



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

Civil Appeal 24 of 2010

BLUE SHIELD INSURANCE COMPANY.....APPELLANT

VERSUS

ESTHER WAMBUI KAMAU & 5 OTHERS.....RESPONDENT

R U L I N G

The Applicant in this Notice of Motion dated 3.4.2010 has moved this court for the following orders:-

1. *That this Honourable Court be pleased to grant orders of stay of execution issued against the Applicant/Appellant in Wanguru SRMCC No. 198 of 2009 pending the hearing and determination of this appeal.*
2. *That this Honourable Court be pleased to grant orders of joinder of parties of the Plaintiffs in Embu CMCC N.254 of 2009 to wit Patrick Njiru Kuria and PALEAH STORES LIMITED as parties in this appeal.*

The application is premised on the 5 grounds on its face and on the supporting affidavit of one Lydia Macharia who describes herself as the Managing Director and Chief Executive officer of the Appellant/ Applicant. The affidavit has several annexures which relate to the **WANGURU SRM CASES** and **EMBU CM CIVIL SUIT No. 255/2009**. The application is opposed through the affidavit of one Esther Wambui Kamau sworn on 7.5.2010 which is nonetheless dubbed as a “supporting affidavit”. I do not know what it is in support of and I would have been inclined to strike it out had I been moved to do so but since the same forms part of the record I will consider its contents. From the affidavit herein and the annexures, it appears that the cause of action in respect of the several civil suits touching on this application was an accident that occurred along the Nyeri-Nyahururu Road, which is in my considered view outside the territorial jurisdiction of the Wanguru Court. That has not been raised as an issue here and is therefore just a digression on my part. Following the said traffic Road accident, the Plaintiffs in the Wanguru Court filed several cases claiming damages against Paleah Stores Limited and Patrick Njiru Kuria who the Applicant herein now seeks to join as parties in the Appeal herein. Judgment was entered in their favour to the tune of KShs.702,084. The decree was not satisfied and instead, the defendants therein moved to the Chief Magistrate’s court Embu and filed a suit against the Applicant herein for declaratory orders that the Applicant as the motor vehicle’s insurer was duty bound by law to satisfy the said decree. While that suit was still pending, the plaintiffs went to the Wanguru Court and filed another declaratory suit against the Applicant seeking similar orders.

That suit was filed on 9.12.09 when the one in Embu was still pending. It ought not to have been filed as it was seeking similar orders. The

most the plaintiffs therein should have done if they felt that the suit before the chief magistrate court was deficient was to apply in that suit to be enjoined as a party. It is trite law that filing a multiplicity of suits seeking the same prayers not only derails and delays justice but also amounts to an abuse of the court process.

The suit before the Wanguru Court was nonetheless allowed after the defendant's defence was summarily struck out. Judgment was entered in favour of the plaintiffs and they proceeded to execute. The defendant in the Wanguru case moved to this court on Appeal against the ruling that struck out its defence.

Pending the hearing of that Appeal, they moved to this court by way of this application. Meanwhile stay orders were granted by the Chief Magistrate Embu against the orders of the SRM Wanguru. I do not wish to venture into the discussion as to whether that was lawful or not at this point.

The issue before this court now is whether this court should stay the execution of the decree obtained from Wanguru Court or not. The orders of stay are opposed by the Respondents vide the affidavit mentioned earlier on.

According to Mr. Mwangi for the Respondent, no substantial loss will be suffered by the applicants if execution proceeds. He also says that there is no Appeal filed against the said judgments and I agree with him on that point. He urges the court to order that the decretal amount be deposited in court in the event this application is allowed.

Counsel for the applicant on the other hand urged the court not to order for a deposit of any security as the Respondents can still execute if the appeal fails.

The principles to be considered before a court can grant orders of stay are now well settled. Was the application filed timeously; Does the applicant have sufficient cause; will the applicant suffer substantial loss if the stay is not granted; will the appeal be rendered nugatory? Is there an undertaking to furnish the court with security?

I have considered all these principles along with the several authority furnished to me by counsel. At the end of the day however, to grant or not to grant stay orders is at the discretion of the court. The discretion must nonetheless be exercised judicially and judiciously. In this case, there are some unique circumstances that prevent me from applying the strict Rules as set out above. The reason I say this is because I appreciate the fact that the Appeal before me is not actually against the decretal amounts awarded to the plaintiff/Respondents. Whichever way the Appeal goes, it may not affect that issue. What troubles me however which I had pointed out earlier on in this Ruling is the fact that the declaratory suit in Wanguru which gives rise to this Appeal was filed while there was already a similar one before the Chief magistrate court in Embu. That fact was drawn to the attention of the learned magistrate but he chose to proceed with the matter all the same. That suit should not have been filed during the pendency of the one in Embu. The magistrate in Wanguru should have stayed it as required under Section 6 of the Civil Procedure Act to await the outcome of the Embu suit which is the one that had been filed earlier. That was wrong. It is for that sole reason that I will allow this application so as not to encourage such a blatant disregard of the law. As to the issue of depositing security, since the execution process was triggered by the hearing of the suit which I have faulted, I will not order the applicant to deposit any security.

If the Appeal fails, then the Respondents will certainly be at liberty to execute and I believe that the applicant is not a 'person of straw' and will therefore be able to meet its obligations.

The Respondents do not seem to oppose prayer No. 5 and so I will allow it too. All in all therefore, the application dated 3.5.2010 is allowed with costs in the cause.

W. KARANJA

JUDGE

Delivered, dated and signed at Embu this 24th day of June 2010.

In presence of :- (as per coram)

24/06/2010

Before W. Karanja J.

Mr. Kimathi present for the Appellant

Mr. Mugo Kariuki for Mr. Wahome for the Respondent

**W. KARANJA
JUDGE**

Court:

Ruling delivered today in open court in presence of the above.

**W. KARANJA
JUDGE**