



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NO. 858 OF 2004

TITUS K. GIKUNYA.....PLAINTIFF/APPLICANT

VERSUS

UNITED INSURANCE COMPANY.....1ST DEFENDANT/RESPONDENT

STEPHEN MWANGI MUHIA.....2ND DEFENDANT/RESPONDENT

DANIEL MWANGI JAVAN.....3RD DEFENDANT/RESPONDENT

SAMUEL GITHINJI KUNGU.....4TH DEFENDANT/RESPONDENT

RULING

The plaintiff's Chamber Summons dated and filed on 9th August, 2004 was brought under sections 3, 3A of the Civil Procedure Act (Cap. 21) and Order XXI rules 22, 25 and 91 of the Civil Procedure Rules. The applicant's main prayers were:

(a) that, there be a stay of execution of the decrees extracted from the Githunguri Senior Resident magistrate's Court decisions in Civil Cases No. 11/2002, 12/2002 and 13/2002, all of which turned against the applicant herein;

(b) that, the warrants of attachment of the plaintiff's movable properties already issued, be lifted and the plaintiff's proclaimed properties be restituted.

The application was founded upon the following premises:

(i) that, the defendants' advocate had obtained warrants of attachment and instructed M/s. Chestem Auctioneers who then proclaimed the plaintiff's motor vehicle, registration number KAL 590X on 20th July, 2004;

(ii) that, the said motor vehicle which had caused an accident was insured by M/s. United Insurance Company Ltd. at the time of the accident, and therefore the defendants were to be paid by the said insurance company;

(iii) that, the plaintiff has filed a declaratory suit in the High Court, Civil Suit No. 858 of 2004 against the said United Insurances Co. Ltd.

In the plaintiff's supporting affidavit of 9th August, 2004 he depones that judgement was entered against

him on 28th April, 2004 in Civil Cases No. 11 of 2002; 12 of 2002; 13 of 2002 at Githunguri – and thereafter the defendant’s advocates obtained a warrant and instructed M/s. Chestem Enterprises Auctioneers who proclaimed motor vehicle registration No. KAL 590X on 27th July, 2004. At the time of the accident, the said motor vehicle had a third-party policy issued by M/s. United Insurance Co. Ltd. under policy No. 10NMCP4104. The deponent did report to the said insurance company, which then instructed M/s. Hudson Wafula & Co. Advocates to institute a defence on the said company’s behalf. The plaintiff avers that he owned the said motor vehicle at the time of the accident, and he had duly taken out a valid insurance cover for the same, issued by the first defendant, in accordance with the provisions of the Insurance (Motor Vehicle Third Party Risks) Act (Cap.405). The deponent states that since his motor vehicle was insured, the insurer had assured him that it would make good the claim. The deponent, on the basis of that assurance, requested the first defendant to pay the decretal amount. This request was not heeded; and so the plaintiff filed suit against the insurance company. He has been advised by his advocates on record, which advice he believes to be true, that his said suit has high chances of success. The plaintiff pleads that he stands “to suffer untold loss and damage” if the said vehicle, registration No. KAL 590X is auctioned.

The advocate for the second-to-fourth defendants, **Mr. Andrew Kanyoni Gachoka**, on 21st September, 2004 filed a replying affidavit the content of which may be summarised here.

The deponent had been instructed in mid-2001 by his clients to file suit against the plaintiff, claiming general and special damages and costs, in connection with a road accident which had occurred on 9th February, 2001 when the defendants were lawfully travelling in the plaintiff’s motor vehicle. After the parties were duly heard, the learned Magistrate delivered his judgement, which turned against the plaintiff, on 5th May, 2004. When the deponent, on 24th June, 2004 requested the drawing of a decree and the certification of costs, after the plaintiff had failed to pay the decretal amount, the plaintiff filed suit and lodged an application against the defendants jointly with the said insurance company.

The main point in the submissions made by learned counsel for the applicant, **Mr. Wakahiu**, at the hearing which took place on 1st November, 2004, was that since the applicant was insured by the first defendant, who besides had constantly been represented at the hearing of the three Magistrate’s Court suits which fixed the plaintiff with liability, it was the responsibility of the **first defendant** and not the plaintiff to meet the terms of the judgements in the said Civil Cases No. 11/2002, 12/2002 and 13/2002. On this argument, that legal liability rested with the first defendant, **Mr. Wakahiu** for the plaintiff prayed that all the execution proceedings in the said Magistrate’s Court cases be stayed. Such stay should be granted, learned counsel submitted, because the *plaintiff had a good case against the insurance company*, namely the first defendant.

Ms. Amani who represented the first defendant did not dispute the plaintiff’s contentions, only stating that the insurance company was *organising for* payment of the decretal amount.

Up to this point in the submissions, it would be apparent that the claims of the 2nd – 4th defendants is unanswerable; but against whom? If the insurance company readily admitted its liability and was only organising itself to pay up, how long would those motions take, and on whom would the burdens thereof rest? On the plaintiff? Or on the second, third and fourth defendants, in whose favour the decrees of the Magistrate’s Court had been issued?

Learned counsel, **Mr. Gachoka** opposed the plaintiff’s application, submitting that the first defendant had not been a party to the suit in the Magistrate’s Court at Githunguri; and therefore the Orders of that Court were restricted to the plaintiffs herein on the one hand, and the 2nd – 4th defendants on the other hand – creating benefits for the latter, and burdens for the former. In this highly meritorious argument, **Mr. Gachoka** was, in effect, contending that the joinder of the 2nd – 4th defendants to the 1st defendant as joint defendants was wanting in legal merit and had no justification. There had been no basis of joint legal obligations resting upon the four defendants, and defendants No. 2 – 4 had no legal bond which could deliver remedies to them from the first defendant, within the framework of the decrees of the Magistrate’s Court at Githunguri. Whereas there was a basis whereupon the plaintiff could place legal burdens upon

the first defendant, the 2nd-to-4th defendants did not have it; and the burdens spawned by the first defendant's delays in doing its legal duty of paying-up, could not, in law, be loaded upon the 2nd-to-4th defendants. There were clear Court orders conferring benefits upon the 2nd-to-4th defendants; and they were entitled to these benefits *immediately*, as against the *plaintiff*.

Learned counsel, **Mr. Gachoka** rightly, with respect, noted that the fact that the plaintiff had lodged no appeal against the judgement and decrees of the learned Magistrate in Civil Cases No. 11/2002, 12/2002 and 13/2002 demonstrated the plaintiff's recognition of the validity of the Court's decisions; and only one obligation now remained – for the plaintiff to pay up; and the 2nd, 3rd and 4th defendants had a clear right to enforce. Counsel submitted, I think quite correctly, that the insurer (first defendant) in paying up in accordance with its contract with the plaintiff, was involved in an exercise entirely separate from the responsibility resting on the plaintiff to perform his own role as a judgement-debtor towards the judgement-creditors. **Mr. Gachoka** submitted, again quite correctly, with respect, that it was the right of the 2nd, 3rd and 4th defendants to enjoy the fruits of their judgement without delay.

My lines of analysis, I believe, are quite clear, and they point to a decision favouring the 2nd, 3rd and 4th defendants. I believe the plaintiff/applicant fully accepts the merits of this position. Indeed, it is on that footing that, on 1st November, 2004 I had made the following short-term order:

“A final decision in this matter is suspended for several days, to allow the plaintiff/applicant and the 1st respondent to reach a consent.”

It became necessary to make several mentions and then, unfortunately, the file went to the Registry in connection with further applications which, I understand, the applicant was making; and so I could not prepare and deliver my ruling before today.

I will make the following orders:

1. The plaintiff's prayer for a stay of execution of the Magistrate's Court decrees in Civil Cases No. 11/2002, 12/2002 and 13/2202 is refused.
2. The plaintiff's prayer that the warrants of attachment of his movable properties be lifted and his proclaimed properties restituted, is refused.
3. The plaintiff/applicant shall bear the costs of the 2nd, 3rd and 4th defendants/respondents in any event, in respect of this application.

Orders accordingly.

DATED and DELIVERED at Nairobi this 25th day of February, 2005.

J. B. OJWANG

JUDGE

Coram: Ojwang, J.

Court clerk: Mwangi

For the Plaintiff/Applicant: Mr. Wakahiu, instructed by M/s G.N. Wakahiu & Co. Advocates

For the first Defendant/Respondent: Ms. Amani, instructed by M/s. S.W. Ndegwa & Co. Advocates

For the 2nd, 3rd, 4th Defendants/Respondents: Mr. Gachoka, instructed by M/s. Gachoka & Co. Advocates