



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 55 OF 2020

CONSOLIDATED WITH

CIVIL SUIT NOS. 98 & 99 OF 2020

INVESCO ASSURANCE COMPANY LIMITED.....1ST PLAINTIFF

AFRICA MERCHANT ASSURANCE COMPANY LIMITED.....2ND PLAINTIFF

DIRECTLINE ASSURANCE COMPANY LIMITED..... 3RD PLAINTIFF

VERSUS

AUCTIONEERS LICENSING BOARD.....1ST DEFENDANT

NATIONAL ASSOCIATION OF KENYA AUCTIONEERS..... 2ND DEFENDANT

KINYANJUI NJUGUNA & COMPANY ADVOCATES1ST INTERESTED PARTY

LAW SOCIETY OF KENYA.....2ND INTERESTED PARTY

RULING

1. By its plaint dated 20th April 2020, *Invesco Assurance Company Limited* (the 1st plaintiff) instituted suit against the *Auctioneers Licensing Board* (1st defendant) and the *National Association of Kenya Auctioneers* (2nd defendant) seeking declaratory reliefs to the effect that properties which it particularized in the plaint and funds held in mobile money platforms operated by mobile telecommunication companies in Kenya to which the plaintiff has subscribed are protected from execution under *Section 44 (1)* of the *Civil Procedure Act* (the Act).

2. The 1st plaintiff also prayed for orders of permanent injunction to restrain any licensed auctioneer or any person from proclaiming or attaching the properties it considers to be its tools of trade or funds held in the aforesaid mobile money platforms in execution of decrees and court orders.

3. Contemporaneous with the filing of the plaint, the 1st plaintiff (applicant) filed a Notice of Motion dated 20th April 2020 under a certificate of urgency seeking interim injunctive reliefs *in rem* to restrain any person from proclaiming or attaching the particularised items it considers to be its tools of trade and funds held in mobile money platforms which in its view are protected from execution under *Section 44 (1)* of the Act. I will list the said items shortly when addressing the prayers sought in the application.

4. The court record shows that after the application was filed and interim injunctive orders *in rem* were granted on 21st May 2020, the Law Firm of *Kinyanjui Njuguna & Company Advocates* and the *Law Society of Kenya* separately applied to be enjoined as interested parties in the suit and sought to have the interim orders *in rem* discharged.

5. In a ruling delivered by this court (*Hon. Serگون, J*) on 23rd June 2020, the applications were allowed and the Law Firm of *Kinyanjui Njuguna & Company Advocates* and the *Law Society of Kenya* were enjoined as the 1st and 2nd interested parties respectively. The interim injunctive orders *in rem* issued on 21st May 2020 were also discharged.

6. On 3rd and 6th July 2020, *African Merchants Assurance Company Limited* (2nd plaintiff) and *Directline Assurance Company Limited* (3rd

plaintiff) filed separate suits against the 1st and 2nd defendants seeking reliefs similar to those sought in the suit lodged by the 1st plaintiff. They also filed applications dated 1st July 2020 seeking temporary injunctive reliefs *in rem* on terms similar to those sought by the 1st plaintiff in the application dated 20th April 2020.

7. On 21st July 2020, with the consent of the parties involved in the three suits, the suits were consolidated with HCCC No. 55 of 2020 being the lead file. The applications filed in the consolidated suits were fixed for hearing on 28th July 2020.

8. On the hearing date, considering that all the applications sought similar reliefs, the court with the consent of the parties directed that hearing would proceed in the Notice of Motion dated 20th April 2020 filed in HCCC No. 55 of 2020 and that its outcome will apply to the applications filed in the other two suits.

9. In the application dated 20th April 2020, the applicant sought several reliefs including orders of temporary injunction *in rem* pending hearing and determination of the application which are now spent. The prayers pending this court's determination are prayers 4, 5, 7 and 8 which are reproduced hereunder:

4. Pending the hearing and determination of the main suit, the Honourable court be pleased to issue interim injunctive orders in rem restraining any licensed auctioneer and or any other person from in any way proclaiming, attaching and/or in any way interfering with the plaintiff's/applicant's tools of trade necessary for the conduct of its insurance business including the following:

(i) Office amenities, facilities and physical infrastructure including furniture, chairs, stationery, cabinets, safes, kitchenware;

(ii) ICT infrastructure including laptops, desktops, servers, modems, scanners, CPUs, printers, photocopiers, network cables, telephone headsets, lines, routers and the necessary cabling for the same; and

(c) Mobile money transaction platforms including paybill and buy goods platforms.

5. Pending the hearing and determination of the suit, the Honourable court be pleased to issue interim injunctive orders in rem restraining any licensed auctioneer and or any other person from in any way proclaiming, attaching and/or in any way interfering with the funds held in mobile money platforms including paybill and buy goods tills operated by mobile telecommunication companies in Kenya and to which the plaintiff has subscribed to facilitate its financial transactions.

7. That the main suit be heard by way of affidavit evidence and written submissions.

8. The costs of this application.

10. The application is anchored on the grounds stated on its face and the depositions made in the supporting and further affidavits sworn on 20th April 2020 and 15th May 2020 respectively by *Mr. Paul Gichuhi*, the applicant's Legal Manager.

11. In the supporting affidavit, in addition to replicating the grounds premising the motion, *Mr. Gichuhi* deposed that the applicant is a limited liability company duly registered under the Companies Act 2015 and is licensed to carry on general insurance business in the Republic of Kenya. It provides insurance cover to a countrywide customer base from its headquarters in Nairobi and 27 branches established countrywide; that from time to time, following the occurrence of insured risks, its insured are the subject of civil claims lodged by third parties seeking compensation for loss and damage to property or for personal injury and death.

12. The deponent further stated that under the law, the applicant has an obligation to satisfy decrees issued against its insureds subject to the limits prescribed under *The Insurance (Motor Vehicle Third Party Risks) Act Cap 405 Laws of Kenya*; that whereas *Section 44 (1)* of the Act clearly defined the properties which are liable to attachment and sale in execution of decrees, its proviso exempts from attachment tools and implements necessary for the performance of a person's trade or profession and books of accounts.

13. It is the applicant's case that since neither the *Civil Procedure Act* nor the *Civil Procedure Rules* (the Rules) define what constitutes a "tool or implement" necessary for the performance of a trade or profession, auctioneers who are licensed and supervised by the 1st defendant (1st respondent) and are members of the 2nd defendant (2nd respondent) have in the execution of decrees against it exploited that lacuna in the law and have been proclaiming, attaching and selling properties which in its view qualify to be tools and implements necessary for its trade and operations which are exempted from the execution process.

14. The applicant identified such properties to be *inter alia*, its office amenities such as furniture, chairs, stationery, cabinets, safes, kitchenware and ICT infrastructure such as computers, servers, modems, scanners, CPUs, printers, photocopiers, telephone headsets, lines, routers and network cables.

15. In addition, the applicant complained that auctioneers have in contravention of *Section 44 (1)* of the Act habitually garnisheed funds held in mobile money platforms which it uses to facilitate receipts of premium payments from members of the public which do not entirely belong to it.

16. The applicant asserted that due to the aforesaid unlawful actions by auctioneers, its business operations have been unduly disrupted and adversely affected and that since there are numerous proclamations of its tools of trade currently pending and due for execution countrywide, if the orders sought are not granted, execution of its unlawfully attached properties will be actualized which will not only diminish its ability to sustain its operations and honour its obligations to its insured but will also render the suit nugatory. According to the applicant, if the

application was allowed, the respondents and the interested parties are not likely to suffer any prejudice.

17. The application is opposed by both respondents and the two interested parties. The 1st respondent which was represented by the Hon. Attorney General filed grounds of opposition dated 8th May 2020. In the main, the 1st respondent contested the application on grounds that *Section 44 (1) of the Act* which protects tools and implements of trade from execution applies only to natural persons as juristic persons are not registered as professionals or tradesmen by the various regulatory authorities set up for that purpose; that the applicant ought to challenge the impugned attachments separately in the suits concerned and that since the applicant is carrying on insurance business as a going concern, it has an obligation to honour its debts or apply for insolvency.

18. On its part, the 2nd respondent opposed the motion through a preliminary objection filed on 28th April 2020; grounds of opposition filed on 29th April 2020 and a replying affidavit sworn on even date by *Mr. Darius Kimwele*, the 2nd respondent's Secretary General.

In the preliminary objection, the 2nd respondent challenged this court's jurisdiction to determine the first limb of the motion as in its view, the prayer sought to amend or fill the lacuna in *Section 44 (1) of the Act* which is the preserve of Parliament; that this court has already interpreted *Section 44 (1) of the Act* in **Blackwood Hodge (K) Limited V Gasoline Tank Cleaning Sam & Chase (K) Limited, [1986] eKLR** and in **Re Khaminwa** and the suit was thus *res judicata*.

19. The 2nd respondent also contended that the application amounts to an abuse of the court process and ought to be dismissed with costs as it was filed after the applicant failed to obtain a blanket stay of execution in Kisumu Petition No. 4 of 2020.

20. In its grounds of opposition and in the replying affidavit, the 2nd respondent maintained its challenge on the competence of the application and the suit. It averred that the pleadings as drafted and filed offends the law as National Association of Kenya Auctioneers (NAKA) as an association cannot be sued and further, the association had been sued in exclusion of KENSAP which means that all auctioneers were not represented in the suit; that execution of judgment is a product of individual separate cases and cannot be lumped together in one suit.

21. The 2nd respondent also contended that the plaintiff was guilty of material non disclosure and forum shopping as demonstrated by various suits pending in various courts an example being Kisumu HC Petition No. 4 of 2020; that as the application stands on a faulty and defective suit, it should be dismissed with costs.

22. In resisting the motion, the 1st interested party filed a notice of preliminary objection dated 10th July 2020 and a replying affidavit of even date sworn by its learned counsel *Mr. Seth Khisa*. In its preliminary objection, the 1st interested party attacked the application on grounds that it was an affront to *Section 34 (1) of the Act* which requires that all questions arising between the parties or their representatives relating to the execution of decrees should be determined by the court executing the decree and not by a separate suit.

23. In his replying affidavit, learned counsel *Mr. Khisa* deposed that in filing the application and the suit, the applicant abused the court process and acted in bad faith by challenging execution of uncontested decrees issued by other courts of competent and concurrent jurisdiction with the aim of obtaining blanket injunctive orders *in rem* to shield it from execution of regular decrees without providing any security.

24. *Mr. Khisa* further averred that if the orders sought were granted, they will have the effect of undermining and interfering with the jurisdiction of other courts of concurrent jurisdiction to determine questions placed before them related to execution of decrees passed by them and will also deny the 1st interested party and other creditors their right to execute regular and uncontested decrees obtained against the applicant.

25. In addition, Counsel asserted that the applicant had refused to settle the uncontested decrees the 1st interested party had obtained against it and had gone to the extent of hiding its assets to defeat the execution process; that in a bid to avoid settling the decrees, the applicant had previously filed multiple suits and applications in various courts seeking a replica of the orders sought in the instant application. He listed those cases as Kitui HC Misc Appln No. 460 of 2018, Kisumu Constitutional Petition No. 4 of 2020 and Nairobi HCC Constitutional Petition No. 139 of 2020.

26. The 1st interested party also contended that the provisions of *Section 44 (1) of the Act* are clear and that they do not require any interpretation; that the provision applies to natural persons and the applicant was not therefore deserving of the protection sought.

27. On its part, the 2nd interested party contested the motion through a replying affidavit sworn by *Ms. Mercy Wambua*, its Secretary/Chief Executive Officer who is also an Advocate of the High Court. In her affidavit, *Ms Wambua* deposed *inter alia* that the orders as framed if issued will give the applicant a blanket moratorium and immunity against execution of all decrees countrywide whether issued by courts of concurrent jurisdiction or higher courts than this court.

28. *Ms Wambua* joined the 1st interested party in averring that in filing the current application, the applicant was forum shopping with the aim of obtaining favourable orders to protect it from meeting its obligations which should not be permitted by this court. Counsel claimed that the applicant was guilty of deception and material non-disclosure as it had previously filed multiple suits and applications seeking substantively the same orders which it had chosen not to disclose to this court. Moreover, having failed to settle existing decrees and other claims, the applicant had approached the court with unclean hands and was undeserving of the exercise of the court's discretion in its favour.

29. The deponent further stated that the applicant had filed judicial review proceedings in the High Court at Kisumu namely, **Republic V Chief Magistrate's Court Homabay Law Courts & Another ex parte Invesco Assurance Company Limited, Okongo Wandago & Company Advocates & Another (Interested Parties), [2020] eKLR** in which the application of *Section 34* of the *Act* was finally

determined and that consequently, the instant application was *res judicata* and an abuse of the court process.

30. The 2nd interested party also faulted the applicant for misjoinder of the defendants and non joinder of proper defendants such as the *Hon. Attorney General, The Insurance Regulatory Authority* and major creditors who have a stake in the outcome of the application and the suit.

31. In rejoinder, *Mr. Gichuhi* in his further affidavit averred *inter alia* that to his knowledge, there was no suit involving the parties in which the issues raised in the instant suit had been considered and finally decided. He asserted that the applicant remained ready and willing to settle all decrees validly issued by the courts against its insureds provided they are executed in accordance with the law.

32. He reiterated that if the interim injunctive reliefs were not granted, the applicant will suffer irreparable harm while the respondents and interested parties are not likely to suffer any prejudice if the application was allowed as all other avenues for execution will continue to be available to them.

33. The application was prosecuted by way of written submissions which all the parties duly filed restating and buttressing the positions they had taken in support and in opposition to the motion as summarized above. The submissions were highlighted before me on 28th July 2020 by learned counsel *Mr. Awele* who appeared for the applicant, learned counsel *Mr. Ngumbi* and *Mr. Pala* who represented the 1st and 2nd respondents respectively. The 1st and 2nd interested parties were represented by learned counsel *Mr. Khisa* and *Mr. Thuita* respectively.

34. I have given due consideration to the pleadings, the application, the affidavits and all the documents filed by the parties in support and in opposition to the motion. I have also carefully considered the rival written and oral submissions made on behalf of the parties and all the authorities cited. Having done so, I find that four key issues crystalize for my determination. These are:

- i. Whether this court is seized of jurisdiction to hear and determine the consolidated suit and the application.
- ii. If the answer to issue no. (i) is in the affirmative, whether the suit and the application are incompetent and fatally defective.
- iii. If the answer to issue no. (ii) is in the negative, whether the applicant is entitled to the interim reliefs sought in the application.
- iv. What orders should be made on costs?

35. The jurisdictional challenge in this case was made by the 2nd respondent and the 1st interested party. In its preliminary objection, the 2nd respondent questioned this court's jurisdiction to grant the prayers sought in the plaint and in the first limb of the motion arguing that the court does not have jurisdiction to amend or fill a lacuna in a statute as this was the preserve of Parliament. The 1st interested party in its notice of preliminary objection impliedly challenged the court's jurisdiction to hear the application contending that the motion violated the provisions of *Section 34* of the *Act* which required that all questions arising between parties to a suit related to execution of decrees should be determined in the suit in which the decree was issued and not in a separate suit. However, in its submissions, the 1st interested party extended this argument to contest the court's jurisdiction to hear and determine the suit.

36. As noted earlier and as can be ascertained from a quick perusal of the complaints instituting the consolidated suit, besides the prayer for orders of a permanent injunction, the plaintiffs are in the suit seeking declaratory reliefs concerning whether the items listed in their respective suits constitutes their tools of trade which should be exempted from execution under *Section 44 (1)* of the *Act* and whether funds held in mobile money platforms such as paybills and till numbers constitutes property which is in their disposable power which can be attached in execution of decrees.

37. In the motion, the applicant is not contesting the validity of the decrees issued against it and is not praying for a determination of any question related to the execution of the decrees annexed to the application. It is seeking interim injunctive orders in rem pending the determination of its declaratory suit. The annexures to the supporting affidavit are just illustrations of the items that have been proclaimed or attached in execution of decrees issued by various courts against the applicant. In the premises, I am unable to agree with learned counsel *Mr. Khisa's* submission that the suit and the motion are an affront to *Section 34* of the *Act* and that therefore, this court lacks jurisdiction to entertain the same.

38. Regarding the objection made by the 2nd respondent, with respect, it is my finding that the consolidated suit invokes the constitutional and statutory mandate of this court to interpret the law as legislated by Parliament. It does not invite this court to either alter or amend any provision of the law as suggested by the 2nd respondent. My take is that this court has jurisdiction to hear the suit and the application and to determine whether or not to grant the orders sought.

39. For the foregoing reasons, I find that the jurisdictional challenge made by the 1st interested party and the 2nd respondent is unmeritorious and it is hereby dismissed.

40. Having found that this court has jurisdiction to hear and determine the suit and the application, I will now proceed to consider the second issue I have identified for my determination. From the material placed before me, I find that the objections raised to the competence of the suit and the motion are based on claims that the same are *res judicata* and that there is non joinder and misjoinder of parties to the suit.

The 2nd respondent and the 2nd interested party argued in their submissions that the applicant's suit and the motion as filed are *res judicata* since they are premised on the interpretation of *Sections 44 (1) and 34 (1)* of the *Act* which has already been settled by competent courts of concurrent jurisdiction in previous cases.

41. According to the 2nd respondent, whether or not *Section 44 (1)* of the Act applies to natural as well as juristic persons like the applicant has been determined in previous decided cases namely, *Blackwood Hodge (K) Limited V Gasoline Tank Cleaning Sam & Chase (K) Limited, [supra]*, *Josephat Nderitu Kariuki suing as legal representative of John Kinyua Nderitu [deceased] V Pine Breeze Hospital Limited, Case No. 223 of 2005* and *Thomas Nguta Kyango V Augustine Mwangela Mwea, Civil Appeal No. 26 of 2009* and since the plaintiff's suit calls for interpretation of the same provision, it is to that extent *res judicata*.

42. The 2nd interested party contended that the matter was *res judicata* in light of the decision by *Hon. Cherere, J* in *Republic V Chief Magistrate's Court, Homabay Law Court & Another, ex parte Invesco Assurance Company Limited case [supra]* where the court determined an issue raised in this suit concerning whether issues arising from execution of decrees can be decided by a court other than the court which issued the decree which question was answered in the negative.

43. The doctrine of *res judicata* is set out in *Section 7* of the *Civil Procedure Act*. The doctrine ousts the jurisdiction of a court to try any suit or issue which had been finally determined by a court of competent jurisdiction in a former suit involving the same parties or parties litigating under the same title.

44. A close reading of *Section 7* of the Act reveals that for the bar of *res judicata* to be effectively raised and upheld, the party raising it must satisfy the doctrine's five essential elements which are stipulated in conjunctive as opposed to disjunctive terms. The doctrine will apply only if it is proved that:

- i. The suit or issue raised was directly and substantially in issue in the former suit.
- ii. That the former suit was between the same party or parties under whom they or any of them claim.
- iii. That those parties were litigating under the same title.
- iv. That the issue in question was heard and finally determined in the former suit.
- v. That the court which heard and determined the issue was competent to try both the suit in which the issue was raised and the subsequent suit.

45. My reading of the authorities availed to me by the 2nd respondent and the 2nd interested party in support of their claim that the instant matter is *res judicata* shows that although those cases involved a determination of matters related to the execution process particularly the interpretation of *Sections 44 (1) and Section 34 (1)* of the Act which interpretation is directly in issue in the instant suit, the former cases involved aspects of the execution process which are not in issue in this case and the parties in the former suits and in the current suit are different. Consequently, it is my finding that the doctrine of *res judicata* is not applicable to this case.

46. As noted earlier, the other objections taken by the 2nd respondent and the 2nd interested party relates to the misjoinder and non joinder of parties to the suit and the motion. Without making any finding, it is my view that non joinder of necessary parties or misjoinder of parties in a suit is an irregularity which does not go to the root of a suit. It is an omission or irregularity which cannot render a suit fatally defective since it is curable by an amendment. In any event, *Order 1 Rule 9* of the *Civil Procedure Rules* is very clear that no suit should be defeated by reason only of misjoinder or non joinder of parties.

47. For the foregoing reasons, I am satisfied that the preliminary objections raised by the 2nd respondent and the interested parties cannot be sustained. It is my finding that the suit as filed and the application are competent and are properly before this court. The preliminary objections are thus not merited and are hereby dismissed.

48. The above determination now leads me to a consideration of the merits of the application. As stated earlier, the applicant seeks interim injunctive reliefs *in rem* to restrain not only licensed auctioneers but any person from proclaiming or attaching properties it considers to be its tools of trade pending the hearing and determination of the suit. The application is premised on *Order 40* of the *Rules* which empowers this court to grant a deserving party temporary injunctive relief before conclusion of a trial. Needless to state, an injunction is an equitable remedy which is granted in the exercise of a court's discretion depending on the facts and circumstances of each case and the ends of justice.

49. In order to be deserving of grant of orders of temporary injunction, an applicant must satisfy the conditions laid down in the celebrated case of *Giella V Cassman Brown & Company Limited, (1973) 358 EA* which are the following:

- (i) The applicant must establish a *prima facie* case with a probability of success.
- (ii) The applicant must then demonstrate that he or she stands to suffer irreparable loss or damage which cannot be adequately compensated by an award of damages.
- (iii) Where there is doubt on the above, that the balance of convenience tilts in favour of the applicant.

50. In the affidavits supporting the motion and in its submissions, the applicant urged me to find that the items it had identified in the suit and in the motion as its tools of trade are necessary for the operation of its insurance business in the modern business environment and that without them, it cannot meet its obligations under the law and to the insuring public.

51. The applicant countered the respondents' and interested parties' submissions that it is not entitled to the orders sought as *Section 44 (1)* of the Act applies only to natural persons by arguing that the provision also applies to companies or juristic persons given that although the Act

does not define who a person is in the context of *Section 44 (1)*, *Section 2* of the *Interpretations And General Provisions Act* defines a person to include a company or an association or body of persons, corporate or incorporate.

52. The applicant also cited the case of ***Victoria Pumps Limited V Kenya Ports Authority & 4 Others, [2015] eKLR*** to support its proposition that the provision also applies to juristic persons. In addition, the applicant relied on this case together with several other authorities in which computers and furniture were held to be tools of trade necessary for the businesses the applicants in those cases were engaged in – See: ***Jonathan Wepukhuli T/A Gati Cleaning Agency Limited V Julius Odhiambo Oduor, [2019] eKLR***; ***Washington Jalango Okumu V Boffar Limited, [2005] eKLR***

53. In my opinion, what qualifies to be tools of trade necessary for the performance of a trade or profession is a question of fact which can only be determined on the basis of evidence depending on the facts of a particular case and the trade or profession of the judgment debtor. It is impossible to have a standard definition of what constitutes tools of trade that would have universal application to all trades and professions.

54. Given the submissions made by the parties in support and in opposition to the application and considering the reliefs sought in the plaint, it is my finding that the issue regarding whether or not the properties itemized by the applicant constitutes tools of trade necessary for the operations of its insurance business and whether or not the applicant is entitled to protection under *Section 44 (1)* of the *Act* are substantive issues which this court cannot determine at this preliminary stage without prejudicing the fair hearing of the main suit. They are issues which go to the merits of the suit and ought to be canvassed and determined in the main suit.

55. That said, given the evidence availed to the court, I am satisfied that the applicant has established that it has a *prima facie* case with a probability of success. It must however be remembered that a case with a probability of success is not one that must succeed at the hearing but it is a case which is arguable and merits further investigations in a trial.

56. Regarding whether the applicant has proved that it will suffer irreparable loss or damage that cannot be compensated by an award of damages, the applicant has contended that with the indiscriminate attachment of what it considers to be its tools of trade as exemplified by the annexures to the application, if the orders sought are not granted, the threatened executions will be actualized exposing it to the risk of insolvency.

57. The applicant's apprehension may be justified but in my view, the envisaged damage is only likely to occur if the hearing of the suit is prolonged and takes a long time to conclude. It is clear from a perusal of the pleadings that the suit turns on points of law and it is possible to have its hearing fast tracked and expedited in which case the applicant is not likely to suffer irreparable damage.

58. On the balance of convenience, I have noted the positions advanced by each of the parties particularly the one taken by the respondents and the interested parties to the effect that if the injunctive orders are granted on terms sought, they will give the applicant a blanket moratorium and an absolute shield to all executions notwithstanding the fact that the decrees sought to be executed are not contested.

59. As admitted by the applicant, being a company engaged in the insurance business, it is duty bound to satisfy all valid decrees issued against its insured subject off course to the amounts limited by the law in the case of third party claims arising from road traffic accidents. Given the manner in which the orders sought are crafted, I am persuaded by the 2nd interested party's argument that if issued, the orders may be used to frustrate, stay or restrain the execution of decrees issued by all courts countrywide including decrees issued by courts with concurrent jurisdiction or higher courts than this court which is not permissible in law.

60. In addition, such orders if granted will not only affect the parties to the consolidated suit but will also adversely affect other decree holders who may constitute a large chunk of the country's population who are not parties to the suit. Issuing such orders in the circumstances would amount to issuing adverse orders against parties who have not been given an opportunity to be heard which would violate one of the basic components of the rules of natural justice. Considering that most of the decree holders who are likely to be adversely affected by orders if issued are victims of road traffic accidents or their dependants in the case of fatal accident claims and having taken into account all other relevant factors, I am convinced that issuing such orders will be against the public interest.

61. I agree with the reasoning of *Ojwang, J* (as he then was) and *Odero J* in ***Flemish Investments Limited V Town Council of Mariakani, MSA HCCC No. 459 of 2010, [2012] eKLR*** which was cited with approval in ***John Mosingi Marube V County Commissioner Kisii County & 2 Others, [2016] eKLR*** that public or community interest should, in appropriate cases, be an additional consideration to the principles laid down in the ***Giella V Cassman Brown & Company Limited, [supra]*** in deciding whether or not to grant interlocutory injunctions.

62. In this case, I am satisfied that the public interest is weighty and far outweighs the private interests of the applicant.

Consequently, I am persuaded to find that the balance of convenience tilts against the applicant.

63. Last but not least, it is apposite to note that the applicant has been accused of abusing the court process by filing multiple suits in various courts of concurrent jurisdiction seeking similar orders which suits it has deliberately failed to disclose to this court. The applicant though admitting having filed several suits in other courts has denied that those suits seek similar orders to those sought in the application under consideration.

64. From the material placed before me, I have noted that prior to filing the current suit and the application, the applicant had filed Constitutional Petition No. 394 of 2019 and Kisumu Constitutional Petition No. 27 of 2019 which were subsequently withdrawn as well as Kisumu Constitutional Petition No. 4 of 2020 which was transferred to the Constitutional Division of the High Court in Nairobi. That petition is still pending hearing.

65. I have also noted that though the petitions involved various other parties, they sought by and large conservatory orders seeking to stop

execution of decrees issued against the applicant which are largely similar to the orders sought in this application.

66. The applicant did not disclose to this court the existence of the aforesaid petitions irrespective of their current status. I thus agree with the submissions made by the 2nd respondent and the interested parties that in filing the current application when there was another suit pending seeking almost similar reliefs, the applicant abused the court process and as it failed to disclose the existence of the petitions previously filed in other courts, in which it sought similar orders, the applicant is guilty of deception and non disclosure of material facts. What this means is that the applicant, though seeking equitable reliefs did not approach this court in good faith but did so with unclean hands.

67. For all the foregoing reasons, it is my finding that the applicant has not demonstrated that it is deserving of the exercise of the court's discretion in its favour by granting it prayers 4 and 5.

68. Regarding prayer 7 in which the applicant sought the court's direction that the suit should be heard by way of affidavit evidence and written submissions, this prayer appears to have been abandoned as parties did not address it in their affidavits and in their submissions. In the premises, I decline to make any finding on the same.

69. In the end, I have come to the conclusion that the Notice of Motion dated 20th April 2020 lacks merit and it is hereby dismissed.

70. As costs follow the event, the respondents and the interested parties are awarded costs of the application.

71. Given my earlier finding that hearing of the suit needs to be expedited, I direct the parties to promptly comply with *Order 11* of the *Civil Procedure Rules* and thereafter take a mention date before the Hon. Deputy Registrar on a priority basis to ascertain compliance and further orders and/or directions.

72. Finally, as agreed by the parties, this ruling will apply to the applications dated 1st July 2020 filed in HCCC No. 98 of 2020 and HCCC No. 99 of 2020.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 27th day of August 2020.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Ngumbi for the 1st defendant

Mr. Pala for the 2nd defendant

Mr. Khisa for the 1st interested party

Mr. Thuita for the 2nd interested party

Mr. Nderitu holding brief for Mr. Awele for the all plaintiffs

Ms Carol: Court Assistant