



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. E037 OF 2021

JANE WANJIRU MWANGI.....PLAINTIFF/APPLICANT

-VERSUS-

XPLICO INSURANCE COMPANY LIMITED.....DEFENDANT

AND

DUNCAN ODHIAMBO OWINO.....INTERESTED PARTY/RESPONDENT

RULING

1. This ruling relates to the Notice of Motion dated 12th February, 2021 taken out by the plaintiff/applicant herein and supported by the grounds set out on its face and the facts stated in the affidavit of the applicant. An order for a stay of execution of the judgment and decree issued by the court in MILIMANI CMCC NO. 9591 OF 2018 (DUNCAN ODHIAMBO OWINO V JANE WANJIRU MWANGI & CLINTON THUKU MAINA) (“the primary suit”) is sought pending the hearing and determination of the present declaratory suit.
2. In answer to the application, the interested party/respondent filed the replying affidavit he swore on 1st April, 2021. The defendant did not file any documents in response to the Motion or participate in the hearing thereof.
3. The Motion was argued by way of written submissions, which I have considered together with the grounds set out on the body of the Motion and the facts deponed in the supporting and replying affidavits.
4. A brief background of the matter is that, the respondent instituted the primary suit against the applicant and a third party not before this court, and sought various reliefs in form of damages for injuries sustained as a result of a road traffic accident involving motor vehicle registration number KCA 314C (“the subject motor vehicle”) allegedly insured by the defendant herein. Going by the record, though the applicant filed a statement of defence in the aforementioned suit, she did not call any evidence at the trial and the hearing proceeded ex parte. In the end, the judgment was delivered on 5th May, 2020 in favour of the respondent against the applicant and the third party in the total sum of Kshs.902,750/=.
5. According to the record, the applicant soon thereafter filed an application and sought to have the judgment set aside, which application was dismissed by the trial court vide the ruling delivered on 29th January, 2021. Subsequently, the applicant lodged the present suit against the defendant seeking declaratory orders against the said defendant in respect to settlement of the decree issued in the primary suit under the doctrine of subrogation.
6. It is clear from the Motion that the order sought is that of a stay of execution of the judgment in the primary suit pending the hearing of the declaratory suit and that the said Motion is predicated on the provisions of Sections 1A & 1B, 3, 3A and 63 (e) of the Civil Procedure Act; Article 159(2) of the Constitution; and Order 51, Rules 1, 3 and 4 of the Civil Procedure Rules.
7. Upon consideration of the cited provisions, I observed that none of them necessarily cater for a situation touching on a stay of execution of a decree pending the hearing and determination of an entirely new suit.
8. It is apparent the applicant is seeking a declaratory judgment against the defendant, her alleged insurer, and not against the interested party. It is also apparent that the judgment delivered in the primary suit has not been challenged by way of an appeal or review.
9. That notwithstanding, I find that while the applicant is entitled to file a declaratory suit against the defendant pursuant to the provisions of the Insurance (Motor Vehicles Third Party Risks) Act, in a bid to have the insurer settle any pending claims arising out of an insurance policy entered into between an insurer and its insured, this does not necessarily bar a decree holder from pursuing the decretal sum from an insured

person, such as the applicant in this instance. This position is supported by the case of **Peter Kilonzo Kioko v Monarch Insurance Co. Ltd; Kisakwa Ndolo King`oku (Sued as Legal Representative of the Estate of Mwanika Kisakwa - Deceased (Interested Party) [2021] eKLR** in which the court determined thus:

“The applicant herein is not seeking judgment against the interested party. It is seeking judgment against its insurer, the Defendant. There is no judgment which the insurer has obtained against the applicant which is sought to be stayed in these proceedings...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.”

10. I am convinced that even after the applicant herein satisfies the decretal sum in the primary suit, she can still pursue the present declaratory suit against the defendant and seek compensation therefrom. In my view, it would not be in the interest of justice to hinder the respondent from realizing the fruits of his judgment.

11. The upshot therefore is that I find no merit in the instant Motion and the same is hereby dismissed with costs to the interested party/respondent.

Dated and signed at Nairobi this 27th day of July, 2021

A. MBOGHOLI MSAGHA

JUDGE

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 29TH DAY OF JULY 2021

J. K. SERGON

JUDGE

In the presence of:

Mwaniki holding brief for Githinji Mwangi for the Appellant

No appearance for Respondent