



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA**

Civil Case 146 of 2009

KENNETH KANG'ETHE T/A SAVANAH INVESTMENTS.....PLAINTIFF/APPLICANT

VERSUS

BLUE SHIELD INSURANCE CO. LTD.....DEFENDANT/RESPONDENT

A N D

ALEXANDER MOI (*Suing as Rep. of the Estate of*

HEMSTONE LICHINA.....INTERESTED PARTY

RULING

1. The Application dated 9.10.2009 is premised on Orders XXI Rule 22, Civil Procedure Rules and S.3; 3A and 63 (e) of the Civil Procedure Act. The Applicant seeks a temporary stay of proceedings and/or execution in Kakamega CMCC 265/2008 pending the hearing of the present suit.
2. The suit itself seeks orders that the Defendant is liable to pay and satisfy the decree in CMCC 265/2008 aforesaid. The suit is predicated on the alleged fact that the Defendant issued a certificate of insurance No. A3270064 and an insurance Policy No.088/000950/07/10/R25 and by fact of that policy is obligated to indemnify and satisfy the decree arising in respect of the insured motor vehicle No.KAZ 685U Toyota Hiace.
3. The Application before me is founded on the following grounds;
 - “1. *That the Plaintiff was duly insured by the defendant.*
 2. *That there is a decree to be satisfied in KAKAMEGA CMCC 265/08 and the defendant being the insurer is not willing to satisfy the same.*
 3. *That the applicant stands to suffer untold loss and suffering should execution go on and the current suit shall be rendered nugatory and a futile academic exercise.*
 4. *That it is in the best interest of justice that the orders sought be granted.”*
3. The Interested Party, Alexander Moi (suing as the legal representative of the estate of Hanstone Luchina), filed a Replying Affidavit on 10.11.2009, and in it he depones that the Application is brought in bad faith, is an afterthought and is also an abuse of court process. Further that he is not privy to the insurance contract between the Plaintiff and the Defendant and he should not be denied the

fruits of his judgment for that reason. Further, that the Plaintiff can satisfy the decree and seek indemnity from the Defendant later.

4. In a further Affidavit sworn on 3.12.2009, the Applicant states that ***“he is unable to satisfy the decree in CMCC 265.2008”*** because he was greatly affected by the post election violence that rocked the Kenyan Nation and is trying to recover from the effects thereof.
5. The Application before me is said to be particularly premised on the provisions of **Order XXI Rule 22** of the Civil Procedure Rules which provides as follows;

“The court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time to enable the judgment-debtor to apply to the court by which the decree was passed, or to any court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay the execution, or for any other order relating to the decree or execution which might have been made by the court of first instance, or appellate court if execution has been issued thereby, or if application for execution has been made thereto.”

6. The above Rule is obviously quite different from Order XVI Rule 4 (2) which relates to stay of execution pending an appeal and the arguments by the Interested Party in that regard are also obviously misplaced.
7. To my mind, what the Applicant is saying is that whereas a decree was lawfully obtained by the Interested Party and the decree was directed at him, the execution thereof should be stayed pending the hearing of the suit (between himself and his insurer, the present Defendant). Is that a sufficient reason within the meaning of Rule 22 above?
8. Before answering that question, the Defendant, for obvious reasons, has not responded to the Application but in a Statement of Defence dated 27.11.2009, it denied knowledge of any insurance policy with the Plaintiff and denied that it was obligated to indemnify him in case of any suit against him and in which the insurance policy allegedly applied. In the alternative, it averred that if any such policy existed, it was repudiated by the Plaintiff's conduct.
9. With that background in mind, order XXI Rule 1 presupposes that;
 - i) there is a court to which a decree has been sent for execution;
 - ii) there is a court by which the decree was passed;
 - iii) there is a court having appellate jurisdiction in respect of the decree or the execution thereof.
10. The Rule is titled; **“when court may order stay of execution”** and the instances are clearly set out. In this case, the decree has not been sent to this court for execution, neither is it a decree passed by this court and this court is certainly not sitting in its appellate jurisdiction. The Application in invoking that Rule is therefore misguided.
11. I should also add as follows: the Application was initially filed without notice to the affected party and it took an Application for him to be enjoined as an Interested Party for him to be heard. No orders can surely be issued against a party that is not substantively affected by the final orders sought in the suit. Every Application must be predicated on the prayers in the Complaint and in this case there is clearly a disconnect between the cause of action and the prayer for stay of execution.
12. But suppose I revert to S.3 and S.3A of the Civil Procedure Rules and invoke the inherent jurisdiction of this court. In that case, the ends of justice must be met by looking at the interests of each party. The Applicant admits that the decree held by the Interested Party is lawful. He says that he cannot honour it because he has no means to do so but the motor-vehicle that was allegedly insured by the Defendant still exists. The Defendant has however denied any relationship with the Plaintiff and has repudiated the contract with the Plaintiff as an alternative. What assurance is there that the indemnity sought will be granted in such circumstances?
13. The Interested Party is an innocent party in these proceedings and should not suffer like the proverbial grass when two elephants are fighting.
14. In the event, I see no reason to accede to the Plaintiff's prayers and the Application dated 9.10.2009 is dismissed with costs to the

Interested Party only.

Delivered, Dated and signed at Kakamega, this 16th day of June, 2010.

ISAAC LENAOLA

J U D G E