



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. E285 OF 2021

ALOIS OCHIENG' NDEGE.....PLAINTIFF

-VERSUS-

EXPLICO INSURANCE COMPANY LIMITED.....DEFENDANT

AND

JANE WACHUKA MUNENE.....INTERESTED PARTY

RULING

1. The plaintiff herein has brought the Notice of Motion dated 23th November, 2021. The Motion is supported by both the grounds laid out on the body thereof and the facts stated in the sworn affidavit of the plaintiff, and seeking an order that there be a stay of execution of the judgment and decree issued by the trial court on 28th June, 2019 in Milimani CMCC No. 7144 of 2018 (Jane Wachuka v Alois Ochieng' Ndege) ("the primary suit") pending the hearing and determination of the present declaratory suit.
2. The interested party filed the replying affidavit sworn by advocate Salome M. Beaco on 3rd December, 2021 to oppose the Motion.
3. The defendant did not at all participate at the hearing of the Motion. Needless to say, both the plaintiff and the interested party filed written submissions on the Motion, pursuant to the directions given by this court on 26th January, 2022.
4. I have considered the grounds laid out on the face of the Motion; the facts deponed in the affidavit in support thereof; and the rival written submissions and authorities cited.
5. Before I address the merits of the Motion, I note that the interested party raised a few preliminary issues and which require my consideration.
6. The first preliminary issue has to do with whether the firm of Angaya & Co. Advocates is properly on record for the applicant.
7. On her part, the interested party submits that the applicant's current firm of advocates mentioned above has not complied with the proviso of **Order 9, Rule 9** of the **Civil Procedure Rules ("the Rules")** which provide for the clear procedure for changing advocates upon delivery of judgment in a claim.
8. In reply, the plaintiff submits that the issue of his representation was not raised in the replying affidavit put in on behalf of the interested party and cannot therefore be raised in her submissions.
9. The plaintiff further submits that the above provisions are intended to apply only in the same matter and do not therefore affect appeals and declaratory suits, and cites inter alia, the case of **Kenya Pipeline Company Limited v Lucy Njoki Njuru [2014] eKLR** in which the court held thus:

"More importantly unlike the ordinary trial or review, or the interlocutory applications within the same cause or matter, an appeal is a "different ball game". The proceedings are fresh or new, and are before a Superior Court, and a party, including both the Appellant or Respondent, are at liberty to change or instruct a new set of counsel to represent them.

In this case therefore, the Appellant was at liberty to change its Advocates at the appeal stage without any order of court or consent of the Advocate on record in the trial court as required under rule 9 of the said order."

10. Upon my consideration of the above sentiments, I note that true to the words of the plaintiff, the issue of representation was not raised in the replying affidavit to the instant Motion and was only brought to the attention of this court in the submissions by the interested party.

11. The legal position is that submissions do not constitute evidence and hence a party cannot be heard to argue its case or present its evidence through its submissions. This was succinctly stated by the Court of Appeal in the case of **Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR** when it held that:

“Submissions cannot take the place of evidence...Submissions are generally parties’ “marketing language”, each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all.”

12. In view of the foregoing position, the interested party cannot be heard to bring up the issue of representation by way of her submissions.

13. The *second* preliminary issue which was raised concerns itself with whether the interested party is a proper party in the matter.

14. On her part, the interested party states and argues that it remains unclear why she has been enjoined in the suit and yet she is not a party to the insurance policy held between the plaintiff and the defendant.

15. The interested party is therefore of the view that it would not be in the interest of justice for her to be made to participate in the instant suit, since there is a judgment in place in her favour.

16. The plaintiff did not address me on this issue.

17. The term ‘interested party’ is defined under **Rule 2 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** and echoed by the court in the case of **Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others [2015] eKLR** as follows:

“interested party” means a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation.”

18. Similarly, the court in the case of **Kenya Medical Laboratory Technicians and Technologists Board & 6 others v Attorney General & 4 others [2017] eKLR** defined an interested party as:

“A party who has a recognizable stake (and therefore standing) in the matter.”

19. Upon my consideration of the pleadings and material constituting the record, I am satisfied that the interested party is properly enjoined in the suit since she has an identifiable or personal stake therein, given that the judgment sought to be stayed is in her favour and hence the outcome of the suit will likely determine who will satisfy her decree.

20. The *third* preliminary issue raised is whether the instant Motion has been brought under the correct provisions of law.

21. The interested party states that the plaintiff has not brought the Motion under the correct provisions touching on a stay of execution. The plaintiff did not respond to this issue.

22. That notwithstanding, upon my perusal of the record, I observed that the instant Motion has been brought under the provisions of Sections 1A, 1B (on the overriding objective of the Act and duty of the court), 3A (on the inherent powers of the court) and 6 of the Civil Procedure Act (“the Act”) touching on stay of a suit/proceeding; and Order 51, Rule 1 of the Civil Procedure Rules (“the Rules”) concerning filing of applications by way of a Notice of Motion where there is no provision for how a party ought to approach the court.

23. It is apparent that the order sought is that of a stay of execution pending the suit and hence the correct provision would be Order 42, Rule 6(2) of the Rules, which supports the averments made by the interested party.

24. Be that as it may, I am of the view that the mere failure on the part of the plaintiff in coming under the correct provisions would not render his application fatally defective and merely constitutes a procedural defect. In the interest of substantive justice, I will consider the merits of the Motion.

25. As earlier mentioned, the application now before me concerns itself with the granting of an order for a stay of execution. In that case, **Order 42, Rule 6(2) of the Civil Procedure Rules, 2010** sets out the conditions to be met when it comes to an application for a stay of execution as follows:

a) The application must be brought without unreasonable delay;

b) The applicant must demonstrate that substantial loss may result; and

c) Provision should be made for security.

26. I will begin with the first condition on whether the application has been timeously filed.

27. The interested party avers that there has been an inordinate delay in presenting the instant Motion and which averment has not been disputed by the plaintiff herein.

28. Upon my perusal of the record, I note that the impugned judgment was delivered on 28th June, 2019 following which the plaintiff filed an application seeking to have the judgment set aside and further seeking for leave of the court to defend the claim. Upon hearing the parties on the application, the trial court dismissed it with costs, vide the ruling delivered on 15th October, 2019.

29. The instant Motion was filed more than two (2) years later on or about the 23rd day of November, 2021. In my view, while it is obvious that there has been a prolonged delay, I do not find the delay to be so inordinate as to cause me not to consider it.

30. This brings me to the second condition of substantial loss. On his part, the plaintiff states and submits that unless the order for a stay of execution is granted, the interested party will move to recover the judgment sum from him and yet he is of the view that it is the defendant; being his insurer; who ought to settle the claim brought by the plaintiff in the primary suit.

31. The interested party on her part is of the view that the plaintiff is intent on hindering her from enjoying the fruits of her judgment and yet he can still make payment and pursue a refund from the defendant.

32. The relevance of substantial loss in any application for a stay of execution was aptly addressed in the Court of Appeal case, namely **Kenya Shell Limited v Benjamin Karuga Kigibu & Ruth Wairimu Karuga (1982-1988) 1 KAR 1018** thus:

“Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented...”

33. Further to the above, the legal position is that substantial loss entails that which has to be prevented by maintaining the status quo of the parties involved, otherwise the appeal will be rendered nugatory.

34. Upon considering the rival positions above, I am of the view that in the circumstances of this case, the plaintiff has reasonably demonstrated the manner in which he stands to suffer substantial loss if an order for a stay of execution is denied. However, it is noteworthy that upon considering the interest of the interested party who already has a judgment in her favor of which she is entitled to enjoy the fruits, it is imperative for the hearing and prosecution of the declaratory suit to be expedited.

35. On the third condition, the interested party is of the view that the plaintiff has not offered to make any provision for security for the due performance of the decree or for security for costs. The plaintiff did not offer a retort to the above sentiments.

36. The law is clear that the provision of security for the due performance of the decree is a mandatory requirement in the granting of an order for a stay of execution.

37. In the end therefore, the Motion dated 23rd November, 2021 is hereby allowed, giving rise to the following orders:

i. There shall be a stay of execution of the judgment delivered on 28th June, 2019 in Milimani CMCC No. 7144 of 2018 on the condition that the plaintiff deposits the entire decretal sum in an interest earning account to be held in the joint names of the parties’ advocates/firm of advocates within 60 days from today, failing which the order for stay shall automatically lapse.

ii. Upon considering the nature of the present suit, I hereby order that the same be expedited and that the parties take dates before the Deputy Registrar on priority basis.

iii. Costs of the application to abide the outcome of the suit.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 1ST DAY OF APRIL, 2022.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant

..... for the Interested Party