



**REPUBLIC OF KENYA**

**IN THE HIGH OF KENYA AT NAKURU**

**CIVIL SUIT NO. 12 OF 2017**

**SAMUEL GITHINJI MWANGI.....PLAINTIFF**

**-VERSUS-**

**XPLICCO INSURANCE**

**COMPANY LIMITED.....DEFENDANT/APPLICANT**

**AND**

**HELLEN WANJIRU MBUGUA**

**MARY WAMBUI WANJIKU (administrators of the**

**Estate of STEPHEN WAGEREKA (deceased).....INTERESTED PARTIES**

**RULING**

1. This is a ruling on application dated **29<sup>th</sup> April 2020** brought under certificate of urgency by the defendant/applicant's advocate seeking following orders: -

**a. Spent**

**b. Spent**

**c. Spent**

**d. The warrant of attachment and proclamation taken out by the interested party in Nakuru CMCC No. 948 of 2015 be lifted and declared null and void;**

**e. The auctioneers' costs incidental to the impugned warrants be borne by the interested party**

**f. This honourable court be pleased to issue appropriate directions as to the hearing of this matter**

**g. The costs of this application be borne by the interested party/respondent.**

2. The application is supported by affidavit sworn by the plaintiff. He averred that he complied with lower court orders by depositing kshs.100,000 and setting the matter for hearing with 45 days. That the plaintiff has tried severally to fix the matter for hearing but due to circumstances beyond his control it has not yet proceeded for hearing.

3. The plaintiff averred that the interested party sneaked back to the lower court file to extract warrants of attached and proceeded to proclaim the plaintiff's property; an action which prompted the plaintiff to file an application for release of the motor vehicle as the stay of execution orders were still in force.

4. In response, the respondent filed replying affidavit on 29<sup>th</sup> June 2020. The respondent submitted that being the mother to the deceased and the administrator of the said estate, she is decree holder in CMCC No. 948 of 2015. She averred that in the judgment delivered on 20<sup>th</sup> December 2016 in CMCC No. 948 of 2015 she was awarded Kshs.949,250/= plus costs.

5. The respondent averred that the applicant herein has been filing numerous application to hinder the respondent enjoy the fruits of her judgment and has suffered gross injustice.
6. She averred that in the suit herein the respondent is a third party as the same is between insured and the insurer; that it is a declaratory suit where the plaintiff want the defendant compelled to settle the decretal sum.
7. She averred that in a ruling delivered by the trial Court on 12<sup>th</sup> October, 2017, the applicant was allowed stay of execution on conditional that he deposits security of Kshs.100,000/= in Court within 30 days and prosecute the case within 45 days but the suit has not been prosecuted and the applicant has been indolent on the same.
8. The respondent averred that it is well within her rights to execute the judgment against the plaintiff as the orders issued on 12<sup>th</sup> October, 2017 has since lapsed and the plaintiff proceeded to extract warrant of attachments and proclaimed the plaintiff's motor vehicle registration number KBV 492S Isuzu Canter.
9. Respondent further averred that the plaintiff filed an application dated 6<sup>th</sup> November 2018 where a consent was entered into between the respondent herein and the defendant Xplico Insurance Company Limited where the defendant herein accepted to make payments on behalf of the plaintiff/applicant herein and made partial payments.
10. She averred that the plaintiff has blatantly abused the Court processes through numerous applications for stay of execution and release of the attached properties.

### **ANALYSIS AND DETERMINATION**

11. I have considered averments herein and submissions filed. The applicant's argument is that they have complied with conditions for grant of stay of execution order granted and the attachment of the vehicle at the instance of the interested party is not warranted and should be declared null and void.
12. On the other hand, the respondent argues that the applicants have not complied with the second limb of conditions they have not set the matter down for hearing within 45 days as ordered by the Court on 12<sup>th</sup> of October 2017 and she should not be denied fruits by the applicants who have delayed this matter by filing various applications and has not set down the appeal for hearing. In the respondents view the numerous applications filed by the applicant is an abuse of the court process.
13. From the judgment delivered by **Justice Korir** on 12<sup>th</sup> of October 2017 stay of execution orders were issued pending the hearing and determination of the suit and the applicant was to deposit security of Kshs. 100,000/= and further set down the case for hearing within 45 days of the said ruling. She further directed the stay was to automatically lapse at the 46<sup>th</sup> day of the ruling if the plaintiff shall not have taken any active steps to prosecute the suit.
14. On 23<sup>rd</sup> November 2017 when the Court noted that the parties had complied and are ready to move the case forward; and that the earliest available date be given in the registry. The Court varied and extended stay to 2<sup>nd</sup> May 2017. The matter was fixed for hearing on 4<sup>th</sup> July 2018. It never proceeded as the Court was not sitting and it was rescheduled to 11<sup>th</sup> October 2018. On that day the matter was given another date 3<sup>rd</sup> December 2018 in the registry. I have not seen proceedings for 3<sup>rd</sup> December 2018 and it is at this point the interested party extracted the warrants of attachment.
15. I note that interim orders were extended up to 28<sup>th</sup> January 2019, when the Court indicated that the parties to file a written consent once settlement is arrived.
16. The applicant attached annexures 10, 11 and 12 which shows that the plaintiff/applicant had initially filed a similar application seeking for stay of execution before the honourable court. And in that regard a consent dated 5<sup>th</sup> December 2018 was entered into between the interested party/respondent herein and the defendant Xplico Insurance Company Limited where Xplico Insurance Company herein accepted to settle the decretal sum on behalf of the plaintiff since they acknowledged their obligation. Cheques have been attached of kshs..450,000/= having been paid to the interested party/respondent advocates via cheques dated 7<sup>th</sup> December, 2018, 10<sup>th</sup> July, 2019 and 15<sup>th</sup> April, 2019. The warrant of attachment was issued on 18<sup>th</sup> October 2018.
17. Record show that the applicant filed an application dated 6<sup>th</sup> November 2018 after the plaintiff property were proclaimed by the interested party/respondent herein; they entered into a consent on 6<sup>th</sup> December 2018 and stay orders were extended to 28<sup>th</sup> January 2019. On 28<sup>th</sup> January 2019, the Court recorded that parties to file consent once settlement is arrived. I note from the Court record that interim orders of stay of execution were not extended on 28<sup>th</sup> January 2018.
18. From the foregoing, there were no orders to stay attachment and the applicant's property were therefore properly attached. No explanation has been given as to why the applicants failed to move the Court from 28<sup>th</sup> January up to 24<sup>th</sup> April 2019 which was prompted by the attachment.
19. In my view the applicants have not demonstrated that they want this matter settled; once the orders for stay are granted they retreat to relax. This matter was filed in the year 2010 and 3 years down the line it is still pending. It is the responsibility of a party who files a suit in Court to ensure that it moves to conclusion. The judgment awarding the interested party damages was delivered on 20<sup>th</sup> December 2016. From pleadings I note that the accident giving rise to the suit filed in the lower court occurred on 19<sup>th</sup> December 2010. It's now 10 years and

the matter is still unsettled.

20. From the foregoing, I see no merit in the applicants' application and do dismiss with costs to the respondent.

21. **FINAL ORDERS**

1. The application dated 29<sup>th</sup> April 2019 is dismissed

2. Costs to the respondents.

**Ruling dated, signed and delivered via zoom at Nakuru this 17<sup>th</sup> day of December, 2020**

.....

**RACHEL NGETICH**

**JUDGE**

**In the presence of:**

Jeniffer - Court Assistant

Mr. Githiru counsel for 1<sup>st</sup> Respondent

Ms.Muthoni holding brief for Kimondo counsel for 2nd Respondent

No Appearance for the Applicant.