



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI  
COMMERCIAL DIVISION, MILIMANI  
CIVIL CASE NO. 377 OF 2004

CATHERINE REBA MAYUNZU .....PLAINTIFF

VERSUS

BLUE SHIELD INSURANCE COMPANY LIMITED .....DEFENDANT

RULING

The plaintiff herein has applied by chamber summons dated 20th August 2004 for the striking out of the Defendant's defence dated 26th July 2004 and for entry of judgment as sought in the plaint. When that application came up for hearing on 4th October 2004 learned counsel for the Defendant raised a preliminary objection to the application upon the ground that it is premature, vexatious and an abuse of the court process in that liability against the Defendant has not yet crystallised under section 10 of the Insurance (Motor Vehicle Third Party Risks) Act, Cap. 405 as stay of execution of decree was ordered in the judgment suit (which is Nakuru CMCC No. 640 'B' of 2001). The application and the suit, further argued the learned counsel, thus offends paragraph (b) of sub section (2) of section 10 aforesaid.

Learned counsel for the Plaintiff conceded that indeed stay of execution of decree was ordered in the judgment suit. But he argued that that stay is not the stay envisaged in section 10 (2) (b) of Cap. 405 as there is no appeal pending against the judgment and no stay pending such existing appeal has been given. An intended appeal, he further argued, is not an appeal for the purposes of the said statutory provision. Learned counsel for the Defendant in his turn conceded that indeed there is no appeal filed as yet.

I have considered the above arguments of the learned counsels. Section 10 (2) (b) of Cap. 405 is in the following words –

***“(2) No sum shall be payable by an insurer under the foregoing provisions of this section –***

***(a) .....; or***

***(b) in respect of any judgement, so long as execution thereon is stayed pending an appeal; or***

***(c) .....”***

The issue for determination in this preliminary objection appears to me to be whether the term “an appeal” as used in the above statutory provision also includes “an intended appeal”. Learned counsels have not quoted any authorities. It seems to me that it cannot have been the intention of Parliament to keep the judgment-creditor from his money merely because it is intended to appeal against the judgment, and a stay of execution is thereby obtained. In any case a stay of execution of decree cannot be properly obtained under rule 4 of Order 41 of the Civil Procedure Rules if there is no appeal already lodged unless there is a notice of appeal duly lodged in respect to an intended appeal to the Court of Appeal (sub rule (4) of rule 4 aforesaid). The judgment in this case having been delivered by a subordinate court any appeal therefrom would have to be lodged in the High Court. Therefore sub rule (4) aforesaid would not be applicable. I have seen the order of stay of execution issued by the subordinate court. It says –

***“... there be a stay of execution of the whole judgement pending hearing and determination of the intended appeal.”***

In my view the subordinate court had no jurisdiction under rule 4 of Order 41 to issue a stay of

execution pending hearing and determination of an intended appeal. The power to order stay under that rule is exercisable only where there is an appeal already lodged and pending. The aforesaid order of stay of the subordinate court therefore appears irregular.

But to come back to section 10 (2) (b) of Cap. 405, I hold that the term “an appeal” as used therein does not include “an intended appeal”. Stay of execution would have to be obtained where there is actually an appeal duly lodged and pending, not an intended appeal. Only then would the insurer find protection under the said provision.

I will in the circumstances reject the preliminary objection. It is hereby dismissed with costs. The application by chamber summons dated 20th August 2004 shall proceed to hearing. Orders accordingly.

**DATED AND SIGNED AT NAIROBI THIS 28TH DAY OF OCTOBER, 2004.**

**H. P. G. WAWERU**

**JUDGE**