



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 402 of 2009**

**STEPHEN MBOGO MWANGI.....PLAINTIFF**

**- VERSUS-**

**BLUESHIELD INSURANCE CO.LTD.....1<sup>ST</sup> DEFENDANT**

**REGINA MUTHONI MWANGI.....2<sup>ND</sup> DEFENDANT**

**S. N. MBIJIWE T/A**

**BEALINE KENYA AUCTIONEERS.....3<sup>RD</sup> DEFENDANT**

**RULING**

The plaintiff filed suit against, *inter alia*, the 1<sup>st</sup> defendant Blueshield Insurance Company Ltd, seeking a declaratory order of this court that the 1<sup>st</sup> defendant be compelled to settle the entire amount decreed in **Murang'a SPMCCC No. 261 of 2008 Regina Muthoni Gachambuiya vs Martin Wanjohi & 2 others** (*hereinafter referred to as the Murang'a case*). Contemporaneous, the plaintiff filed an application pursuant to provisions of **Section 3A** of the **Civil Procedure Act** and **Order XXXIX Rules 1, 2 & 9** of the **Civil Procedure Rules**, seeking orders of temporary injunction to restrain the 2<sup>nd</sup> and the 3<sup>rd</sup> defendants by themselves or by their servants or agents from selling, by way of public auction or disposing in any manner whatsoever, motor vehicle Reg. No.KAR 483D pending the hearing and determination of the suit. The plaintiff further prayed for an order of mandatory injunction to compel the 1<sup>st</sup> defendant to pay to the 2<sup>nd</sup> defendant the entire sum as per the decree issued in the Murang'a case together with all other consequential costs. The application is supported by the annexed affidavit of the plaintiff and the grounds stated on the face of the application. The application is opposed. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants swore replying affidavits in opposition to the application.

At the hearing of the application, I heard rival submissions made by Mr. Njenga for the plaintiff, Mr. Mbuthia for the 2<sup>nd</sup> defendant and Mr. Oduor for the 3<sup>rd</sup> defendant. I have carefully considered the arguments made by the parties in this application. I have also considered the pleadings filed by the parties herein in support of their respective opposing positions. The issue for determination by this court is whether the plaintiff established a case to entitle this court grant him the order of injunction sought. The principles to be considered by this court in determining whether or not to grant the interlocutory injunction sought are well settled. The plaintiff must establish that he has a prima facie case with a high probability of success. He must also establish that he would suffer irreparable damage that is unlikely to be compensated by an award of damages should the injunction sought not be granted. If the court is in doubt, it will determine the application on a balance of convenience (see **Giella vs Cassman Brown [1973] EA 358**).

In the present application, the facts are more or less not in dispute. The plaintiff is the owner of a public service motor vehicle registration No.KAR 483D. At the material time, the plaintiff had insured the said motor vehicle with the 1<sup>st</sup> defendant. On 20<sup>th</sup> November, 2007 the said motor vehicle was involved in an accident with another public service motor vehicle registration No.KAY 369Q wherein the

2<sup>nd</sup> defendant herein was a passenger. As a result of the said accident, the 2<sup>nd</sup> defendant was injured. Subsequently thereafter, the 2<sup>nd</sup> defendant filed the Murang'a case seeking to be paid compensation on account of the injuries that she had sustained. It is not disputed that upon being served with summons to enter appearance, the plaintiff notified the 1<sup>st</sup> defendant who took over the conduct of the matter. The 1<sup>st</sup> defendant appointed the firm of Lucy Mwai & Company Advocates to act on behalf of the plaintiff herein in the matter. The suit was compromised on liability and consent judgment was entered thereto. The plaintiff and the 2<sup>nd</sup> defendant agreed to apportion liability as between themselves at the ratio of 90:10 in favour of the 2<sup>nd</sup> defendant. The issue as to quantum of damages was left for determination by the court.

On 8<sup>th</sup> April, 2009, judgment was entered in favour of the 2<sup>nd</sup> defendant as against the plaintiff for sum of Kshs.138,357/= plus costs and interest. It was apparent that after the decree was issued by the court, and after the 1<sup>st</sup> defendant had been notified of the judgment, that no settlement of the decree was forthcoming. The 2<sup>nd</sup> defendant obtained warrants of attachment and sale and instructed the 3<sup>rd</sup> defendant to execute the said warrants against the plaintiff. The plaintiff's motor vehicle has already been attached. The thrust of the plaintiff's case in this suit is that the 1<sup>st</sup> defendant, as the insurer of the said motor vehicle should be compelled to settle the said decree in accordance with the provisions of **Section 10 (1) of the Insurance (Motor Vehicles Third Party Risks) Act** which legally mandates the 1<sup>st</sup> defendant to settle such a claim. Pending the hearing and determination of the plaintiff's suit as against the 1<sup>st</sup> defendant, the plaintiff wishes to stop the 2<sup>nd</sup> defendant through the 3<sup>rd</sup> defendant from executing the warrants of attachment against him in satisfaction of the decree in the Murang'a case hence this application for injunction.

Can this court grant injunction to restrain the 2<sup>nd</sup> defendant from executing a decree issued in her favour in the circumstances narrated above? I do not think so. Under **Section 34 (1) of the Civil Procedure Act**, all questions arising between the parties in the suit where the decree was passed relating to the execution, discharge or satisfaction of the decree shall be determined by the court executing the decree and not in a separate suit. It is evident that the plaintiff has a legitimate and valid cause of action against the 1<sup>st</sup> defendant. Under the **Insurance Act**, the 1<sup>st</sup> defendant is legally mandated to settle any claim once it became due. The plaintiff is therefore entitled to seek the court's intervention when it is apparent that the 1<sup>st</sup> defendant had failed to abide by its statutory obligation to settle the claim.

However, the plaintiff cannot frustrate execution of a decree issued by a court of competent jurisdiction on the basis that he has a pending suit against an insurance company seeking to enforce the settlement of the claim as provided by the law. In the present application, it is evident that this court lacks jurisdiction to entertain any claim in regard to whether a decree passed by a subordinate court should be executed or not. The matter before this court is not an appeal. The plaintiff is not challenging the judgment of the subordinate court that the decree emanated from. The plaintiff has not sought to invoke this court's judicial review jurisdiction in regard to the said decree issued by the Murang'a subordinate court. **Section 34(1) of the Civil Procedure Act** prohibits this court from considering any issue regarding a decree issued by another court, even if that court is subordinate to it. This court can only grant a remedy in regard to the said decree if its jurisdiction is properly invoked. In the present application, it is clear that the plaintiff has failed to establish a prima facie case.

The plaintiff has failed to persuade the court that it has the requisite jurisdiction to grant him the interlocutory application of injunction sought. The plaintiff is at liberty to pursue the 1<sup>st</sup> defendant for settlement of the decree issued in the Murang'a case. He has no cause of action against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants in this case. It is this court's view that the plaintiff conveniently enjoined the 2<sup>nd</sup> and 3<sup>rd</sup> defendants into this suit for the purpose of obtaining interlocutory orders of injunction. From the plaint, it is evident that the plaintiff has no claim in this suit against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. The application sought cannot therefore in the circumstances be granted.

I find no merit with the plaintiff's application dated 3<sup>rd</sup> June, 2009. It is hereby dismissed with costs. It is so ordered.

**DATED** at **NAIROBI** this 19<sup>th</sup> day of **JUNE**, 2009.

**L. KIMARU**

**JUDGE**