is not. It is an action to enforce a settlement or compromise of a claim made under the policy. As such it is not a ground of defence to the plaintiff's claim.

(2) that the dispute should have been referred to arbitration (para 8 of the defence).

It is not a dispute out of the policy it is a dispute arising out of a settlement or compromise made between the parties arising from a claim made by the plaintiff under the policy.

(3) that the compromise was 'entered into without prejudice and or without admission of liability.'

I do not understand this plea. It could only be made by a lawyer who did not understand the significance of the words 'without prejudice.'

You cannot have an agreement made without prejudice. If an offer is made ‘ without prejudice’, evidence cannot be given of this offer. However, if this offer is accepted, a contract is concluded and one can give evidence of the contract and given evidence of the terms of the ‘without prejudice’ latter offer. See the quotation from *Walker vs Walker* 23 QBD 335 referred to by Mr Wandaka and

(4) the compromise was entered into under mistake and ignorance of the facts as set out in paragraph 4 of the defence. Is this defence? Can one avoid performing one’s bargain because one has learnt something that one didn’t know when one made the bargain? I think not. It is plainly from the correspondence exhibited by both the plaintiff and the defendant in the various applications made herein that the matters complained of were discovered by the defendants after investigations instigated by it after it had concluded the settlement of the claim with the plaintiff. One asks why didn’t the defendant do this before it had settled the claim with the plaintiff? It does not speak highly of the defendant’s good faith. No reason has been advanced as to why the defendant did not carry out the investigation prior to the settlement of the dispute. One cannot but feel that this late embarked – on investigation. Connotes a reluctance to pay and nothing else. It does not reflect favourably on the prelity of the defendant.

In order for the defendants to avoid payment of the claim on this last ground it must show that its mistake rendered the contract nullity one naturally turns to the decision of the House of Lords in *Bell vs Lever Brothers*. I feel that the best and briefest statement of what that cure decided is Lord Denning (then Denning L J) in *Solle vs Butcher [1950] 1* TLR at p 458, which reads: “Let me first consider mistakes which render a contract a nullity. All previous decisions on this subject must now be read in the light of *Bell vs. Lever Bros. Limited* (48 The Times L R 133; (1932) A C 161). The correct interpretation of that case, to my mind, is that, once a contract has been made, that is to say, once the parties, whatever their inmost states of mind, have to all outward appearances agreed with sufficient certainty in the same terms on the same subject-matter, then the contract is good, unless and until it is set aside for failure of some condition on which the existence of the contract depends, or for fraud, or on some equitable ground. Neither party can rely on his own mistake to say that it was a nullity from the beginning, no matter that it was a mistake which to his mind was fundamental, and no matter that the other party knew that he was under a mistake.”

In this case a contract to settle the plaintiff’s claim under the policy was clearly made. The sending of a completed discharge voucher to the plaintiff was plainly an offer. His signing and returning the same was clearly an acceptance. The parties had to all outward appearances settle the claim. The contract is good unless and until it is set aside for failure of some condition which the existence of the contract depends or for fraud or on some equitable ground. It has not been so set aside and I think an application seeking this remedy would have little success.

Accordingly, I give judgment for the amount claimed with interest at court rates thereon (only in view of H L decision in *President of India vs La Prutention Liu (1984) 2 A E 713*) from the date of the filing of the plaint. The plaintiff is entitled to his costs.

High Court, at Nairobi , June 4, 1986
Shields, J