



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 572 OF 2017

KENINDIA ASSURANCE CO. LTD.....APPELLANT/APPLICANT

VERSUS

ISABELLA ATIENO OPIYO & WALTER ONYANGO OPIYO

(Suing as the personal representatives of the estate of RAYSTUS

MUGUDO ASHIUNDU-Deceased).....RESPONDENT

RULING

1. The appellant/applicant has brought the Notice of Motion dated 6th September, 2018 supported by the grounds laid out on its face and facts deponed to in the affidavit sworn by advocate, *Winnie Awuor Paul*. The applicant is seeking for the orders hereunder:

(a) Spent.

(b) Spent.

(c) THAT there be a stay of further execution of the judgment and decree dated 16th October, 2017 and of further proceedings in CMCC NO. 4647 OF 2017 pending the hearing and determination of the appeal.

(d) THAT the respondents be restrained by an order of injunction from remaining with, keeping and/or in any other manner distributing the sum of Kshs.1,139,134/= collected by Daystar Auctioneers by way of two (2) cheques of Kshs.569,567/= each issued to Kulecho & Co. Advocates to the dependants of the deceased, pending the hearing and determination of the appeal.

(e) THAT the 1st respondent (Isabella Atieno Opiyo) be ordered to refund and deposit in this court the sum of Kshs.1,139,134/= paid by the appellant and out of which sum Kshs.800,000/= is purported to have been released to her on 1st November, 2017 by the firm of Kulecho & Co. Advocates and the sum of Kshs.339,134/= said to have been retained by the said firm of advocates in settlement of the decree issued in CMCC NO. 4647 OF 2017 and the sum once deposited be retained by this court as security pending the hearing and determination of the appeal.

(f) THAT the costs of the application be provided for.

2. The abovementioned *Winnie Awuor Paul*, deponed inter alia, that the trial court found the applicant liable to settle the decretal sum despite the said applicant having never insured the motor vehicle that caused the accident in the suit, neither had it issued a policy of insurance in favour of the 2nd defendant in the suit.

3. The deponent further stated that the applicant was never heard on merit, its statement of defence having been struck out upon filing of an application by the respondents and judgment was entered against the applicant. She has conveyed the applicant's apprehension that unless an order for a stay of execution is granted, the applicant stands to suffer substantial loss by virtue of the fact that it is possible the decretal amount may not be recovered from the respondents should the appeal succeed, thus rendering it nugatory.

4. The deponent went ahead to aver that the decretal amount that the applicant was condemned to pay was illegally collected on the basis that the decree was not extracted; no application had been made for execution; no valid warrants of attachment and sale had been obtained; adding that the applicant's advocate only came to learn of these facts after the decretal amount had been paid to the respondents through their auctioneers.

5. It was equally *Winnie Paul's* assertion that the applicant had previously filed an application seeking an order for a stay of execution before

the subordinate court and which application was dismissed. The deponent added that the payments made to the auctioneers by the applicant were made under duress.

6. When the application came up before this court, it was ascertained that despite having been served with a copy thereof, the respondents did not file any documents in response thereto or participate at the hearing. On his part, *Mr. Oliwa* counsel for the applicant submitted that the execution was unlawfully carried out and that his client was under duress, thereby resulting in the release of the decretal amount, reiterating that no decree had been extracted neither had valid warrants of attachment and sale been issued by the subordinate court.

7. The advocate further restated that the application has not only been filed timeously but that unless a stay of execution is granted, the appeal will be rendered nugatory.

8. I have cautiously considered the grounds set out on the face of the Motion, the affidavit in support of the same and the oral arguments made by the applicant's advocate.

9. If I may offer a brief background of the matter, the respondents in this instance had previously lodged a suit against two (2) persons who are not parties to the application or appeal vide CMCC NO. 3543 OF 2014 (*Isabella Atieno Opiyo & Walter Onyango Opiyo-Suing as representatives of the estate of Raystus Mugudo Ashiundu [Deceased] v Ann Torori & Jared M. Mokamba*) claiming damages arising from a fatal accident. Going by the documents availed to this court, the respondents being the plaintiffs in that instance served the summons and suit documents upon the defendants, neither of whom entered appearance and/or filed their defence, though the case against the 1st defendant was withdrawn.

10. That being the case, interlocutory judgment was entered against the 2nd defendant and the matter proceeded for formal proof and judgment entered in favour of the respondents against the 2nd defendant in the sum of Kshs.1,026,400/= on 9th October, 2015.

11. Subsequently, the respondents filed a declaratory suit against the applicant herein vide CMCC NO. 4647 OF 2017 (*Isabella Atieno Opiyo & Walter Onyango Opiyo-Suing as representatives of the estate of Raystus Mugudo Ashiundu [Deceased] v Kenindia Assurance Co. Limited*), seeking the above stated sum on the premise that the applicant was at all material times the insurer of the motor vehicle registration no. KAH 145L said to have caused the accident. That a default judgment was entered against the applicant on 9th August, 2017 for failing to enter appearance and/or file its statement of defence in good time.

12. Thereafter, the applicant filed an application dated 11th September, 2017 seeking for an order for a stay of execution; an order seeking to have the default judgment set aside and a further order for leave to defend its case, which application it would appear was allowed by consent of the parties filed on 21st September, 2017. Nevertheless, the respondents filed an application dated 27th September, 2017 seeking to have the defence struck out and their application was allowed vide the ruling delivered on 16th October, 2017 and the applicant ordered to satisfy the judgment together with costs and interest thereon.

13. Since then, the applicant has filed two (2) other applications before the subordinate court dated 23rd October, 2017 and 1st November, 2017, both seeking a stay of execution pending appeal amongst other orders. The applicant indicated that both applications were eventually dismissed.

14. Having laid out the above, I now return to the application herein. I have noted that the orders being sought are three (3)-fold in nature. I will begin with the order for a stay of execution. Going by the grounds and facts presented in the application and supporting affidavit respectively, as well as the oral submissions, it is the applicant's position that it has already paid to the respondents the sum of Kshs.1,139,134/= which sum it would appear constitutes the decretal amount. That being the case, it is clear that there is really nothing to be stayed since the decretal amount has been paid out.

15. The applicant claimed the amount was paid through duress; however, this has not been illustrated. Unfortunate as it is, given that the applicant has admitted to having paid the decretal amount; the evidence of which has been attached to its application; I am convinced that the order for a stay of execution now sought has been overtaken by events. In view of these circumstances, I am unable to consider or grant this particular order.

16. The second order relates to a stay of proceedings. As earlier indicated, it has been established that judgment had been entered in CMCC NO. 3543 OF 2014 (*"the primary suit"*) and that CMCC NO.4647 of 2017(*"the secondary suit"*) was merely declaratory. I am similarly guided by the application and documents attached thereto which ascertain that the secondary suit was determined on 16th October, 2017 when the trial court struck out the applicant's defence and entered judgment in favour of the respondents as prayed in their plaint. That being the position, I am of the considered view that there are no pending proceedings to be stayed, the substance of the same having essentially terminated.

17. Further to the above, I also noted with interest that through its application dated 30th November, 2017 the applicant sought for a similar order for a refund of the amounts paid to the respondents and their auctioneers. Equally, the applicant in that particular application went ahead to raise the same issues raised before this court concerning the validity of the execution process undertaken by the respondents through Daystar Auctioneers. Upon hearing the parties, the trial court held *inter alia*, that the respondents were entitled to execute and did in fact comply with the statutory requirements on execution, further holding that the applicant voluntarily effected payment while also noting that the said applicant had the option of depositing the decretal amount in court but did not. Going by the record and information presented to this court, there is nothing to indicate that the aforesaid ruling has been challenged by way of appeal or review.

18. In the circumstances, there is no basis for this court to address its mind on the issue of refund and/or an injunction in relation to a decretal sum already paid to the judgment creditors.

19. The upshot is that the Motion lacks merit and is hereby dismissed. Costs shall abide the outcome of the appeal.

Dated, Signed and Delivered at Nairobi this 26th day of September, 2019.

L. NJUGUNA

JUDGE

In the presence of:

..... for the Appellant/Applicant

..... for the Respondents