REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

PETITION NO. 1 OF 2020

(Coram: Odunga, J)

ELIZABETH MUNGE.....1ST PETITIONER

THOMAS RATEMO.....2ND PETITIONER

VERSUS

ELIZABETH MAZIBO KIBERENGE.....1ST RESPONDENT

DIRECTLINE ASSURANCE CO. LTD.....2ND RESPONDENT

CHIEF MAGISTRATE'S COURT, MAVOKO.....3RD RESPONDENT

RULING

1. The 1st Petitioner is the registered owner of motor vehicle registration no. KCE 702W which was at all material times being driven by the 2nd Petitioner. The said vehicle was involved in an accident with motor vehicle registration no. KCC 760D both vehicles were registered by the 2nd Respondent. Following the said accident, in which **Franklin Bora Malenge** (the deceased) sustained fatal injuries, the 2nd Petitioner was charged with the offence of causing death by dangerous driving.

2. In the meantime, the 1st Respondent as the legal representative of the deceased instituted Mavoko CMCC No. 57 of 2018 seeking damages on behalf of the deceased's estate. Upon being served with summons in the said case, the Petitioners forwarded the same to the the 2nd Respondent to protect their interests as the insurers of the said vehicle. According to the Petitioners the only communication they received subsequently from the 2nd Respondent was a letter informing them that should the matter proceed to formal proof, judgement was likely to exceed Kshs 3,000,000/- which is the minimum payable under Cap 405 and they were advised to retain their own advocate. Subsequently they received a letter informing them that judgement had been entered in favour of the 1st Respondent in the sum of Kshs 9,736,675/- plus costs and interests. Upon making inquiry from the 2nd Respondent the 2nd Respondent maintained its earlier position regarding the maximum amount payable and advised them to arrange to settle the balance. Based on legal advice the petitioners sought to have the said judgement set aside but the said application was dismissed.

3. According to the Petitioners, the actions of the 2nd Respondents have exposed them to great hardship as they are not in a position to pay the said sum of Kshs 6.736,675/=. They blamed the 2nd Respondent for not taking steps to take out third party proceedings against the other vehicle that was involved in the accident due to conflict of interest. They blamed the 3rd Respondent for failing to adhere to the provisions of the Constitution on fair administration by denying them a chance to be heard before they were condemned to pay the said amount and failing to appreciate the mischief occasioned by the conflict of interest on the part of the 2nd Respondent.

4. In the petition the petitioners are seeking declarations that their rights to fair hearing and fair administrative action have been infringed by the 2nd and 3rd Respondents and for setting aside the said proceedings in Mavoko CMCC No. 57 of 2018.

5. In the meantime, by a Notice of Motion dated 12th February, 2020, the Petitioners seek an order staying execution of the judgement in Mavoko CMCC No. 57 of 2018 pending the hearing of this petition. It is the said Motion that is the subject of this ruling.

1st Respondent's Case

6. In response to the application, the 1st Respondent asserted that judgement was entered for the 1st Respondent against the Petitioners on the 28th August, 2019 in CMCC No.57 of 2018 - Mavoko Law Courts following a full hearing where all the parties were represented by their respective Advocates and the Petitioners fully participated in the suit through their Advocates on record, Kairu Mcourt Advocates in all the proceedings before the court from the pre-trial directions stage to the judgement stage.

7. While the 1st Respondent averred that it was not privy to the allegations made by the Petitioners against the 2nd Respondent, she averred that no appeal has been preferred against that ruling to date.

8. According to the 1st Respondent, though the Petitioners were at all times represented by their Advocates on record throughout the proceedings and had the opportunity to file the Defence statements, they did not file the same. Neither did they give an indication of intention of instituting any third party proceedings up to 2.7.2019 when the matter proceeded for full hearing. Despite having been indulged when their counsel sought to adjourn the matter on diverse dates, at no time did the Petitioners' counsel express the non-availability of witnesses and the 1st Respondent and her witness, who is a county government employment had to endure several adjournments as a result.

9. According to the 1st Respondent, the issues raised in the Petitioners'/Applicants' Application that no 3rd party proceedings were instituted because the 2nd Respondent was conflicted is speculative as no evidence has been brought forth at all to demonstrate that if the same were instituted there would have been a different outcome in the judgement, the 2nd petitioner having been charged with causing death by dangerous driving. The 1st Respondent noted that the Applicants' Advocates and the applicants' insurer had considered the matter and were well aware that the same would attract a sum exceeding Kshs.3 Million and there is no complaint at all that the court misdirected itself on the evidence presented before it. From the foregoing, it is clear that the Applicants were at all times aware of the pending suit and the progress thereof and the likely outcome and in any event they had a personal and legal duty to follow on the case whether represented or not and they should not be rewarded for laxity on their part.

10. It was deposed that after all the evidence was presented to the court, there was no finding of contribution by the third party vehicle and there has been a series of claims from the said accident and none has found that the third party vehicle contributed the accident after hearing the cases on merits and therefore even if the third party vehicle had been enjoined, it would not have made any difference in the obligations to be borne by the Applicants.

11. The 1st Respondent disclosed that following the death of her husband in the said accident, she suddenly became a widow with two children to look after and their lifestyle has drastically changed to the worse and it is both unconstitutional and contrary to the rules of natural justice that she cannot enjoy the fruits of the litigation after all the facts were presented to the court on the matter and the court making a finding on the same. In her view, the Petition and this application is intended to delay the payment of the whole decretal sum to her and the same should not be entertained by the court as the same would create a bad precedent if the application was allowed and there would be no end to litigation. According to her, no justifiable reasons under the law have been availed in court for the matter to be heard de novo. To her, a judgment entered in accordance with the law cannot be set aside merely because the Petitioners cannot afford to settle the same as alleged by the Petitioners in their supporting Affidavits.

12. It was her view that in the unlikely event that the court grants the orders as sought, the same should be conditional in that the Applicants should deposit the sum of Kshs. 6,736,675/= in an interest earning account of a reputable bank in the joint names of the advocates for the parties as security as required by the law.

2nd Respondent's Case

13. On their part the 2nd Respondent averred that upon being notified of the accident, the 2nd Respondent commissioned an investigation therein whose result was that the 2nd Petitioner herein was wholly to blame. The same position was arrived at by the police and the 2nd petitioner was charged with the offence of causing death by dangerous driving.

14. As a result of the said accident the 1st Respondent commenced civil proceedings aforesaid and upon being served with the summons the petitioners forwarded the same to the 2nd Respondent to defend them under the principle of subrogation and on that basis the 2nd Respondent instructed counsel to defend the matter. However, since the deceased was a passenger, it was the opinion of the said counsel that the 2nd petitioner would be found 100% liable in the circumstances. It was this opinion that informed their decision to address the petitioners regarding the maximum payable as alluded to by the petitioners. Later judgement was delivered in the sum of Kshs 9,736,675/- which was in excess of the statutorily provided limit of liability by the 2nd Respondent. Accordingly, the petitioners were informed to organise and address the excess amount of Kshs 6,736,675/-. However, the petitioners ignored the advice by the 2nd Respondent on both occasions. The 2nd Respondent however proceeded to settle the sum of Kshs 3,000,000/- as required by the law.

15. According to the 2nd Respondent since the 2nd Petitioner was wholly to blame for the accident, there was no evidence of contribution by the third party vehicle hence it was unnecessary to institute third party proceedings against it. In the 2nd Respondent's view, since the bulk of the award was on loss of dependency which was based of the deceased's income, it is unlikely that the award will be reduced even if the judgement is set aside hence it is no use reopening the matter.

Determination

16. I have considered the application, the affidavits both in support of and in opposition to the application herein as well as the submissions on record. This is an unusual case where the Petitioners are petitioning this court to stay execution of a judgement of the lower court pending the hearing and determination of this petition. In this petition the petitioners seek an order setting aside the said judgement and for hearing of that case de novo. According to the petitioners, their attempt to have the said judgement set aside by the trial court was futile. One would have thought that the Petitioners would have had a recourse in an appeal against the decision declining to set aside in which event they would

have sought for stay pending their appeal but I will say no more on the propriety of these proceedings at this stage since the matter before me at this stage is stay of the judgement pending the Petition.

17. In my view, whereas an insured may well be entitled to seek a declaration that its insurer is entitled to settle the claims covered under the insurance policy, that statutory right of action does not bar a person who is injured from executing the decree issued in its favour against the insured directly. I believe it is on that basis that the Petitioner are not seeking orders that the 2nd Respondent be compelled to satisfy the judgement. Instead they seek setting aside judgement on the basis that they were unaware of the proceedings giving rise to the same judgement.

18. The reason advanced by the Petitioners for seeking conservatory orders in form of a stay is that they are not in a position to satisfy the balance of the judgement in question and unless the stay sought is granted they risk being committed to civil jail. The Supreme Court in **Gitirau Peter Munya vs. Dickson Mwenda Kithinji and 2 Ors [2014] eKLR** expressed itself as follows:

> **"'Conservatory orders' bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold adjudicatory authority of the Court, in the *public interest*. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as the "prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success' in the applicant's case for orders of stay. Conservatory orders consequently, should be granted on the inherent merit of the case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes...The principles to be considered before a Court of law may grant stay of execution have been crystallized through a long line of judicial authorities at the High Court and Court of Appeal. Before a Court grants an order for stay of execution, the appellant, or intending appellant, must satisfy the Court that:**
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> **(i) the appeal or intended appeal is arguable and not frivolous; and that**
>
> **(ii) unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory.**
>
> **These principles continue to hold sway not only at the lower Courts, but in this Court as well. However, in the context of the Constitution of Kenya, 2010, a third condition may be added, namely:**
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> **(iii) that it is in the public interest that the order of stay be granted.**
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> **This third condition is dictated by the expanded scope of the Bill of Rights, and the public spiritedness that run through the Constitution."**

19. In considering whether or not to grant conservatory order, it is my view that the principle of proportionality plays a not remote role. As was stated by **Ojwang, AJ** (as he then was) in **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589** the Court, in responding to prayers should always opt for the lower rather than the higher risk of injustice. The learned Judge expressed himself as follows:

> **"…Although the court is unable at this stage to say that the applicant has a prima facie case with a probability of success, the Court is quite convinced that it will cause the applicant irreparable harm if his prayers for injunctive relief are not granted; and in these circumstances, the balance of convenience lies in favour of the applicant rather than the respondent. There would be a much larger risk of injustice if the court found in favour of the defendant, than if it determined this application in favour of the applicant."**

20. The question here is whether there is real danger that the petitioners will suffer prejudice as a result of the violation or threatened violation of the Constitution. What amounts to real danger was dealt with by **Mwongo, J** in **Martin Nyaga Wambora vs. Speaker of The County of Assembly of Embu & 3 Others [2014] eKLR**, where he expressed himself as follows: -

> **"To those erudite words I would only highlight the importance of demonstration of "real danger". The danger must be imminent and evident, true and actual and not fictitious; so much so that it deserves immediate remedial attention or redress by the court. Thus, an allegedly threatened violation that is remote and unlikely will not attract the court's attention."**

21. In this case what the Petitioners term real danger is that they might be committed to civil jail. In my view, an order for committal to jail is not automatic. It therefore follows that the course of committal to civil jail will only be resorted to in appropriate cases and the guidelines for determining whether a particular case is appropriate for such course must necessarily depend on whether the conditions stipulated under section 38 of the Act have been fulfilled. The course to be adopted by the Court in such circumstances was explained in **Braeburn Limited vs. Gachoka and Another [2007] 2 EA 67** as follows:

> **"Rules 18 and 32 of Order 21 of the Civil Procedure Rules do meet and in a very special way in relation to a debtor surpass the standard laid down in the Constitution for the deprivation of a person's liberty. This is so because the deprivation of a person's liberty whether for contempt of court (under section 72(1)(b) of the Constitution), or for default to pay a money decree, is in the nature of criminal proceedings and for a person to suffer the loss of liberty, it must be in the words of that hackneyed phrase, be proved beyond reasonable doubt, that he has the means to pay but that he has refused and/or neglected to pay…To Conform with that high standard proof, the discretion conferred upon the court to either issue a warrant of arrest and instead issue a notice calling upon the judgement to appear before the court on a day to be specified in the notice and show cause why he should not be committed to prison, must be construed, strictly, that is to say mandatorily, that upon an application by a decree holder for execution of a money decree by way of arrest and committal to prison the**

court to which an application is made for issue of a warrant of arrest shall in the instance first issue a notice to the judgement debtor to appear in court and show cause why he should not firstly be arrested, and secondly, committed to prison. That is the first step towards the execution of a decree for payment of money…The second step is the examination of the judgement debtor when he appears in court. Of course if he does not appear, the court issuing the notice in the first instance is at liberty to issue a warrant of arrest and if arrested, the judgement debtor may be detained in prison pending his appearance in court and may be released upon provision of security to ensure his attendance or appearance in court…If however the debtor appears to the notice to show cause, which is mandatory, in terms of the said Order 21, rule 35, or pursuant to his arrest and appearance before he can be committed to prison, it is the duty of the decree holder (who has sought the arrest and committal of the judgement debtor to prison) to satisfy the court that the judgement debtor is not suffering from poverty or any other sufficient cause and is able to pay the decretal sum that: (i) the judgement debtor, with the object or effect of obstructing or delaying the execution of the decree: (a) is likely to abscond or leave the local limits of jurisdiction of the Court; (b) has, after the institution of the suit, in which the decree was passed, dishonestly transferred, concealed or removed any party of his property or committed any other act of bad faith in relation to his property; or (ii) the judgement-debtor has or has had since the date of the decree , the means to pay the amount of the decree, or some substantial part thereof and refuses or neglects or has refused or neglected, to pay the same, but in calculating such means there shall be left out of account any property which is exempted from attachment, in execution of the decree; or (iii) that the decree is for a sum for which the judgement-debtor was bound in a fiduciary capacity to account (trustees or persons holding moneys in a professional capacity or in trust)…In essence, the judgement debtor should be examined in the manner envisaged in Order 21, rule 36 as to the debtor's total wealth and indebtedness to determine the judgement debtor's total ability or inability to pay and whether such inability to pay is from poverty or other sufficient cause. It is only after the court is satisfied of these matters, after subjecting the judgement-debtor to due process in the manner construed, the requirements of mandatory notice, before a warrant of arrest may be issued for his arrest and compulsion to attend or appear before a court can decree for payment of a money debt be executed upon a judgement debtor by way of arrest and committal to prison…The execution of a judgement decree by way of arrest and committal to prison is extreme in nature. It deprives a citizen of his liberty, to do so, the highest standards, that is to say, the constitutional safeguards as to due process by way of notice of intended execution of the decree by way of arrest and committal be given to the judgement debtor as a first step and as a second step, a due inquiry and satisfaction to the court, by the decree holder, as to judgement debtor's ability to pay and refusal and/or neglect to pay, and therefore the necessity to punish him for contempt of a court order by depriving him of his liberty…It is clear under both section 38 of the Civil Procedure Act and Order 21, rule 35(1) that no judgement-debtor will, on account of his inability from poverty or other sufficient reason, be arrested and committed to prison…The section is not vindictive and the Court, in the exercise of its discretion would not order the imprisonment of a defaulting trustee unless it was likely to be productive of payment…"

22. It ought to be appreciated that the burden falls on the decree holder to prove that the conditions in section 38 of the ***Civil Procedure Act*** have been fulfilled. In my view that burden can only be satisfied by way of evidence in form of an affidavit. In other words, it is my view that a notice to show cause ought to be by way of a formal application supported by an affidavit to which the judgement debtor ought to respond so that the Court can make a determination as to whether the case is one fit for the invocation of the drastic remedy of committal to civil jail. Committal to civil jail is a very drastic remedy that ought to be granted only in cases where there is strict compliance with the provisions of the law. Before a person is committed the Court must be satisfied that that person was duly served and an opportunity of being heard afforded to him. To send a person to jail without being heard amounts to a breach of the rules of natural justice especially when the law casts the burden on the decree holder as it does in this case.

23. It is therefore my view that if the Petitioners satisfy the Court in the primary suit on the allegations they make herein that they are not capable of satisfying the decretal sum, that Court may well not commit them to jail. In other words, the Petitioners are, at this stage, relying on speculations as opposed to real danger in order to obtain the orders they seek herein.

24. In this case I find no merit in the application dated 12th February, 2020 which I hereby dismiss with costs.

25. It is so ordered.

Read, signed and delivered in open Court at Machakos this 27th day of January, 2020.

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Wanga for Mr Khakula for the 2nd Respondent

CA Geoffrey