

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. E 0116 OF 2023.

SUSAN ADHIAMBO OGOL & ANOTHER (*Suing as the legal Representatives of the Estate of Ibrahim Oketch*)..

.....CLAIMANT

VERSUS

BADAR HARDWARE LIMITED1st

RESPONDENT

TAHAFUL INSURANCE OF AFRICA.....2ND

RESPONDENT

JUDGMENT

Background

1. The Claimants, as legal representatives of the Estate of the deceased, have sued the Respondents herein jointly and severally for the following reliefs;

- a) An order of specific performance compelling the Respondents to remit KShs. 1,212, 592.00 being the balance of the award issued by the Director of Occupational Safety and Health Services.
 - b) Costs of this suit
 - c) Interest on [a] and [b] above at court rates.
2. The 1st Respondent and the 2nd Respondent have both resisted the Claimants' claim through Responses to Claim dated 17th November 2023 and 4th December 2024, respectively. They deny the Claimants' cause of action against them and their entitlement to the reliefs sought.
 3. It is important to point out that the 2nd Respondent also filed its Notice of Claim against Co-Defendant [1st Respondent] dated 4th December 2023.

The Claimants' Case.

4. It is the Claimant's case that they are widows of the deceased and legal representatives of his estate.

5. They stated that on or about 12th July 2021, the deceased was involved in a road traffic accident while in the course of his duties as an employee of the 1st Respondent. As a result of the accident, the deceased suffered severe injuries that resulted in his untimely death.
6. Subsequently, a Claim was lodged with the Director of Occupational Safety and Health Services, pursuant to the provisions of the Work Injury Benefits Act, 2007. On 25th May 2022, the Director assessed the compensation payable to the estate of the deceased at KShs. 3, 360, 000.00. Following the assessment, the 1st Respondent was directed to pay the amount within 90 days of the date of the assessment.
7. The 2nd Respondent, the 1st Respondent's Insurers Paid a sum of KShs. 2, 147, 408.00, leaving a balance of KShs. 1, 212,592.00, an amount which they subsequently refused to settle, hence the instant suit.
8. Cross-examined by Counsel for the 1st Respondent, the 1st Claimant admitted that by his letter dated 7th March 2023, their Counsel indicated that the 2nd Respondent was willing

- to settle the claim at Kenya Shillings two million, four hundred thousand.
9. She and her Co-administratrix executed the Memorandum of Understanding between them and the 1st Respondent. The 1st Respondent also executed the memorandum. At the signing of the memorandum, they were informed that the 2nd Respondent was to pay KShs. 2,147, 000, and that the balance was to be offset later.
 10. She admitted that they executed the Settlement Deed. The 1st Respondent's Director equally signed the same. Clause 3.4 of the Deed stipulated that upon the sum of KShs. 2,147,000 being duly paid to the estate of the deceased, the 1st Respondent stood discharged from liability.
 11. Eventually, the sum was paid. Upon this, their Advocate endorsed his signature on the document, acknowledging the settlement, and subsequently, on 14th April 2023, wrote a letter to Counsel for the 1st Respondent, confirming that they had been discharged.

The 1st Respondent's case

12. The 1st Respondent presented one witness, Mr Shuaib Abdi Sigar, to testify on its behalf. The witness testified that at all material times, the deceased was an employee of the 1st Respondent. He was involved in a fatal traffic accident on 10th July 2021 while in the course of his duties as such an employee.
13. Subsequently, the 1st Respondent lodged a claim on behalf of the beneficiaries of the estate of the deceased.
14. Through their Counsel's letter dated 7th March 2023, the Claimants demanded payment of the assessed amount. However, in the said letter, it was indicated that the 2nd Respondent had shown willingness to settle the claim to an extent of KShs. 2,247, 408.00.
15. Thereafter, the 1st Respondent and the Claimants executed a memorandum of understanding dated 20th March 2023, whose main objective was to secure the interest of the Claimants by settling the claim to the extent of the funds expected from the 2nd Respondent.
16. On 27th March 2023, the Claimants and the 1st Respondent executed a deed of settlement of the claim for

compensation. The execution of the deed was intended to facilitate the payment of the sum of KShs. 2,247, 408.00.

17. The 1st Respondent paid the sum of KShs. 2, 247, 408.00 in instalments. The last instalment of KShs. 147,410.00 was paid on 18th April 2023. After settling this mentioned sum, the 2nd Respondent refunded the same to the 1st Respondent.
18. The Claimants issued a discharge against the 1st Respondent on 17th April 2023. They undertook not to hold the 1st Respondent liable any further in respect to any claim arising from the compensation of the beneficiaries to the estate of the deceased.
19. The Claimants executed a legally binding agreement on 27th March 2023, which agreement was fully executed and performed.
20. It was further stated that the Claimants do not have any valid and lawful claim against them.
21. The witness stated that they had a cover with the 2nd Respondent at all material times. The 2nd Respondent is obligated to settle the claim.

22. Cross-examined by Counsel for the Claimants, the witness testified that the claim in respect of the accident was duly settled by the 2nd Respondent. The 1st and 2nd Respondents had to agree on the amount the latter was to pay under the cover. An amount of KShs. 2,247, 480.00 was agreed on. At the time of this agreement, the Director had already assessed the compensatory amount at KShs. 3,360,00.
23. The 2nd Respondent insisted on settling the above stated amount, and maintained that if the balance of KShs. 1, 142, 992 was to be paid; thereafter, the 1st Respondent was required to do so.
24. Cross-examined by Counsel for the 2nd Respondent, the witness stated that the 1st Respondent executed a voucher dated 9th March 2023, and undertook to pay the balance of KShs. 1,142, 592 to the estate of the deceased.

The 2nd Respondent's Case

25. The 2nd Respondent presented its legal officer, Dolphine Moindi, to testify on its behalf. The witness stated that once the Occupational Safety and Health Office made an

assessment of KShs. 3,360,000, the 2nd Respondent paid the sum of KShs. 2, 147, 808 to the 1st Respondent for release to the Claimants. This is the sum that was insured by the 1st Respondent based on the declared salary of a driver of KShs. 23, 098. As opposed to what the Director relied on, KShs. 35,000.

26. The 1st Respondent entered into an express agreement with the 2nd Respondent by way of a discharge voucher that it would shoulder the difference of KShs. 1, 142, 592 since the insurer had settled the maximum insured amount.
27. It was further contended that should Judgment be entered against them, they would seek to be indemnified by the 1st Respondent.
28. Lastly, the 2nd Respondent stated that there is a misjoinder of parties and causes of action because the party primarily obliged to pay the Claimants is the 1st Respondent. The primary dispute over which this court would have jurisdiction [but only on appeal] is between the Claimants and the 1st Respondent, based on a statutory obligation under the Work Injury Benefits Act. However, the cause of action between

the 1st and 2nd Respondents is secondary and arises from an alleged breach of an insurance policy, which is a commercial dispute. Hence, this court lacks the jurisdiction to entertain the dispute between the 1st and 2nd Respondents.

The Claimants' Submissions

29. Counsel for the Claimant submitted that the decision of the Director of Occupational Safety and Health Services of 25th May 2022 was final and binding and stands as it remains unchallenged through appeal or review.
30. Counsel further submitted that the remaining balance of KShs. 1,112,592.00, which is part of the assessed amount of KShs. 3, 360, 000 remains unpaid, and this fact is uncontested. It is apparent that the only issue concerning the payment of the balance is the dispute between the Respondents as to who among them should settle the same.
31. The Memorandum of Understanding was signed to calm a situation of demonstrations by the Civil Society against the 1st Respondent, regarding the payment of the assessed

amounts in favour of the deceased's estate. It wasn't intended to, and did not, in any way set aside the Director's decision or preclude any of the parties from discharging their fiduciary duties to the estate.

32. The Memorandum of Understanding did not obviate the estate's right to seek compensation it was entitled to the fullest extent.

33. Counsel further submits that the Memorandum of Understanding of 20th March 2023 is not binding on the parties for the following reasons;

a) It was a local arrangement of receipt of part payment from the employer of the deceased, hence an indemnity for the received amount.

b) It was not a legal consent filed in court to enforce or vary the decision of the Director.

c) The Director was not involved to enable him to reassess the amount payable to the estate of the deceased.

34. The 2nd Respondent's witness was unable to explain why they quantified the deceased's salary at KShs. 23,000 rather than the KShs. 30,000 applied by the Director, thereby

arriving at the wrong values and precipitating the disagreement between them and the 1st Respondent.

The 1st Respondent's submissions

35. Counsel for the 1st Respondent submitted that a contract freely executed by the parties without undue influence or coercion is bound by its terms. In the instant matter, the Claimants signed the contracts without objection. More importantly, they were represented by an Advocate.
36. The Claimants have not disputed signing the Memorandum of Understanding and the deed of settlement, and they have not pleaded coercion or undue influence in executing the two documents. Having signed the contracts, and their advocate having issued a letter of discharge, the claim herein lacks *bona fides* and ought to be dismissed. To support this point, Counsel placed reliance on the case of **Mwangi v Multiple Haulier [EA] Limited [2022] KEELRC 12978 [KLR]**.
37. A discharge voucher or settlement can be impeached or assailed only if there was misrepresentation, fraud, or if a

party was coerced or induced to execute a contract against their will. To support this point, reliance was placed on **Moses Gihohi Gateru v Njuca Consolidated Co Ltd [2019] eKLR** and **Coastal Bottlers Ltd v Kimathi Mithika [2018] eKLR**.

38. The circumstances of this matter are that the Claimants are estopped from making fresh claim[s] or suing for any balance on the basis of facts that arose through a contract duly signed and fully executed. To buttress this submission, Counsel placed reliance on the case of **Kenya Breweries Ltd v Kiambu General Transport Agency Ltd [2000] 2 EA**.

The 2nd Respondent's submissions

39. The 2nd Respondent's Counsel submits that two primary issues arise in this matter: first, whether they were properly joined in this matter; and second, whether this court has jurisdiction to entertain a dispute that clearly appears to be an insurance claim involving a breach of an insurance policy.

40. The 2nd Respondent, as an insurer, cannot be enjoined in a claim of the nature of the instant one. It has no direct contractual link with the Claimants. The only direct contractual link was between the 1st Respondent and the 2nd Respondent. Any dispute between the 2nd Respondent and the 1st Respondent would be resolved as a commercial dispute in a Commercial or Civil Court, not in this court. Section 12 of the Employment and Labour Relations Act, which sets out the jurisdiction of this court, does not contemplate jurisdiction over disputes arising from the breach of an insurance policy.

Analysis and Determination

41. I have carefully considered the pleadings, evidence, and submissions by the parties herein, and the following issues emerge for determination;

a) What is the effect of the Memorandum of Understanding and Deed of Settlement that were executed by the Claimants and 1st Respondent?

b) Whether the 2nd Respondent is properly enjoined in this suit.

c) Whether the Claimants are entitled to the reliefs sought.

42. There is no dispute that;

a) The Director of Occupational Safety and Health Services, pursuant to his statutory mandate, assessed compensation payable by the 1st Respondent to the estate of the deceased, at KShs. 3, 360, 000.

b) Subsequently, there were engagements between the Claimants with the involvement of their advocate at every stage, and the 1st Respondents, which culminated in the execution of a Memorandum of Understanding dated 20th March 2023, a Deed of Settlement dated 27th March 2023, and a payment of KShs. 2, 247, 408.000 to the Claimants.

c) On 17th April 2023, the advocate for the Claimants communicated to the 1st Respondent that they were discharged from further obligations.

43. In my view, a Memorandum of Understanding, once voluntarily executed by the parties, constitutes a binding contract. By affixing their signatures, the parties unequivocally manifest their mutual assent and are legally bound to honour and perform the terms set forth therein.
44. A party to such a Memorandum of Understanding cannot simply withdraw from the binding effect at will. The only lawful basis for avoiding its obligations is to clearly demonstrate the existence of recognised legal grounds capable of vitiating a contract, such as fraud, misrepresentation, mistake, duress, undue influence or illegality. Absent proof of such factors, the party remains fully bound by the terms of the agreement. See also **Moses Gateru v Njuca Consolidated Co. Limited [2019] eKLR.**
45. I have carefully considered the Claimants' pleadings and the evidence they presented to this Court, and I take the clear view that they neither pleaded nor asserted the existence of

any of the factors mentioned above. They presented no evidence establishing the existence of any of the factors.

46. A holistic reading and understanding of the Memorandum of Understanding reveals that the sum assessed by the Director was negotiated downwards by the parties in the circumstances of the matter, and of course they had a right to do so. They did not require authority from the Director to negotiate the amount or to seek a reassessment, as Counsel for the Claimants has attempted to suggest. A court order wasn't a precondition to the negotiations the parties entered into, and the result of those negotiations.
47. In sum, the Claimants, on behalf of the estate of the deceased, bound themselves and the estate of the deceased to be paid the negotiated amount. They cannot bolt out of that binding effect of the Memorandum of Understanding.
48. It is trite law that a discharge voucher or Settlement Deed / Agreement has a contractual effect on the parties thereof. In **Coastal Bottlers Limited v Kimathi Mithika Mwekele [2018] eKLR**, the Court of Appeal stated;

*“Firstly, the competency of the suit was attacked on the basis of the settlement agreements, which the appellant believed took away the respondent’s right to make further claims. While considering the said agreement, we bear in mind that employment contracts are governed by the general law of contracts. This was restated by the Court in **Krystalline Salt Limited vs- Kwekwe Mwakele & 67 others [2017]:-***

“It is important to bear in mind that in Kenya, employment is governed by the general law of contract as much as the principles of common law, now enacted and regulated by the Employment Act and other related statutes. In that sense, employment is seen as an individual relationship negotiated between the employee and the employer according to their needs.”

The court further held as follows: -

“it is instructive to note that the respondent never denied signing the said agreement or questioned the

veracity of the agreement. Further, from the record, we do not discern any misrepresentation on the import of the said agreement or incapacity on the respondent's part at the time he executed the same. It did not matter that the amount thereunder would be deemed as inadequate. As it stood, the agreement was a binding contract between the parties. In Trinity Prime Investment Limited vs- Lion of Kenya Insurance Company Limited [2015] eKLR, this Court, while discussing the import of a discharge voucher which is more or less similar to the agreement in question, observed: -

“The execution of the discharge voucher, we agree with the learned judge, constituted a complete contract. Even if payment by it was less than the total loss sum, the appellant accepted it because he wanted payment quickly and execution of the voucher was free of misrepresentation, fraud or The appellant was thus fully discharged.”

49. By reason of the foregoing premises, I come to the inescapable conclusion that the Memorandum of Understanding and the Deed of Settlement bound the Claimants and the deceased's estate to receive the negotiated amount and to discharge the 1st Respondent from all liabilities concerning compensation for the deceased's demise. In essence, the Claimants didn't have a cause of action to institute the instant claim against either the 1st Respondent or the 2nd Respondent.

50. Having found as I have hereinabove [paragraph 49], I find it unnecessary to venture into considering the other two identified issues. This suit is hereby dismissed with costs.

Read Signed and Delivered this 19th Day of February 2026.

OCHARO KEBIRA

JUDGE

ORIGINAL

ORIGINAL