



IN THE HIGH COURT OF KENYA

AT KISII

CORAM: D.S. MAJANJA J.

CIVIL SUIT NO. 24 OF 2013

BETWEEN

ICEA LION GENERAL INSURANCE CO., LTD.....PLAINTIFF

AND

THE BOARD OF GOVERNORS RIOMA

MIXED SECONDARY SCHOOL.....DEFENDANT

RULING

1. The application for consideration in this ruling is a Notice of Motion dated 14th June 2019 made under **Article 159** of the Constitution, **sections 1A, 1B, 3 and 3A** of the **Civil Procedure Act** and **Order 42 Rule 6(1), (2), (4), 7(2)** and **Order 51** of the **Civil Procedure Rules** and all the enabling provisions of the law. The plaintiff mainly seeks three orders pending the hearing and determination of **ICEA INSURANCE COMPANY LIMITED v THE BOARD OF GOVERNORS RIOMA MIXED SECONDARY SCHOOL AND 22 OTHERS Kisumu Civil Appeal No. 89 of 2019** which is an appeal from the judgment rendered by Okwany J., on 7th March 2016 in this matter. First, an order of stay of proceedings and or execution in respect of 41 declaratory suits instituted by various claimants against the plaintiff at Ogembo Magistrates Court. Second, an order stay pending execution of the judgment and a stay of those proceedings. Third, an order that an escrow account be opened and the decretal amounts in respect of the 41 declaratory suits against the plaintiff be deposited by the plaintiff into the escrow account as security.

2. Before I consider the arguments for and against the application. I propose to set out the background facts leading to the application which are common ground. The plaintiff was the insurer of motor vehicle registration number KBT 580 (“the Bus”) belonging to Rioma Mixed Secondary School (“the School”). On 10th July 2013, the Bus was involved in a road accident where several passengers were either injured or died. The plaintiff filed this suit seeking declarations discharging it from liability under the policy issued to the School pursuant to **section 10(4)** of the **Insurance (Motor Vehicle Third Party Risks) Act (Chapter 405 of the Laws of Kenya)**. In the judgment dated 7th March 2016, Okwany J., issued the following decree:

1. THAT the plaintiff’s suit is dismissed with costs to the defendant.

2. THAT the order staying all related civil suits pending before the lower court is hereby lifted.

3. THAT the defendant’s counterclaim is hereby allowed but only in respect to orders that the plaintiff shall perform all its contractual obligations to the defendant in respect to the genuine third party claimants in line with the Insurance Policy 980-A1-118482-13 issued to the defendant on 16th January 2013.

3. The plaintiff, being dissatisfied with the judgment and decree, lodged the appeal now pending. It also filed an application for stay of proceedings in the cases filed at Ogembo Magistrates Court pending the hearing and determination of that appeal. The Court of Appeal dismissed the application on 21st February 2019.

4. The application under consideration is based on grounds set out in the face of the application and the deposition of Lucy Muriithi, its Deputy Manager Claims – Legal Section, sworn on 14th June 2019. The thrust of the application and deposition is that the issue of the plaintiff’s liability under the policy is still pending determination in the Court of Appeal and if the declaratory suits filed by the claimants before Ogembo Magistrates Court proceed and execution ensues, the pending appeal will be rendered nugatory. The plaintiff contends that the defendant’s and interested parties’ financial ability is unknown and that should execution proceed or if the claimants receive payment, they are unlikely to refund the money.

5. The application was opposed by the 23 interested parties who had filed declaratory suits against the plaintiff at Ogembo Magistrates Court. Ms Irene Kusa, an advocate representing some of the claimants filed a replying affidavit sworn on 12th July 2019. She also made brief submissions in court. Nicholas Munge Tai, an interested party, in his replying affidavit sworn on 16th July 2019, also opposed the application. His case was agitated by his advocate, Mr Gichana. The School principal, Samuel Onyiego Atembe, opposed the application through the affidavit sworn on 18th July 2009 and was supported by submissions through his advocates, Mr Nyambega.

6. The common approach taken by the defendant and interested parties was that this court was *functus officio* in so far as Okwany J., delivered a ruling dated 7th March 2016 declining to grant an order of stay pending appeal. They further contended that this court lacks jurisdiction to entertain this application in so far as the Court of Appeal delivered a ruling dismissing the plaintiff's application for stay pending appeal on 21st February 2019. They submitted that the application was *res judicata* and if the circumstances had changed then the plaintiff was entitled to move the Court of Appeal for further orders. Counsel argued that the plaintiff had not made a case for the grant of the orders sought as each claimant in the pending cases had an accrued right as a result of the judgment of this court. The respondent and interested parties pointed out that the appeal was incompetent as it was filed out of time and that in fact that application before the court was filed after inordinate delay and only after execution was imminent. Finally, they submitted that the appeal was incompetent as it was filed out of time.

7. In response to the defendant and interested parties' arguments, Mr Chesoni, counsel for the plaintiff, pointed out that the issue of competence of the appeal could only be dealt with by the Court of Appeal. In his view, the Court of Appeal did not deal with declaratory suits that are the subject of execution but rather the primary suits in which the plaintiff's insured had been sued by various claimants. In the circumstances, he urged that the court was entitled to issue orders of stay in respect of the declaratory suits.

8. The main issue I must address is whether the Court of Appeal decision denying an order of stay precludes this court from hearing the application at hand. I have looked at the application and what was before the Court of Appeal at the time was an application for stay of proceedings and further proceedings of cases filed in Ogembo Magistrates Court. From the schedule of cases shown in the motion before the Court of Appeal, those suits were the primary suits filed by various claimants against the defendant. It is for this reason that the Court of Appeal found that the intended appeal could not be rendered nugatory as those claimants had no direct claim against the plaintiff as it was not a party to those suits.

9. In the present application, the plaintiff seeks a stay of proceedings in respect of declaratory suits against it by the same claimants. The circumstances in this application are therefore different as the plaintiff seeks to stay the declaratory suits. I therefore find and hold that I have jurisdiction to determine the present application as it is not *res-judicata* as the circumstances are different. The next question is whether the plaintiff has made out a case for the grant of stay.

10. I am constrained to agree with the defendant and interested parties that this application must fail for several reasons. First, the suits sought to be stayed are declaratory suits which are at various stages of litigation. It is not clear from the depositions at what stage each case is. Second and in the event there is judgment, the plaintiff herein will be entitled to lodge an appeal if it wishes to challenge the judgment. It is not clear from what is on record that the plaintiff has lodged appeals in respect of all the judgments. The reason this is important is that in the event an appeal is lodged in each case, the court may consider granting a stay of execution of proceedings based on the circumstances of each case.

11. What the plaintiff seeks from this court is an omnibus order of stay in respect of matters that are not subject of the appeal in the Court of Appeal. In *Pyaralal Mhand Bheru Rajput v Barclays Bank and 3 Others* HC ML Civil Case No. 38 of 2004 [2004] eKLR, Ringera J., **warned of the dangers of an** omnibus applications as follows;

There is no doubt the application is an all-cure, omnibus application. It is a wide net cast over a large body of water, and out of all the lake or sea, creatures caught in it, there will be one or two edible crabs or fish. It is not quite so. An omnibus application is incapable of proper adjudication by the court for each of the reliefs sought apart from being governed by different rules, is also subject to long established and different judicial principles which counsel need to bring to the attention of, and the court needs to consider before granting the entire relief sought. This alone makes the plaintiff's application incurably defective, and a candidate for striking out.

12. I agree with the sentiments expressed by Ringera J. While I accept that the Court of Appeal decision may have an effect on the cases in the subordinate court, each suit against the plaintiff at the Ogembo Law Court is by an independent party who has filed a distinct suit and merely because the pending appeal in the Court of Appeal succeeds, it does not implicate the proceedings before the subordinate court unless the plaintiff herein appeals to the High Court to challenge those decisions. The plaintiff may elect to appeal and apply for stay in each case and the appellate court will consider whether a case for stay has been made out. A stay of execution and proceedings in the circumstances sought by the plaintiff in this case is therefore untenable.

13. For the reasons I have set out, I find that the plaintiff's notice of motion dated 14th June 2019 lacks merit. It is dismissed with costs to the defendant and interested parties.

DATED and DELIVERED at KISII this 15th DAY of AUGUST 2019

D. S. MAJANJA

JUDGE

Mr Chesoni instructed by Onyinkwa and Company Advocates for the plaintiff/applicant.

Mr Mose instructed by Mose Nyambega and Company Advocates for the defendant/respondent.

Mr Gichana instructed by Ben Gichana and Company Advocates for the interested party.

Ms Kusa instructed by Khan and Associates Advocates for the interested party.