



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 111 OF 2019

EVAN MWEHA.....PLAINTIFF/APPLICANT

VERSUS

BRITISH AMERICAN INSURANCE (K) LIMITED.....DEFENDANT/RESPONDENT

TRACISIO MAINA MWANGI.....1ST INTERESTED PARTY

JOHN WANYAGE MWEHA.....2ND INTERESTED PARTY

RULING

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The plaintiff brought this suit against the defendant and named the interested parties seeking declaratory orders to the effect that, the defendant be directed and or compelled to meet its contractual obligation to the plaintiff, and or genuine 3rd party claimants as per insurance policy cited therein.

There was another order sought to the effect that the defendant is bound to honour and or satisfy the decree issued against the plaintiff and the 2nd interest party in HCCC No. 457 of 2009. Finally, the plaintiff sought a declaration that, public policy enjoins the defendant to uphold the contract in terms of the compulsory third party insurance dimensions of the contract.

There is before me an application by way of Notice of Motion dated and filed on 24th May, 2019 under Order 22 Rule 22(1) Order 51 Rule 18 of the Civil Procedure Rules, Sections 3A and 63 (e) of the Civil Procedure Act, seeking a stay of execution of the Judgment, decree and warrants of arrest issued in HCCC No. 457 of 2009, between Taracisio Maina Mwangi vs. Evan Mweha & John Wanyage Mweha pending the hearing and determination of this suit.

There is also a prayer for stay of all proceedings in the said case No. 457 of 2009 cited above as against the 2nd interested party, pending the hearing of this suit. The reasons for seeking those orders are set out on the face of the application and the supporting affidavit sworn by the plaintiff.

The defendant and the 1st interested party have filed replying affidavits in opposition to the application and there is a further affidavit sworn by the plaintiff. Some authorities have also been cited. The orders sought are discretionary taking into account the interests of both parties.

There is no dispute that there is a judgment in favour of the 1st interested party against the plaintiff. It is the plaintiff's case that the defendant is bound to satisfy that judgment, because he had taken an insurance cover relating to any claims including the judgment in question.

I observe at this point that, some of the issues raised by the parties in this application go to the root of the orders sought by the plaintiff in the main suit. It may be prejudicial therefore, for this court to go beyond what is necessary in addressing this application.

It has been argued that this application comes rather late in the day but my perusal of the record exonerates the plaintiff in that regard. It all depends on when he became aware of the judgment against him.

There is no dispute that the plaintiff was served with summons relating to HCCC No. 457 of 2009 aforesaid, and forwarded the same together with the pleadings to the defendant as his insurer. The defendant appointed a firm of advocates to represent the plaintiff in that suit. Although there is correspondence addressed to the plaintiff in this suit by the defendant, there is no evidence that that correspondence was received by the plaintiff.

The plaintiff herein had a legitimate expectation that the lawyers appointed by the defendant would represent him under the terms of the policy. The question is whether or not stay of the decree against the plaintiff should be issued pending the determination of the present suit where he seeks declaratory orders. The application before me was filed as soon as the plaintiff became aware of the decree and orders against him.

On the other hand, if execution is allowed and he is committed to civil jail, he will have lost his freedom and obviously substantial loss will have been visited upon him. The circumstances of this case do not lead me to consider whether or not the plaintiff should post security for due performance of any decree that may be found against him.

I observe also that the plaintiff does not seek to challenge the judgment given against him in favour of the 1st interested party. In that regard I agree that if anything, the orders sought in his suit are likely to benefit the 1st interested party in the event he succeeds.

I am persuaded that this application should be allowed, and it is so ordered. The Notice to show cause shall be lifted and the warrants of arrest recalled. The proceedings in HCCC No. 457 of 2009 shall be stayed in as much as they may be detrimental to the plaintiff herein.

The nature of the present suit calls for first tracking of the proceedings and therefore, the parties herein should endeavour to comply with the relevant rules of procedure expeditiously so that the prayers herein can be determined as early as possible. The costs shall be in the cause.

Dated, signed and delivered at Nairobi this 25th Day of July, 2019.

A. MBOGHOLI MSAGHA

JUDGE