IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MARAGA, OUKO & GATEMBU JJ.A.)

CIVIL APPEAL NO. 22 OF 2007

BETWEEN

UAP PROVINCIAL INSURANCE COMPANY. LTD…….....… APPELLANT

AND

MICHAEL JOHN BECKETT…….. RESPONDENT

(Appeal from the Decision and Decree of the High Court at Nairobi (Kasango J.) dated 5th December, 2005 at the High Court of Kenya, Milimani Commercial Courts Nairobi

in

CIVIL CASE NO. 1310 OF 2001)

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JUDGMENT OF THE COURT

1. This is an appeal from the judgment of the High Court (Kasango J) allowing the respondent's application for summary judgment against the appellant.

Background

2. The background to this matter is captured in greater detail in our judgment in a related appeal being Civil Appeal Number 26 of 2007 between the same parties, which was heard together with this appeal. Briefly however, the respondent Michael John Beckett (Beckett) insured his motor vehicle, a Mitsubishi Pajero then bearing English registration number K941 VFC and subsequently registered in Kenya as vehicle registration number KAD 193K (the insured vehicle), with the appellant, UAP Provincial Insurance Company Limited (UAP) under a comprehensive private car policy (the Policy) in 1993.

3. The insured vehicle was stolen on 18th December 1993 during the currency of the Policy. Upon lodging a claim for the loss of the insured vehicle with UAP under the Policy, Beckett was requested to submit to UAP documentary proof of payment of customs duty for the insured vehicle as well as a copy of the registration book. According to Beckett the necessary documents were supplied to UAP. UAP repudiated liability under the Policy on the basis that the documents submitted by Beckett were not genuine.

4. The decision to repudiate liability was communicated to Beckett by UAP in a letter dated 18th November 1994. Based on complaints by UAP, Beckett was charged with two counts of offence of making false documents for the purposes of clearance of his vehicle without authority contrary to section 357(a) of the Penal Code. Beckett was also charged with the offence of attempting to obtain money by false pretences contrary to section 313 of the Penal Code in that he attempted to obtain cash from UAP by falsely pretending that the claim under the Policy for his stolen insured vehicle was genuine and valid.

5. On 25th November 1995, Beckett was acquitted on all charges.

6. The parties thereafter entered into negotiations with a view to compromising the claim. According to Beckett, those negotiations culminated in a settlement in his favour of Kshs.6,6,000,000.00. UAP did not make payment to Beckett.

7. On 26th August 1997, Beckett filed Mombasa High Court Civil Case No. 263 of 1997 to enforce the settlement agreement and sought judgment against UAP for, *inter alia*, Kshs.6, 000,000.00. The suit was subsequently transferred from Mombasa High Court to the High Court at Milimani Commercial Court, Nairobi and assigned High Court Civil Suit No. 1310 of 2001. UAP's attempt to stay proceedings in that suit and to refer the matter to arbitration on the basis that the Policy at clause 10 required all differences between the parties to be referred to arbitration failed after UAP's application under Section 6 of the Arbitration Act was rejected by the High Court. UAP lodged Appeal No. 26 of 2007 against that decision which appeal was heard together with this appeal.

8. Beckett's application, under the then Order XXXV Rule 1 of the Civil Procedure Rules, seeking summary judgment against UAP with respect to the settlement amount was scheduled to be heard subsequent to the dismissal of UAP's application for stay of proceedings. Counsel for both parties took preliminary objections to the application for summary judgment. After hearing counsel on the preliminary objections, the High Court [the Honourable Lady Justice Kasango] in a ruling dated 5th December 2005 allowed Beckett's application for summary judgment and entered judgment for Beckett against UAP for Kshs. 6,000,000.00, with interest and costs.

9. Aggrieved by that ruling, UAP instituted the present appeal.

Grounds of appeal

10. In its memorandum of appeal dated 19th February 2007, UAP listed 15 grounds of appeal. The substance of the complaints by UAP is that the learned judge of the High Court erred in deciding the application for summary judgment when all that was before her for hearing were two preliminary objections; that the application for summary judgment was not substantively argued before her; that the learned judge erred in relying on the ruling of the Honourable Mr. Justice Mutungi given on 27th April 2004 with respect to the application for stay of proceedings pending arbitration as amounting to a decision or determination that Beckett was entitled to payment of Kshs. Kshs. 6,000,000.00; that the decision of the learned judge in favour of Beckett on the issue of illegality of the claim and the acceptance of indemnity by UAP with regard to under-payment of duty is tantamount to acquiescence and or collusion in a fraud on the Government of Kenya; that the learned judge erred in failing to hold that UAP demonstrated that there were triable issues.

11. On those grounds UAP prays that the appeal be allowed and the judgment of the High Court be set aside.

12. In a notice of cross-appeal dated 23rd July 2008, Beckett seeks a reversal and or variation of the High Court judgment that UAP was entitled to raise and rely on the grounds of opposition to the summary judgment application and be substituted with the decision that UAP was estopped from relying on the said grounds by way of opposition to the application for summary judgment and that judgment be entered for Beckett as prayed.

13. In other words Beckett's cross appeal is that the learned judge erred in failing to hold that the grounds relied upon by UAP in opposition to the application for summary judgment ought to have been raised on the hearing of the application for stay of proceedings pending reference to arbitration and the failure to do so precluded UAP from raising those grounds in the application for summary judgment; that the learned judge erred in failing to appreciate that the issue before the court when dealing with the application for stay of proceedings was whether there was a genuine dispute between the parties so as to preclude a reference to arbitration which necessarily involved a consideration of the question whether there was a valid and concluded agreement between the parties to settle the dispute between them.

Submissions by counsel

14. Counsel for the parties dispensed with oral arguments at the hearing of the appeal and elected instead to file and exchange written submissions.

15. UAP in its written submissions filed on 31st October 2011 submitted: that UAP having repudiated liability on 18th November 1994, the negotiations for settlement commenced on 26th October 1996, more than a year afterwards were, under the clause 10 of the conditions of the Policy which was not waived, null and void; that in opposition to the application for summary judgment UAP raised triable issues, including the contention that the settlement was tainted with illegality and unenforceable; that on the authority of this Court's decision in the case of **Provincial Insurance Co of East Africa v Kivuti [1995-1998] 1 E A 283**, UAP was entitled to unconditional leave to defend the suit; that the learned judge erred in determining the preliminary objections raised before her; that having correctly found that the Hon. Justice Mutungi's ruling on the application for stay of proceedings pending arbitration was *obiter dictum*, the learned Judge erred in going ahead to hold that she was bound by it; that the learned judge's finding in any case could only have disposed off the issues raised in the preliminary objection; that the learned judge decided the summary judgment application which was never argued before her and which was not up for decision as the only issue that had been canvassed was the preliminary point on the issue of *res judicata*.

16. Beckett on his part, by written submissions filed on 22nd November 2011, conceded grounds 1, 2 and 3 of UAP's memorandum of appeal and asserted that "*having dismissed the preliminary objections that had been argued before her, Kasango J. fell into error in considering and allowing the summary judgment application which was yet to be argued*."

17. Beckett then goes on to submit that the learned judge should have sustained his objection that the appellant was precluded from objecting to the application for summary judgment on grounds which should have been raised before Mutungi J. when the application for stay of proceedings was argued; that the determination by Mutungi J. on the question whether there was a valid agreement between the parties for the payment of Kshs.6, 000,000.00 necessarily involved the question whether the agreement was invalid by reason of illegality or fraud or lack of consideration; that the determination by Mutungi J that there was a valid agreement necessarily meant that the agreement was not invalid by reason of the alleged illegality, fraud or lack of consideration.

18. According to Beckett, the claims of illegality, fraud or lack of consideration had already been

raised through the affidavit of Owen-Burke sworn on 20th March 1998, before the application for stay of proceedings was heard before Mutungi J; and it was incumbent upon UAP to raise and canvass those grounds before Mutungi J in the course of hearing the application for stay of proceedings in order to show that the agreement relied upon by Beckett was invalid; that having regard to the determination of Mutungi J the issue of the validity of the agreement, was *res judicata*. In support of that contention UAP cited **Humphries v Humphries [1910]2 KB 531**; **Henderson v Henderson (1843) 3 Hare 100** at 114-15; **Fidelitas Shipping Co Ltd v V/O Exportchleb [1965] 2ALL E. R 4.** Accordingly Beckett's application for summary judgment was supported by the holding by Mutungi J. that the parties had agreed to the settlement of the claim.

19. In reply, UAP submitted that the question for determination before Mutungi J. was not on the question of validity of the agreement and the doctrine of res judicata cannot apply as what was before Mutungi J. for decision was whether there was a dispute or difference between the parties which should have been referred to arbitration under the Policy.

Analysis

20. There are essentially two issues for our determination in this appeal. The first is whether Kasango J. erred in deciding the application for summary judgment which was not canvassed instead of determining the preliminary points raised before her.

21. The second issue for our determination, which is also the subject of the cross appeal, is whether the learned judge erred in overruling Beckett's preliminary objection that UAP was, by reason of the principle of *res judicata*, estopped from raising, in opposition to the application for summary judgment, the grounds that the settlement agreement lacked consideration, was tainted with illegality and was against public policy. That is linked to the question whether a determination by the court, under Section 6 of the Arbitration Act that there is no dispute for reference to arbitration can be a basis for summary judgment. In other words does a finding by a court that there is no dispute for reference to arbitration under Section 6 of the Arbitration Act render that question *res judicata*?

22. We will first address the first question. The respondent has conceded, quite correctly in our view, that the learned judge fell into error in considering and allowing the application for summary judgment which had not been argued. A review of the record of appeal reveals that when Beckett's application for summary judgment came up for hearing before the Honourable Lady Justice M. Kasango on 19th May 2003, UAP raised a preliminary objection to it. When the hearing resumed on 27th June 2005, Mr. Nagpal, learned counsel for UAP, indicated that he did not wish to proceed with the preliminary objection and the court directed that it would accordingly "***proceed to hear the plaintiff application which the defendant will respond to***."

23. At the resumed hearing on 28th September 2005, the court observed that "***Mr. Inamdar wishes to raise a preliminary objection to the defendant's affidavit. The court reviews the order of 27th June 2005 and will allow the plaintiff to argue preliminary objection***." Mr. Inamdar then argued that the defendant was estopped, on grounds of res judicata, from arguing that there were triable issues disentitling the Beckett to summary judgment.

24. After hearing counsel on the preliminary objection, Kasango J reserved her ruling to 5th December 2005, when she allowed Beckett's application for summary judgment and entered judgment for him against UAP for Kshs. 6,000,000.00 with interest and costs.

25. It is clear from the record therefore that the learned judge, having disposed of the preliminary points, should have heard the parties substantively on the summary judgment application. She did not do so. We therefore hold that the learned judge erred in deciding the application for summary judgment instead of confining herself to the determination of preliminary points raised before her.

26. If the matter ended there, we would have allowed the appeal. But the matter does not end there. There is a cross appeal to which we must now turn.

27. The issue in the cross-appeal is whether the learned judge erred in overruling Beckett's preliminary objection that UAP was estopped, by reason of the principle of res judicata, from raising and relying on the grounds that the settlement agreement, on the basis of which Beckett sought summary judgment, lacked consideration, was tainted with illegality and was against public policy. In other words was the issue of validity of the settlement agreement *res judicata* by reason of the determination by Mutungi J. in relation to the application for stay of proceedings pending arbitration? Was the appellant, UAP, seeking to re-agitate, in the course of the summary judgment application, an issue that had finally been decided by Mutungi J. in the context of the application for stay of proceedings?

28. In addressing those questions it is necessary to establish what findings of fact and what conclusions of law and fact can legitimately be inferred from the decision of Mutungi J.

29. Beckett submitted that when dealing with the application for stay of proceedings under section 6 of the Arbitration Act, the basic or fundamental issue which Mutungi J. had to decide was whether there was a valid agreement between the parties for the payment of Kshs. 6,000,000.00 by UAP to Beckett and the determination of this issue necessarily involved the question whether the agreement was invalid by reason of illegality or fraud or lack of consideration. Consequently, Beckett went on to say, UAP should have taken up those grounds or arguments before Mutungi J. to show that the agreement was invalid and cannot subsequently in the context of the application for summary judgment raise the same matters as the same were *res judicata.*

30. UAP on the other hand maintained that what was before Mutungi J. was the question whether there was a dispute or difference between the parties for reference to arbitration. It was not for Mutungi J. to determine whether the difference had merit but only whether they existed. The fundamental question was not, as submitted by UAP, whether there was a valid agreement between the parties for the payment of Kshs. 6,000,000.00. The question whether the agreement was tainted by illegality and offended public policy was one of several issues in dispute, which should have been referred to arbitration under the Policy. Accordingly, Mutungi J. could not have decided that there was a valid agreement between the parties as neither party addressed him on either the question of legality and/or want of consideration for the settlement agreement or the effect of clause 10 of the Policy. UAP concluded that as those issues were not for decision before Mutungi J. and as they were not argued before him, he could not decide on them to constitute *res judicata.*

31. We have considered the submissions and the authorities to which we were referred in that regard.

32. When dealing with UAP's application for stay of proceedings under Section 6, Mutungi J. had this to say:

> " ***… I hold that there is no dispute between the parties to warrant reference, to arbitration. The differences, if any, were sorted out by the parties themselves, prior to the agreement concluded on 13th November 1996 in the terms therein. The existence of the arbitration clause in the Insurance Policy in this case is no bar to the action before this court in respect of the admitted claim of Kshs. 6million. It is illogical for the Defendant to seek stay of proceedings simply because there is an arbitration clause in the policy document, unless he can demonstrate that there is a dispute.***
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> ***As was held in ABDUL AZIZ SULEIMAN V. SOUTH BRITISH INSURANCE CO. LTD. Civil Appeal No. 779 of 1964 [1965] E.A. 66, at page 70, where the parties have reached a settlement, there is nothing to be referred to arbitration. The parties in this case agreed to settle the claim for the specified sum of kshs. 6million.***

The upshot of all this is that I decline to stay the proceedings herein is there is nothing to be referred to arbitration. There is no dispute between the parties. All there is is plaintiff's right to be paid as per the agreement, and that has nothing to do with the policy document."

33. When considering Beckett's application for summary judgment, Kasango J. in the ruling given on 5th December 2005 in reference to the argument on res judicata stated:

> " ***Plaintiff's counsel referred to the ruling of the Hon. Justice Mutungi delivered on 27th April 2004, when he ruled on the application for stay pending arbitration. The Judge thereof, made a find as follows:-***
>
> ***"……. there is nothing to be preferred to arbitration. The parties in this case agreed to settle the claim for the specified sum of Kshs. 6million. The upshot of all this is that I decline to stay the proceedings herein as there is nothing to be referred. There is no dispute between the parties. All there is is the plaintiff's right to be paid as per the agreement, and that has nothing to do with the policy document."***
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> ***It does seem that the defendant was given leave to appeal against the ruling but at the hearing of the summary judgment application there was evidence presented to court, of such appeal. That means that that finding by the judge has never been challenged to date. It is clear in that ruling the judge found that the present claim has nothing to do with the policy and that it had to do with a separate agreement, arrived at by correspondence, which settled the amount payable to the plaintiff***."

Kasango J. then went on to state that:

> "***I reject the plaintiff's argument that the defendant's argument in opposition to the plaintiff's claim was res judicata because it was obiter dictum. Although I find so, I do on the other hand find that a finding was made by Hon. Justice Mutungi, and which finding would bind me***."

34. With great respect, it is difficult to follow the learned judge's reasoning. If Mutungi J's pronouncement was obiter dictum, it is no clear on what basis the learned judge considered she was bound. The question is this, was Kasango J. right in stating that Mutungi J's pronouncement was obiter? Was the judge bound by the finding by Mutungi J? In other words was the matter res judicata? When is a matter deemed to be resjudicata?

35. Spencer Bower, Turner and Handley's in the title **The Doctrine of Res Judicata** capture the principle of the law that:

> "***Where a question was necessarily decided in an earlier suit, although not in express terms, the same question could not be raised again between the parties in a later suit***."

The learned authors go on to say that:

> "***Where a cause of action had been the subject of final adjudication, determinations of issues which are its essential foundation may be the basis of issue estoppel if another cause of action is set up***."

In **Henderson v Henderson**, Wigram (supra) V C stated:

> "***The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence, might have brought forward at the***

time." [emphasis]

36. The case of **Humphries v Humphries** [1910] 2 KB 531 stands for the proposition that a general adverse decision imports an adverse decision on any fundamental allegation by the successful party which his opponent failed to challenge, including an implied allegation.

37. Lord Denning, M R in **Fidelitas Shipping v V/O Exportchleb [1965] 2ALL E R 4 at page 8** expounded on issue estoppel citing Diplock L J in **Thoday v Thoday [1964] 1 ALL E R 341** as follows:

> "***The law, as I understand it, is this: if one party brings an action against another for a particular cause and judgment is given on it, there is a strict rule of law that he cannot bring another action against the same party for the same cause. Transit in rem judicatam; …But within one cause of action, there may be several issues raised which are necessary for the determination of the whole case. The rule then is that, once an issue has been raised and distinctly determined between the parties, then, as a general rule, neither party can be allowed to fight that issue all over again. The same issue cannot be raised by either of them again in the same or subsequent proceedings except in special circumstances; see per LORD MACNAGHTEN in Badar Bee v. Habib Merican Noordin…And within one issue, there may be several points available which go to aid one party or the other in his efforts to secure a determination of the issue in his favour. The rule then is that each party must use reasonable diligence to bring forward every point which he thinks would help him. If he omits to raise any particular point, from negligence, inadvertence, or even accident (which would or might have decided the issue in his favour), he may find himself shut out from raising that point again, at any rate in any case where the self-same issue arises in the same or subsequent proceedings. But this again is not an inflexible rule. It can be departed from in special circumstances***." [Our emphasis]

38. In our view, and as we have held in the judgment of this Court in Civil Appeal No. 26 of 2007, the issue with which Mutungi J. was concerned when dealing with the application under section 6 of the Arbitration Act was whether or not the arbitration clause would be enforced and whether the matter was one for reference to arbitration. This is what we said:

> "***Section 6 of the Arbitration is an enforcement mechanism available to a party who wishes to compel an initiator of legal proceedings of a matter that is the subject of an arbitration agreement to refer the dispute to arbitration. The enquiry that the court undertakes and is required to undertake under section 6(1)(b) of the Arbitration Act is to ascertain whether there is a dispute between the parties and if so, whether such dispute is with regard to matters agreed to be referred to arbitration. In other words, if as a result of that enquiry the court comes to the conclusion that there is indeed a dispute and that such dispute is one that is within the scope of the arbitration agreement, then the court refers the dispute to arbitration as the agreed forum for resolution of that dispute. If on the other hand the court comes to the conclusion that the dispute is not within the scope of the arbitration agreement, then the correct forum for resolution of the dispute is the court.***
>
> ***The inquiry by the court with regard to the question whether there is a dispute for reference to arbitration, extends, by reason of Section 6(1)(b), to the question whether there is in fact, a dispute***."

39. We accordingly held, in Civil Appeal No. 26 of 2007 that it was within the province of the court, when dealing with the application for stay of proceedings under Section 6 of the Arbitration Act to form an opinion on the merits of the case.

40. In the context of the principle in **Henderson v Henderson**,[supra] to which we have referred

above Mutungi J. was required, in dealing with a Section 6 application, to form an opinion or pronounce himself on the merits or otherwise of the dispute. The merits or demerits of the dispute were a matter that properly belonged to the subject that was before him. The ratio *decidendi* of his decision in our view is in the pronouncement that "***the upshot of all this is that I decline to stay the proceedings herein as there is nothing to be referred to arbitration. There is no dispute between the parties***." The learned judge's further pronouncement that "***all there is is the Plaintiff's right to be paid as per the agreement***…" is part of the decision and not, as Kasango J. stated, *obiter dictum*.

41. It was necessarily part of the decision that was required to be made under Section 6(1)(b) and that finding was therefore binding on Kasango J. in the subsequent application for summary judgment.

    In its judgment in Civil Appeal No. 26 of 2007 this Court stated that:

> "***We uphold the submission by counsel for the respondent that under section 6(1)(b) of the Arbitration Act, 1995, the issue whether the dispute or differences between the parties had any merit beyond the consideration whether they existed was a matter properly before Mutungi J. and his determination thereon was binding and constituted res judicata. It follows from the findings and conclusion of Mutungi J. that UAP ought to have raised and relied on the grounds of illegality, lack of consideration et al as mentioned in the affidavit of Mr. Owen-Burkes sworn on 20th march 1998 on the hearing of the application for stay of proceedings pending arbitration and its failure to do so precluded it from raising the same grounds subsequently before Kasango J.***"

42. The result of the foregoing is that we hold that the learned judge erred in overruling Beckett's preliminary objection. By reason of the principle of *res judicata*, UAP was estopped from raising and relying on the grounds that the settlement agreement on the basis of which Beckett sought summary judgment lacked consideration, was tainted with illegality and against public policy, in opposition to the application for summary judgment. In the result, Beckett's cross appeal succeeds.

43. What then is the overall effect of the appellant's appeal succeeding and the respondent's cross appeal succeeding? We set aside the judgment of the Kasango J allowing the application for summary judgment. We also set aside the learned Judge's order dismissing the respondent's preliminary objection and substitute therewith an order upholding the respondent's preliminary objection that UAP is estopped from raising and relying upon the three grounds in opposition to the application for summary judgment with the consequence that we enter judgment for the respondent against the appellant as prayed in the plaint.

44. Judgment is accordingly entered for Beckett against UAP as prayed in the in the plaint.

45. Beckett will have the costs of the cross-appeal and of the proceedings in the High Court. There will be no order as to costs with regard to the appeal.

Dated at Nairobi this 4th day of October 2013.

D. K. MARAGA

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JUDGE OF APPEAL

W. OUKO

……

JUDGE OF APPEAL

S. GATEMBU KAIRU

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR