



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

CIVIL APPEAL NO. 180 OF 2021

KASSAM HAULIERS LIMITED.....APPELLANT

VERSUS

SHREEJI ENTERPRISES (K) LIMITED.....RESPONDENT

RULING

1. By a Motion on Notice dated 3rd January, 2022, the Appellant herein seeks the following orders:

1. **THAT** the instant application be certified urgent and heard *ex-parte* at the first instance.

2. **THAT** there be a stay of execution of the judgement and Decree in Civil Suit No. 692 of 2018 at Machakos Law Courts (*Shreeji Enterprises (k) Limited –vs- Kassam Hauliers Limited*) pending hearing and determination of the instant application.

3. **THAT** there be stay of execution of the judgement and Decree in Civil Suit No. 692 of 2018 at Machakos Law Courts (*Shreeji Enterprises (k) Limited –vs- Kassam Hauliers Limited*) pending hearing and determination of the instant Appeal.

4. **THAT** costs be provided for.

2. The application was supported by an affidavit sworn by **Mohammed Kassim Hussein** on 3rd January, 2022. According to the deponent, one of the directors of the Appellant/Applicant herein, they instructed the firm of **J. Mbugua Mburu & Associates** to file the application dated 16th August 2021 in Civil Suit no. 692 of 2018 at Machakos Law Courts (*Shreeji Enterprises (K) Limited –Vs- Kassam Hauliers Limited*) seeking stay of execution and proceedings pending hearing and determination of a declaratory suit (**Kassam Hauliers Limited vs. Trident Insurance Company Limited**). However, in a ruling delivered on 4th November 2021, the trial court dismissed the said application dated 16th August 2021 on account that:-

i. The advocate who filed the application was not actively involved in proceedings.

ii. There was no evidence that he was proceeding physically.

iii. There was delay in filing the application.

3. According to the deponent, the trial court held that the firm on record had not filed a Notice of Appointment. It was however noted that that the advocates on record for the application, **J. Mbugua Mburu & Associates** had filed a Notice of Appointment on 30th April 2021.

4. According to the deponent, with the dismissal of the said application, the interim orders granted pending hearing and determination of the application have since lapsed and our goods/items that had already been proclaimed are under real and imminent risk of being attached thus occasioning immense and irreparable loss to us.

5. It was disclosed that the declaratory suit, **Kassam Hauliers –Vs- Trident Insurance Company Limited, E163/2020** was determined and judgment delivered on 30/7/2021 hence there hasn't been any delay on the part of the Appellant/Applicant in prosecuting the matter.

6. By a further affidavit sworn by the same deponent on 21st February, 2022, it was deposed that while it is true that there is a valid decree against the Applicant for a sum of Kshs. **7,927,752/-**, it is also true that the Applicant has obtained a declaration that its Insurer Trident Insurance is bound to satisfy the decree. However, the trial court in Civil Suit No. 692 of 2018 dismissed our application dated 16th August

2021 on account, *inter alia*, that the Applicant had not made any efforts to execute the decree, a position that is not true as the Applicant has made every effort to execute the decree including filing an Insolvency Petition (*Insolvency cause E001 of 2021*), which has now been stayed by this court.

7. According to the deponent, the very essence of the ***Insurance (Motor Vehicle Third Party Risks) Act*** is to protect Insureds such as the Applicant from paying colossal amounts of money and the burden being shouldered by the Insurer.

8. The Applicant lamented that from the proclamation notice, the Motor vehicles proclaimed are the core of its business and it stands to suffer irreparably in the event they are attached and sold off while there is a valid court order directing our Insurer to satisfy the decree.

9. The deponent averred that the alleged application dated 16/12/2021 is a fabrication as it was never filed with the Applicant's authority. In his view, the instant appeal and application arises out of an application for stay pending satisfaction of a decree hence there is no decree for which security for due performance can be required.

10. In opposing the application, the Respondent relied on the replying affidavit sworn by **Dhaval Soni**, its Director on 13th January, 2022.

11. According to him, the Respondent herein has a valid Decree against the Appellant for a current sum of Kshs. 7,927,752/=, a decree which has not been appealed against or set aside and instead, the Appellant herein has engaged the Respondent in an endless game of Applications before the trial court in order to evade satisfying the said Decretal sum.

12. According to the deponent, the Ruling of the lower court was based on the fact that the Appellant and its advocate had blatantly lied to the court and sought to distort and misrepresent what was in the court record. It averred that the Respondent is not a party to the alleged insolvency suit and it unclear how the Appellant's alleged Insolvency Proceedings against Trident Insurance concerns the Respondent. It was deposed that the claim of irreparable loss is unfounded, and in any event, it is the Respondent that is suffering owing to the Appellant's failure to satisfy the Decree, and the Appellant has frustrated any attempt to realize the fruits of the said Decree by filing numerous frivolous applications, conduct which, according to the Respondent, further demonstrate the Appellant's blatant abuse of the court process. According to the deponent, the current Application has been filed while there is another identical Application dated 16th December, 2021 filed before the trial court, seeking the same orders as the ones sought herein which application was scheduled for hearing on 27th January, 2022 but the Appellant herein has conveniently failed to disclose this fact to this court. To the deponent, it is clear that the Appellant is engaging in a trial and error kind of venture, to see which of the two courts will grant the orders he seeks in order further frustrate the Plaintiff's bid to realize the fruits of its Judgment, which is a gross abuse of the court process.

13. The deponent averred that curiously, whereas both the current Application and the one before the trial court are brought under the provisions of Order 42 Rule 6 of the ***Civil Procedure Rules***, the Appellant has not offered any security for due performance which is one of the mandatory requirements under the said provision before the grant of an order for stay.

14. It was therefore the applicant's position that its sole objective in all these applications is to avoid satisfying the Decree.

15. Notwithstanding the above, the Respondent disclosed that it will consent to the grant of an Order of stay of execution, on condition that the Appellant deposits the entire outstanding Decretal sum of Kshs. 7,927,752/= (Kenya Shillings Seven Million, Nine Hundred and Twenty Seven Thousand, Seven Hundred and Fifty Two) in a joint interest earning account in the names of the advocates for the Appellant and the Respondent within such a reasonable period as the court may direct. However, in the event the Appellant is not willing to provide security, or does not provide the security within such a period as the court may direct, the Application should be struck out/dismissed and any orders vacated

Determination

16. I have considered the application, the affidavits both in support of and in opposition to the application herein.

17. In this case, the applicant contends that it was insured by Trident Insurance Company in respect of the cause of action in which the Applicant was sued by the Respondent herein. Though the Respondent obtained judgement against it, the Applicant instituted proceedings against its said insurer and obtained a judgement that the Insurer was bound to satisfy the decree obtained against the Applicant. However, the Respondent has moved to to execute the said judgement. In order to forestall the said execution, it moved the Lower Court but its application was disallowed hence the instant appeal.

18. If I understand the Applicant its cause of action against the Insurer was based on section 10 of the ***Insurance (Motor Vehicles Third Party Risk) Act*** Cap 405 which states that:

(1) If, after a policy of insurance has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of section 5 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.

(2) No sum shall be payable by an insurer under the foregoing provisions of this section—

(a) in respect of any judgment, unless before or within fourteen days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings; or

(b) in respect of any judgment, so long as execution thereon is stayed pending an appeal; or

(c) in connexion with any liability if, before the happening of the event which was the cause of the death or bodily injury giving rise to the liability, the policy was cancelled by mutual consent or by virtue of any provision contained therein, and either—

(i) before the happening of the event the certificate was surrendered to the insurer, or the person to whom the certificate was issued made a statutory declaration stating that the certificate had been lost or destroyed; or

(ii) after the happening of the event, but before the expiration of a period of fourteen days from the taking effect of the cancellation of the policy, the certificate was surrendered to the insurer, or the person to whom the certificate was issued made such a statutory declaration as aforesaid; or

(iii) either before or after the happening of the event, but within a period of twenty-eight days from the taking effect of the cancellation of the policy, the insurer has notified the Registrar of Motor Vehicles and the Commissioner of Police in writing of the failure to surrender the certificate.

(3) It shall be the duty of a person who makes a statutory declaration, as provided in subparagraphs (i) and (ii) of paragraph (c) of subsection (2), to cause such statutory declaration to be delivered to the insurer.

(4) No sum shall be payable by an insurer under the foregoing provisions of this section if in an action commenced before, or within three months after, the commencement of the proceedings in which the judgment was given, he has obtained a declaration that, apart from any provision contained in the policy he is entitled to avoid it on the ground that it was obtained by the non-disclosure of a material fact, or by a representation of fact which was false in some material particular, or, if he has avoided the policy on that ground, that he was entitled so to do apart from any provision contained in it:

Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not thereby become entitled to the benefit of this subsection as respects any judgment obtained in proceedings commenced before the commencement of that action, unless before or within fourteen days after the commencement of that action he has given notice thereof to the person who is the plaintiff in the said proceedings specifying the non-disclosure or false representation on which he proposes to rely, and any person to whom notice of such action is so given shall be entitled, if he thinks fit, to be made a party thereto.

(5) Deleted by Act No. 8 of 2009, s. 41.

(6) In this section, “material” means of such a nature as to influence the judgment of a prudent insurer in determining whether he will take the risk, and, if so, at what premium and on what conditions; and “liability covered by the terms of the policy” means a liability which is covered by the policy or which would be so covered but for the fact that the insurer is entitled to avoid or cancel, or has avoided or cancelled, the policy.

(7) In this Act, references to a certificate of insurance in any provision relating to the surrender or the loss or destruction of a certificate of insurance shall, in relation to policies under which more than one certificate is issued, be construed as references to all the certificates, and shall, where any copy has been issued of any certificate, be construed as including a reference to that copy.

19. In the case of Charles Makenzi Wambua vs. Africa Merchant Assurance Co. Ltd & Another [2014] eKLR the court expressed itself as follows:

“In my analysis, I have found that if stay is not granted, the court will be assisting the defendant to avoid a contract whose terms are dictated by statute, to compensate the interested parties herein then revert to the plaintiff to recoup any extra sums that they may have paid to third(interested) parties...I must also consider whether granting the stay sought will in any way prejudice the interested parties who have opposed this application. The interested parties being persons covered under Section 4 (1) of the Act-Cap 405 Laws of Kenya, the liability of the defendant is preserved as against them and they could as well, sue the defendant by way of a declaratory suit to recover the sums due as per the decrees in their favor...However, the plaintiff has opted to carry that burden on their behalf. If the suit herein is determined in favor of the plaintiff, then the interested parties stand to benefit directly. They need not file any other declaratory suit against the defendant. For that reason therefore, time and resources, will also be saved for the interested parties. Therefore, no prejudice will be caused to them.”

20. I must however state that the primary obligation of settling the decree falls squarely on the Applicant and in the event the Insurer fails to satisfy the decree, the Applicant will still be called upon to satisfy the same. The mere fact that the Insurer is bound both contractually and statutorily to satisfy the decree does not absolve the Applicant from meeting its obligations under the tort of negligence. It must be noted that nothing prevents the Applicant from settling the decretal sum and then proceeding with the execution against its insurer against whom it has already obtained a judgement.

21. Nevertheless, it is my view that, in these circumstances of this case, justice would be better served to all the parties if there was a stay of execution for a short period to, at least enable the Applicant prosecute its case against its insurer. Accordingly, I hereby grant an order staying execution in Machakos Chief Magistrate's Court Civil Suit no. 692 of 2018 (*Shreeji Enterprises (K) Limited –Vs- Kassam Hauliers Limited*) pending the determination of this appeal on condition that the Plaintiff/Applicant secures a bank guarantee or any other suitable form of security, movable or immovable, to be approved by the Respondent to cover the said decretal sum being security for the due performance of the decree or order as may be ultimately be binding on it within 30 days of this order. In default the stay will automatically lapse.

22. The costs of this application will be in the cause.

23. Liberty to apply granted.

24. It is so ordered.

RULING READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 24TH DAY OF MARCH, 2022.

G V ODUNGA

JUDGE

In the presence of:

Mr Muriungi for the Respondent

Mr Mburu for the Appellant

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