



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

MACHAKOS HIGH COURT CIVIL CASE NO. E5 OF 2020

MARTIN KAMAKYA

alias MARTIN KAMAKYA MUTISYA.....PLAINTIFF

-VERSUS-

RESOLUTION INSURANCE COMPANY LTD.....DEFENDANT

AND

PETER NGUMBI

alias PETER NGUMBI MWALYO.....INTERESTED PARTY

RULING

1. By a Motion on Notice dated 30th October, 2020 the Plaintiff/Applicant herein seeks the following orders:

(a) That this application be certified as urgent and heard exparte in the first instance.

(b) That there be a stay of execution of the judgment and decree of the Chief Magistrates court in Civil Suit No. 448/2019 issued on 25th August 2020 pending the inter parte hearing and determination of this application.

(c) That there be stay of execution of the judgment and decree of the lower court in Civil suit No. 448 of 2019 issued on 25th August 2020 and proceedings pending the hearing and determination of the declaration suit herein.

(d) That costs of this application be provided for.

2. According to the Applicant, he paid for and took out third party insurance cover under policy Number P100/0708/2018 from the Defendant for his vehicle registration No. KCP 392X. The said vehicle was however involved in an accident on 5/3/2019 where one **Peter Ngumbi Mwalyo**, the Interested Party, suffered injuries and filed suit in the lower court Chief Magistrate's Court Machakos against the Plaintiff. It was averred that the Defendant did not appoint any law firm in exercise of its subrogation rights to defend the Plaintiff in violation of the Plaintiff's rights as a result of which an award of damages was made against the Plaintiff.

3. It was averred that the Defendant insurance company did not repudiate the insurance contract but has in any event failed or refused to pay the decretal sum awarded as damages in the suit in the lower court. Based on legal advice it was deposed that in pursuance of the insurance contract and sections 5 and 10 of the **Insurance (Motor Vehicle Third Party Risks) Act** Cap 405 the defendant was obliged in law to pay the decretal sum awarded however in this case.

4. The Plaintiff/Applicant lamented that he has been abandoned by the Defendant as a result of which his motor vehicle Registration No. KCP 392X was attached and was due to be auctioned yet the Defendant did not avoid or cancel the policy and is obliged to pay the interested party of the judgment amount in CMCC 448/2019 as the **Insurance (Motor Vehicle Third Party Risks) Act** statutorily obliges an insurer to pay the decretal sum in respect of an accident covered by its insurance policy.

5. Based on legal advice, he averred that pursuant to Section 10 of the **Insurance (Motor Vehicle Third Party Risks) Act** a statutory notice and notice of intention to institute a declaratory suit against the insurer (defendant) as aforesaid was issued in full compliance of the law on 19th October, 2020 and a statutory notice pursuant to section 10(2)(a) of the same Act on 19th October, 2020 and the Defendant never

responded. Notwithstanding the foregoing, the defendant has declined, failed and/or neglected to admit liability to make good the claim.

6. In the Applicant's view, he has an extremely meritorious and arguable declaration suit with a high probability of success hence it would be in the best interest of justice for this Court to grant stay of execution pending the hearing and determination of the declaration suit as the application has been brought without unreasonable delay.

7. In support of the case the Applicant relied on the case of **Xplico Insurance Co. Ltd vs- Mary NthambiMutua (2019) eKLR** and submitted that the Interested Party's submission that the Applicant did not produce the insurance policy or cover does not arise as the Defendants herein have not denied that they had insured the Plaintiffs motor vehicle.

8. It was submitted that the Interested Party is correctly joined in this matter as the outcome of this declaration suit would affect the Interested Party. He relied on **Brek Sulum Hemed vs. Constituency Development Fund Board & Another [2014] eKLR** and **Fidelity Shield Insurance Company Limited vs. Joseph IhaWanja [2018] eKLR** and submitted that the interested party is rightly joined as an interested party in this suit.

9. It was further submitted that before the commencement of this suit the Plaintiff issued the Defendant with a statutory Notice and Notice of Intention to file a declaration suit if they would not settle the interested parties claim in CMCC 48/2016. Despite that the Defendant did not avoid or cancel the policy and is entitled to pay the interested party of the judgment amount in CMCC 48/2016 as obliged by the Act pursuant to sections 5 and 10 thereof.

10. It was noted that the Defendant did not file any response to the application and/or defence to the plaint and interlocutory judgment was entered against the Defendant subject to formal proof after the determination of this application.

11. According to the Plaintiff/Applicant, he will suffer substantial loss unless the orders sought are issued and reliance was placed on the case of **Justus Mutiga & 2 others vs. Law Society of Kenya & Another [2018] eKLR** where the Court of appeal held that limiting the compensation payable by the underwriter who has received premiums; particularly in the face of an innocent third party who is armed with a court judgment, is unjustifiable. It offends the very essence of insurance; which is to ensure mitigation against risks that result in loss. In particular, it defeats the very objective of compulsory third party insurance cover, if an innocent victim is left to recover the bulk of his claim against the insured personally.

12. It was the Applicant's case that this application has been made without unreasonable delay as immediately the Defendant was notified of the lower court judgment and refused to pay the Plaintiff filed this suit and the present application. He undertook to provide a bank guarantee as security for the due performance of the decree or order as may be ultimately be binding on him.

13. It was contended that the Applicant is in business and was using motor vehicle KCP 392X before it was attached and now is not in any income generating business and therefore he is a pauper as such he cannot afford to deposit the decretal sum in court. He relied on the case of **Focin Motorcycle Co. Limited vs. Ann Wambui & Another [2018] eKLR** where the court relied on the case of **Arun C Sharma vs. Ashana Raikundalia T/A Rairundalia & Co. Advocates.**

14. It was the Applicant's case that he has shown a sufficient cause for the orders to be granted in light of the overriding objective stipulated in sections 1(A) and /(B) of the *Civil Procedure Act*.

15. In response to the Application, the Interested Party averred that the Applicant was served with all the processes in the primary suit but failed to respond to the same. According to the Interested Party, it was only after the commencement of the execution that the Applicant moved to stay the execution.

16. The Interested Party's position was that the Applicant should first settle the decretal sum and thereafter follow up with the Defendant to indemnify him.

17. The Interested Party averred that the application has been brought with undue delay as judgement was delivered on 21st May, 2020 but the Applicant waited till execution process was put in motion before filing the suit. As there is no appeal against the decree in the primary suit, it was contended that this court cannot stay execution in a different suit in which the parties are different. According to the interested party, the cause of action in this matter involves the plaintiff and the defendant and there is completely no cause of action as against the interested party herein. In support of the submissions the Interested Party relied on the case of **Kenneth Kangethe T/A Savanah Investments vs. Blue Shield Insurance Co. Ltd [2010] eKLR** and it was submitted that the applicant has not filed this suit as an appeal and is instead seeking to stay execution in a different matter involving different parties thereto. It was submitted that this court cannot stay judgement through another suit which is not an appeal and reliance was placed on **Abraham Lenauia Lenkeu vs. Charles Katekeyo Nkaru [2016] eKLR.**

18. It was submitted that the Applicant has not shown that he stands to suffer substantial loss or the probability of success of the suit or that he stands to suffer irreparable loss in the event that the orders sought are not granted.

Determination

19. I have considered the application, the affidavits both in support of and in opposition to the application herein as well as the submissions filed.

20. In this case it is not disputed that the Applicant is the judgement debtor in the primary suit where the Interested Party is the decree holder. The Applicant contends that the Defendant was the insurer of the vehicle which caused the accident the subject matter of that primary suit

and that contention is not challenged by the Defendant herein. In this suit, the Applicant seeks to compel the Defendant to meet its obligations under the contract of insurance by satisfying the said decree. In the meantime he seeks to have the execution and proceedings in the primary suit stayed. There is no doubt that the said order of stay if granted will affect the interests of the Interested Party herein.

21. In Brek Sulum Hemed vs. Constituency Development Fund Board & Another [2014] eKLR the court held that;

“As necessary parties, the provisions of rule 10 Order 1 will apply to require that their involvement to be necessary for the court to effectually and completely adjudicate upon and settle all questions involved in the suit’. As Interested parties, the applicants need only demonstrate interest in the subject of the suit or in other relevant matter affecting the suit.... and in giving effect to the Article 159 principle of substantial justice without undue regard to technicalities of procedure, I allow the applicants’ application for them to be joined in the suit, as necessary or interested parties.”

22. In Departed Asians Property Custodian Board –V- Jaffer Brothers Ltd Supreme Court of Uganda (1999) I.E.A 55 it as held that:

“A clear distinction is called for between joining a party who ought to have been joined as a defendant and one whose presence before the court is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit A party may be joined in a suit, not because there is a cause of action against it, but because that party’s presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all the questions involved in the cause or matter.”

23. Similarly, the Supreme Court of Kenya in Trusted Society of Human Rights Alliance –vs- Mumo Matemo & 5 Others (2014) eKLR held as follows with regard to an interested party:

“Suffice it so say that while an interested party has a ‘stake/interest’ directly in the case, an amicus’s interest is its ‘fidelity’ to the law: that an informed decision is reached by the Court having taken into account all relevant laws, and entertained legal arguments and principles brought to light in the Courtroom. Consequently, an interested party is one who has a stake in the proceedings, though he or she was not a party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause. (emphasis added).

24. Further, in Gateway Insurance Co. Ltd –v- Moses JaikaLuvai (2008) eKLR, Ibrahim, J (as he then was) stated that:

“The plaintiffs in the suits which the insurer seeks to avoid liability under Section 10(1) by way of declaratory suit must be notified of the institution of the declaration suit and after which the said Plaintiffs are entitled to be made parties to the Insurer’s suit if they think fit. The provision is mandatory and the Court has no discretion on the matter. The discretion and election lies with the Plaintiffs who have sued the insured for damages and losses arising from motor accidents. It is a right which none of the parties or the Court can take away.”

25. In Fidelity Shield Insurance Company Limited vs. Joseph IhaWanja [2018] eKLR it was held that:-

“An interested party is the one who has a stake in the proceedings though he was not a party in the cause ab initio. This is in line with the definition quoted above. The party must demonstrate that it is necessary for him to be joined as a party to enable the court to settle all the questions involved in the suit. It is not sufficient for a party to state he has an interest he must convince the court that his being enjoined in the suit is crucial and will be necessary to assist the court in the determination of the questions involved in the suit. The applicant has stated the factual basis for this application which she has indicated is not in dispute and the facts are pleaded in the plaint. The pleading by the plaintiff is alleging a breach of the policy. Simply stated the plaintiff is seeking to avoid liability to pay the interested parties. It is based on a claim that the defendant was not using the motor vehicle on that particular day for the insured purpose. The plaintiff seeks a declaration that he is not bound to settle decree in Baricho R. M. C.C. 36, 37, 38, 39, 40 & 41 of 2013 or any other suit that maybe filed in future on account of suits having arisen in breach of the express provisions of the own goods master comprehensive policy No. MC 03312 887. There is no doubt that the decision of this court will affect the rights and interests of the interested party. The interested party has a stake and or interest in the case. This was well stated in the Supreme Court in Trusted Society of Human Rights Alliance –v- Mumo Materu& Others, (Supra). The applicant will be affected by the decision and has a stake in the proceedings. The interest of Justice demands he be party in the proceedings. This matter is brought under section 10 of the Insurance Motor Vehicle 3rd Party Risk) Act. The provision makes it mandatory for the Insurer to settle the Judgment(s) in respect of persons it has insured against claims by 3rd parties. Such claims are where death or bodily injuries has resulted from an accident involving the vehicles insure under the Act. Section 10(4) is mandatory that a person who has been given notice of the proceedings to repudiate liability shall be entitled if he thinks fit to be made a party thereto. It means that if such a party wishes to be enjoined in the suit, the court has no discretion, it has to allow such a party to be enjoined in this suit. I am in agreement with the decision of Justice Ibrahim as he then was in the case of Gateway Insurance Co. Ltd –V- Moses JaikaLuvai, (Supra) that if the party applies to be joined in the suit the court is without discretion, it must allow him. Where a party has been given a right by a statutory provision to be enjoined in a suit, the plaintiff or the party cannot take away the right. I am in agreement with the counsel for the interested parties that the interested party has the legal basis in Section 10(4) of Insurance Act to be enjoined in this suit.”

26. Based on the said decisions I am satisfied that the Interested Party is properly joined to these proceedings.

27. In the instant application, what the Applicant seeks in this application is to stay execution of the decree in the primary suit as well as the proceedings therein pending the determination of this suit. The application is however predicated, *inter alia*, upon Article 159(2) of the

Constitution, Sections 3A, 75 and 63(c) and (e) of the *Civil Procedure Act* and Order 51 Rules 1 and 22 of the *Civil Procedure Rules*.

28. To my mind, Article 159 of the Constitution does not create a cause of action. As was held by the Supreme Court in **Michael Mungai vs. Housing Finance Co. (K) Ltd & 5 other [2017] eKLR**:

“We hasten to add that before us is not an issue that can be wished away by the provisions of Article 159 of the Constitution, as mere technicalities. Before a Court of law can invoke Article 159 of the Constitution and focus on substantive justice, the Court must at the first instance be properly moved and there must be before it a legitimate and cognizable cause of action. In the case of *Raila Odinga v I.E.B.C & Others (2013) eKLR*, this Court said that Article 159(2)(d) of the Constitution simply means that a court of law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the court. We are unable to see before us a prima facie cause of action that can warrant invocation of Article 159 of the Constitution for the question, what is it that is before us” remains unanswered.”

29. I associate myself with the decision of the Court of Appeal (Kiage, JA) in **Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 6 Others [2013] eKLR** that:

“I am not in the least persuaded that Article 159 of the Constitution and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succour and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned.”

30. As regards Order 22 of the *Civil Procedure Rules*, the closest provision is rule 25 thereof which provides as follows:

Where a suit is pending in any court against the holder of a decree of such court in the name of the person against whom the decree was passed, the court may, on such terms as to security or otherwise, as it thinks fit, stay execution of the decree until the pending suit has been decided

31. What this provision means is that A files a suit against B and obtains a judgement therein. However, B files a separate suit against A. B is in those circumstances entitled to seek that pending the hearing and determination of the subsequent suit, the execution in the earlier suit be stayed. That is not the scenario in the instant matter. The applicant herein is not seeking judgement against the interested party. It is seeking judgement against its insurer, the Defendant. There is no judgement which the insurer has obtained against the applicant which is sought to be stayed in these proceedings. It follows that the said provision is inapplicable.

32. However, 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 his favour against the insured directly.

33. Therefore there is no basis for grant of stay of execution. However, the Applicant also seeks stay of proceedings in the primary suit. It is not in doubt that this Court has powers to stay proceedings under its inherent jurisdiction reserved in section 3A of the *Civil Procedure Act*. See **George Oraro vs. Kenya Television Network Nairobi HCCC No. 151 of 1992**.

34. It was therefore held in **Jadva Karsan vs. Harnam Singh Bhogal [1953] 20 (1) EACA 74** that:

“It is true that there is a wider power under section 97 [now 3A of the Civil Procedure Act] to stay proceedings where the ends of justice so require or to prevent an abuse of the Court process.”

35. This jurisdiction is meant to avoid a waste of valuable judicial time; prevent the court from duplication of efforts and prevent multiplicity of suits and applications being filed and where if the stay is not granted and defendant were to succeed it would have rendered the appeal nugatory. In such applications the Court aims at ensuring that the object of the application is not rendered nugatory and that substantial loss and irreparable harm is not suffered by the applicant once the Plaintiff proceeds with the suit and the appeal succeeds. Obviously the decision whether or not to grant stay of proceedings being discretionary, the application must be made without unreasonable delay. Whereas I agree that delay is neither the sole factor nor the predominant factor to be considered, I am convinced that delay is a factor that ought to be taken into account. In **Re Global Tours & Travel Ltd HCWC No. 43 of 2000 Ringera, J** (as he then was) held that:

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matter, it should bear in mind such factors as the need for expeditious disposal of case, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.”

36. In my view delay in making an application where the Court is expected to exercise discretion must always be a factor for consideration since it is an equitable principle that delay defeats equity as equity aids the vigilant, not the indolent.

37. In David Morton Silverstein vs. Atsango Chesoni Civil Application No. Nai. 189 of 2001 [2002] 1 KLR 867; [2002] 1 EA 296 the Court of Appeal citing Kenya Commercial Bank Ltd vs. Benjoh Amalgamated Ltd & Another Civil Application No NAI 50 of 2001 held that it is not the law that a stay of proceedings cannot be granted but that each case depends on its own facts. In Niazons (Kenya) Ltd. vs. China Road & Bridge Corporation (Kenya) Ltd. Nairobi (Milimani) HCCC No. 126 of 1999 Onyango-Otieno, J (as he then was) held that:

“Where the appeal may have very serious effects on the entire case so that if stay of proceedings is not granted the result of the appeal may well render the orders made nugatory and render the exercise futile, stay...should be granted.”

38. Similarly, the Court of Appeal in Wachira Waruru & Another vs. Francis Oyatsi Civil Application No. Nai. 223 of 2000 [2002] 2 EA 664 held that:

“In an application for stay of proceeding pending appeal where the Judgement is entered in an application for striking out a defence, it cannot be gainsaid that unless a stay is granted the appeal will be rendered nugatory since if the process of assessing damages goes on and the appeal is allowed that process would be an exercise in futility.”

39. The present suit is premised 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.

40. It follows that if the applicant herein were to succeed in this suit, it would follow that the Defendant would be liable to settle the decretal sum in favour of the Interested Party. In this case it is contended that the Defendant did not file any response to the application and/or defence to the plaint and interlocutory judgment was entered against the Defendant subject to formal proof after the determination of this application.

41. It is my view that in these circumstances, justice would be done to all the parties if there was a stay of proceedings for a short period to enable the Applicant prosecute his case. Accordingly, I hereby grant an order staying further proceedings in Machakos CMCC No. 448 of 2019 pending the determination of this suit on condition that the Plaintiff/Applicant secures a bank guarantee for the said decretal sum as security for the due performance of the decree or order as may be ultimately be binding on him within 21 days of this order. In default the stay will automatically lapse.

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

43. Liberty to apply granted.

44. It is so ordered.

Ruling read, signed and delivered in open court at Machakos this 23rd day of February, 2021.

G V ODUNGA

JUDGE

In the presence of:

Mr Muema for Mr Musya for the Interested Party

Mr Kilonzo for Mr Mutinda Kimeu for the Plaintiff

CA Geoffrey