



Pasha Enterprises Limited v Kenya Alliance Insurance Company Limited; Karama & Yussuf (Suing as the Legal Representatives of the Estate of Abdul Wahab Hassan -Deceased) & 3 others (Interested Parties) (Civil Case E002 of 2024) [2024] KEHC 5185 (KLR) (16 May 2024) (Ruling)

Neutral citation: [2024] KEHC 5185 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL CASE E002 OF 2024
EM MURIITHI, J
MAY 16, 2024**

BETWEEN

PASHA ENTERPRISES LIMITED PLAINTIFF

AND

KENYA ALLIANCE INSURANCE COMPANY LIMITED DEFENDANT

AND

YUSSUF HASSAN KARAMA & HALIMA YUSSUF (SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF ABDUL WAHAB HASSAN - DECEASED) INTERESTED PARTY

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MOHAMED ALI DAWA & JAMILA MOHAMED (SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF ADAN ALI - DECEASED) INTERESTED PARTY

BISHARO ALI HASSAN & RUKIA ABDULLAHI ALI (SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF ALI HASSAN BORU – DECEASED) INTERESTED PARTY

RULING

1. By an application under certificate of urgency dated 25/4/2024, pursuant to Order 45 Rule 1 and 40 Rule 1 of the [Civil Procedure Rules](#), Sections 80, 1A and 1B of the [Civil Procedure Act](#), Article 159 (2) (d) of the [Constitution](#) and all other enabling provisions of the law, the Interested Parties/Applicants seek that:

1. Spent



2. This Honourable Court be pleased to stay the injunction orders issued on 18th April, 2024 pending the hearing and determination of this application inter partes.
 3. This Honourable Court be pleased to review, vary and/or set aside the Ruling delivered on 18th April, 2024 and proceed to discharge the injunction orders issued on 18th April, 2024 as per the provisions of Order 40 Rule 7 of the Civil Procedure Rules (Amendment), 2020 on account of there being an apparent error on the face of the record.
 4. Costs of this application be provided for.
2. The application is based on grounds on the face of it and supported by an affidavit sworn by Kiautha Arithi, the Interested Parties' advocate. He avers that this matter emanates from the judgments/decrees issued on 24/10/2023 in Isiolo CMCC Nos. 46, 47, 48 & 49 of 2015 by the Interested Parties against the Plaintiff. Aggrieved with the aforesaid judgments/decrees, the Plaintiff preferred Meru Civil Appeal Nos. 202, 203 and 204 of 2023 and subsequently filed an application for stay of execution. Later, the Plaintiff instituted this declaratory suit contemporaneously with an application seeking inter alia injunction orders restraining the Interested Parties from levying any execution on the Plaintiff. This suit and the appeals were heard concurrently and rulings delivered on 18/4/2024. The court issued injunction orders restraining the Interested Parties from proceeding with execution. On the other hand, the court issued conditional stay of execution in Meru Civil Appeal Nos. 202, 203 and 204 of 2023. The injunctive orders are conflicting with the stay of execution orders since the Interested Parties cannot proceed with execution in the event the Plaintiff fails to adhere with the conditions for stay. The Interested Parties are apprehensive that the Plaintiff will not comply with the conditions of stay since it has already obtained injunctive orders against execution. No appeal has been preferred in respect of Isiolo CMCC No. 46 of 2015. Unless this court reviews its ruling of 18/4/2024 and sets aside the injunctive orders, the Interested Parties shall be prejudiced by the absurd orders and justice shall not be served. There is therefore an apparent error and/or mistake in the ruling of 18/4/2024 as this court did not consider that it had already granted conditional stay of execution. The error and/or mistake herein shall occasion miscarriage of justice if the ruling herein is not reviewed and the injunction orders discharged.
3. The Plaintiff opposed the application vide a replying affidavit sworn by Samwel Theuri, its director on 7/5/2024. He terms the application as an abuse of the court process as it raises no sufficient grounds to warrant review. Additionally, the application does not meet the threshold for review under Order 45 Rule 1 (b) of the Civil Procedure Rules as there is no error apparent on the face of the record. The court issued the ruling of 18/4/2024 on merit as the Plaintiff met the threshold for grant of injunctive orders under Order 40 Rule 1 of the Civil Procedure Rules. The rulings in Meru Civil Appeal Nos. 202, 203 and 204 of 2023 were equally delivered on merit as required under Order 42 Rule 6 (2) of the Civil Procedure Rules. The Plaintiff had been comprehensively insured by the Defendant, and therefore, it had a legitimate expectation under section 5 (b) and 10 of the Insurance (Motor Vehicle Third Party Risks) Act to have the Defendant fully settle the decretal sums in Isiolo CMCC No. 46, 47, 48 and 49 of 2015. He prays for determination of this suit on priority basis so as to protect the rights of the parties because allowing the application will greatly prejudice the Plaintiff. In the meantime, the Defendant is working on honouring the conditions for stay in Meru Civil Appeal Nos. 202, 203 and 204 of 2023, however its delay or refusal to honour the rulings should not prejudice the Plaintiff.

Submissions

4. The Applicants urge that they have satisfied the test for review of the ruling of 18/4/2024 under Order 45 of the Civil Procedure Rules, and cite Francis Njoroge v Stephen Maina Kamore (2018) eKLR and



Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya (2019) eKLR. They urge that the Plaintiff will use the injunctive orders granted herein not to comply with the conditions of stay issued in the Civil Appeals. They urge that the application has been brought timeously as the period within which the Plaintiff was required to comply with the conditions for stay has not yet lapsed.

5. The Plaintiff/Respondent urges that it is a consumer of insurance services by the Defendant and its constitutional right under Article 46 of the *Constitution* must be protected. It faults the Applicants for failing to identify the specific error on the face of the record as pleaded in the application, and cites *R v Advocates Disciplinary Tribunal Ex parte Apollo Mboya* (2019) eKLR and *Robert Tom Martins Kibisu v Republic* (2018) eKLR. It urges that there is no error apparent on the face of the record on the ruling as the applications by the Plaintiff were determined on merit, and prays for the dismissal of the application.
6. Counsel for the defendant did not oppose the application for injunction in this suit, or participate in the application for review thereof.

Determination

7. The Applicants urge that the issuance of the orders of 18/4/2024 in this case conflicts with the stay orders of 18/4/2024 issued in Civil Appeal Nos. 202, 203 and 204 of 2023.
8. The Plaintiff, Pasha Enterprises Limited and another moved this court *vide* an application dated 7/12/2023 seeking stay of execution of the decrees in Isiolo CMCC Nos. 47, 48 and 49 of 2015. Shortly thereafter on 25/1/2024 and while the application of 7/12/2023 was pending ruling, the Plaintiff filed an application for injunctive orders to bar the Applicants from executing the decrees in the aforementioned suits pending the determination of this declaratory suit. On 18/4/2024, the court issued conditional stay of execution and an injunction as prayed in the application of 25/1/2024.
9. It has come to the court's realization that it did not give due weight to the fact of the pendency of the appeals against the judgment of the trial court the subject of this declaratory suit. The appeals brought in the name of the insured plaintiff herein challenge the judgment which is here the subject of the suit by the very insured plaintiff against the insurer seeking for declaration based on breach of contract to pay under the insurance contract.
10. The injunctive orders in this suit would defeat any consequential execution that the Interested Parties/Applicants decree-holders are entitled to in the event of default in the conditional stay of execution in the appeals. The orders for stay in the appeals would then be rendered nugatory by the order in this suit. This is what counsel for the Interested Parties uncharitably but properly calls an absurd outcome.
11. The counsel for the applicant, indeed, points out that there was no appeal in respect of trial court suit Isiolo CMCC No. 46 of 2015, yet the injunction order would bar the realization of the fruits of judgment in the matter.
12. It is this court's respectful view that the principle of presumption against absurd result is a principle of general application in construction of all law, including statutes, orders of the court and directions on procedures as indeed of all judicial process because the Rule of Law is based on the doctrine of reasonableness. And a court should not act in vain; for what would be the purpose of granting an order which cannot be enforced while the whole idea of judicial remedy is based on the possibility of enforcement of the judicial determinations?
13. The situation before the court is resolved in this way: the plaintiff insured has a right under access to justice to file the declaration suit in enforcement of alleged breach of contract. The decree holder in the trial court suit is entitled to enforcement of the fruits of his judgment, subject only to a successful



appeal. The decree-holder is not beholden to the insured's claim in breach of contract in a declaratory suit. Consequently, the decree-holder is entitled to recover the award in his judgment, subject only to appeal but the insured defendant is entitled to recover by declaratory suit or otherwise the benefit of his insurance contract in which no privity of contract exists as against the successful suitor/decreed-holder.

14. Consequently, in giving effect to the parties' rights aforesaid, the conditional stay orders already in place in Civil Appeal Nos. E202, E203 and E204 of 2023, must be given specific effect; and the insured plaintiff in this suit must be facilitated to pursue his declaratory remedy against its defendant insurer, while avoiding any absurd result.

Orders

15. Accordingly, for the reasons set out above, this court will review and set aside the injunctive orders issued in this suit on 18/4/2024.
16. For the expeditious disposal of the dispute in this suit pursuant to section 1A and 1B of the [Civil Procedure Act](#), the Court directs that the suit be fixed for pre-trial directions on 20/6/2024.
17. For good order and to avert a similar predicament in future, the appeals Civil Appeal Nos. E202, E203 and E204 of 2023, shall be progressed to hearing simultaneously or prior to the suit herein, as is practical.
18. Costs in the Cause.
Order accordingly.

DATED AND DELIVERED THIS 16TH DAY OF MAY, 2024.

EDWARD M. MURIITHI

JUDGE

Appearances

Mr. Mutuma G. Advocate for the Plaintiff.

Mr. K. Arithi Advocate for the Interested Parties.

