IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR

(COMMERCIAL DIVISION)

ORIGINATING SUMMONS NO.: WA-24NCC-432-08/2019

BETWEEN

ETIQA GENERAL TAKAFUL BERHAD
(1239197-A) **...PLAINTIFF**

AND

1. **CHE INTAN BINTI HASHIM**
2. **JANUDIN BIN BAKAR**
3. **MOHAMAD FIRDAUS BIN JAINUDDIN**
4. **WONG FONG YEN** **…DEFENDANTS**

GROUNDS OF DECISION

Introduction

[1] The Plaintiff's application, by way of an Originating Summons, is for a declaration pursuant to s. 96 (3) of the Road Transport Act 1987 ("**the RTA**") that Policy No. TVP-80664605-B1 which provided insurance coverage for motor vehicle no. BGX 5572 ("**the Vehicle**") for the period between 18.4.2018 until 17.4.2019 ("**the Policy**") is void and unenforceable with respect to a road accident on 15.6.2018 involving the Vehicle driven by the 3rd Defendant and motorcycle no. CDC 2928 claimed to be ridden by the 4th Defendant ("**the Accident**").

[2] On 19.9.2019, this Court allowed the application ("**the Order**").

[3] On 21.10.2019, the 4th Defendant filed enclosure 10 which is an application to set aside the Order. After hearing parties, this Court dismissed enclosure 10. Dissatisfied, the 4th Defendant appealed against the decision.

Background facts

[4] The First Defendant was the registered owner of the Vehicle at the time of the issuance of the Policy by the Plaintiff.

[5] The Plaintiff was served with a notice pursuant to s. 96(2) of the RTA in relation to the Accident.

[6] The 4th Defendant instituted a civil action in the Sessions Court in Raub (No. CC-A53KJ-251-12/2018) to claim general and special damages arising from the Accident against the 1st and the 3rd Defendants ("**the Writ Action**").

[7] The Plaintiff's investigations revealed that the Vehicle was sold to the 2nd Defendant in 2012 without the Plaintiff's knowledge. Subsequently, the Plaintiff filed the Originating Summons.

[8] A notice under s. 96 (3) of the RTA inclusive of the Originating Summons and Affidavit in Support were served in accordance to O. 10 of the Rules of Court 2012 to all the abovenamed Defendants including the 4th Defendant. This was shown in the Affidavit of

Service affirmed by the process server, Saravanan a/l Sarugonam on 6.9.2019.

[9] Further, a letter dated 6.9.2019 to inform on the hearing date fixed on 19.9.2019 was served to all the Defendants including the 4th Defendant.

[10] However, no letter of reply or affidavit in reply were filed. The Court therefore granted the Order after hearing the Plaintiff on 19.9.2019.

[11] The sealed order dated 19.9.2019 were served on all the Defendants including the 4th Defendant.

[12] The 4th Defendant dissatisfied with the served Order dated 19.9.2019 and filed an application to set aside the said Order.

Issue in dispute

[13] The crux of the issue in dispute in the present application is whether the 4th Defendant may set aside a regularly obtained Order by the Plaintiff from the same Judge.

Analysis

Setting aside a regular judgment

[14] It can be seen from prayer (b) in enclosure 10, the 4th Defendant is seeking to set aside the Order forthwith. The principles of law

governing the setting aside a final order can be seen from the following cases.

[15] In ***Hock Hua Bank Bhd V. Sahari Bin Murid [1980] 1 MLRA 687 (FC)***, the Federal Court stated that:

> *"...in this case the order was not obtained because of default of the other party.* ***He had the same material before him at the first foreclosure proceeding and quite clearly he should have consider himself functus officio after having considered the contentions raised at this proceedings and refused to do anything about it on the ground of lack of jurisdiction and he should have left it to the respondent to commence a fresh action to asset aside the foreclosure order on the ground of fraud.*** *The right practice was pointed out to him and his attention was drawn to the cases directly in point. Unless he could distinguish them, he was bound by them.*
>
> ***Clearly the Court has no power under any application in the same action to alter vary or set aside a judgment regularly obtained after it has been entered or an order after it is drawn up, except under the slip rule in 0.28 r. 11 Rules of Supreme Court 1957 (0.20 r. 11 Rules of the High Court 1980) so far as is necessary to correct errors in expressing the intention of the Court;*** *Re St. Nazaire Co.12 Ch D 88, Kelsey v Doune. [1912] 2 KB 482; Hession v Jones [1914] 2 KB 421", unless it is a judgment by default or made in the absence of a party at the trial or hearing. But if a judgment or order has been obtained by fraud or where further evidence which could not possibly have been adduced at the original hearing forthcoming, a fresh action will lie to impeach the original document..."*
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> (Emphasis added)

[16] In the case of ***Badiaddin Bin Mohd Mahidin V. Arab Malaysian Finance Bhd [1998] 1 MLJ 393 (FC)***, the Federal Court held as follows:

> *"...It is of course settled law as laid down by Federal Court in Hock Hua Bank's case that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction. But special exception to this rule (which was not in issue and therefore not discussed in Hock Hua Bank) is where the final judgment of the High Court could be proved to be null and void on ground of illegality or lack of jurisdiction so as to bring the aggrieved party within the principle laid down by a number of authorities culminating in the Privy Council case of Isaacs v Robertson [1985] AC 97..."*

(See also ***Pacific & Oriental Insurance Co Berhad V. Azhar Azizan; Mohd Asyraf Yusoff (Intervener) [2014] MLRHU 646***)

[17] It is not in dispute that it was this Court that granted the said Order. As such, applying ***Hock Hua Bank***, this Court is now *functus officio*. It can no longer make any amendment or set aside the Order. It is the decision of this Court that enclosure 10 must be dismissed *in lemine* as a court has no power to set aside an order made in the same action where the judgment has been regularly obtained and after it had been entered and drawn up.

[18] The option that should have been considered by the 4th Defendant was to either appeal against the Order or embark on a separate suite on the basis of fraud or deception. In the case of ***Gobi a/l***

Loganathan V. Allianz General Insurance Company (M) Berhad [2017] 1 LNS 2075, the court held:

> *"Having given the matter our utmost consideration, we were of the view that the recourses validly open to the respondents in the circumstances was, either:*
>
> > ***(a) to appeal against the order of court of 27 March 2014 in the 2013 - Saman Pemula, and therein possibly apply for material further or fresh evidence to be adduced, to have any order made therein reversed; or (b) to institute separate proceedings by way of writ action to impeach any of the orders issued in the 2013 - Saman Pemula on the grounds that those orders had been obtained by the appellant upon a fraud or deception being perpetrated on the court to secure those orders."***
> >
> > (Emphasis added)

[19] By not taking any of the actions mentioned in ***Gobi***, the 4th Defendant has lost her opportunity to set aside the Order.

[20] It is the view of this Court that the Order was obtained regularly and devoid of any irregularity. The said Order was not tainted by any illegality or lack of jurisdiction when this Court granted the Order. Therefore, there is no basis for this Court to set the Order aside. Applying the principles laid down in ***Badiaddin***, it is the view of this Court that there is no legal basis for this Court to set aside the Order.

Attempt to show irregularity

[21] Realizing that the application was not on solid footing for this Court to set aside its own order, the 4th Defendant argued that there were procedural defects rendering the Order to be irregular.

[22] The 4th Defendant alleged that the Plaintiff was wrong in not serving the cause papers when it came to this Court seeking a declaration under s. 96 (3) of the RTA. It was argued that the Plaintiff was fully aware that the 4th Defendant was represented by counsel during the Writ Action but for reasons best known to the Plaintiff, they chose not to serve on the solicitors of the 4th Defendant. There was an insinuation of *mala fide* read into the actions of the Plaintiff.

[23] Further, the 4th Defendant argued that there was an irregularity in the notification of the hearing of the Originating Summons to the 4th Defendant. He spiritedly highlighted to Court that the notice and the relevant cause papers i.e. the Originating Summons and the Affidavit in Support informing the 4th Defendant was only sent after the Order was granted.

[24] Counsel made reference to the Affidavit of Service affirmed by the Plaintiff's process server. In the said Affidavit, a proof of posting was exhibited. Counsel for the 4th Defendant beguilingly argued that the proof of posting showed a rubber stamp dated 21.9.2019. This is contrary to the averment of the process server that he served the notice and documents to the 4th Defendant on 21.8.2019.

[25] It was therefore argued that the service of the cause papers was made after the Court granted the Order on 19.9.2019. This therefore constituted an irregularity which entitled the Court to set aside the said Order.

[26] This Court went on to conduct a semi forensic examination on the proof of service document as exhibited in the Affidavit of Service. A careful comparison of the exhibit was made between the copy used by counsel and the Court's copy. Upon completing the exercise, it is the finding of this Court that due to the photocopying exercise, the copies differed in quality of print. The exhibit in the Court's copy was much clearer compared to the copy used by counsel for the 4th Defendant. This Court then showed both counsels the Court's copy where the rubber stamp evidencing the proof of postage legibly showed the date of 21.8.2019. Therefore, the argument by counsel for the 4th Defendant did not hold water and was dismissed.

[27] The Plaintiff in summing up the case of the 4th Defendant argued that she had no basis to set aside the regularly obtained Order dated 19.09.2019 other than putting up frivolous excuses including making baseless accusation against the Plaintiff including suggesting that the Plaintiff was acting in *mala fide*. The Plaintiff argued that it was actually acting in good faith when it made the 4th Defendant a party to the Originating Summons without having the 4th Defendant to intervene. By having made the 4th Defendant a party in the Originating Summons, it actually shortened the procedure for the 4th Defendant to dispute the Originating Summons.

[28] It was submitted that the actual reason that can be drawn from the 4th Defendant's Affidavit is that there was a miscommunication and/or lack of communication between the 4th Defendant and her solicitor. It had nothing to do with the Plaintiff acting in bad faith.

[29] This Court fully accepts the submissions of the Plaintiff. The Plaintiff acted transparently and afforded the opportunity to the 4th Defendant to challenge the said Originating Summons. However, it was not done so.

[30] This Court is satisfied that the Order was obtained regularly devoid of irregularities when it was granted on 19.9.2019 in accordance with s. 96 (3) RTA to the Plaintiff.

[31] Despite of the service of the Notice and OS on the 4th Defendant and being made a party to the Originating Summons, no affidavits were filed to dispute the said Originating Summons.

[32] In evaluating affidavit evidence, where one party makes a positive assertion upon a material fact, the failure of his opponent to contradict it is usually treated as an admission (see ***Ng Hee Thoong V. Public Bank Berhad [1995] 1 MLJ 281 (CA)***).

[33] In the final analysis, it is this Court's finding that the failure of the 4th Defendant to challenge the Order was fatal. This is coupled with her failure to rebut the contention of the Plaintiff in the affidavits.

Recourse to the 4th Defendant

[34] It is most unfortunate that the 4th Defendant is left in a predicament of this sort. However, her next recourse must be to lodge a claim with the Motor Insurance Bureau (MIB), which is to cater for cases of such nature.

Conclusion

[35] This Court finds no basis to set aside the Order dated 19.9.2019 issued by this Court as there is no legal basis to do so. In the foregoing, the 4th Defendant's application in enclosure 10 is dismissed with no order as to costs.

(AHMAD FAIRUZ BIN ZAINOL ABIDIN)
Judge
High Court of Malaya
Kuala Lumpur

Dated: 5th January 2021