Shimanyula v Invesco Insurance Co Ltd & another (Civil Appeal 37 of 2022) [2023] KEHC 18243 (KLR) (12 May 2023) (Judgment)

Neutral citation: [2023] KEHC 18243 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CIVIL APPEAL 37 OF 2022

PJO OTIENO, J

MAY 12, 2023

BETWEEN

KENNEDY SHIMANYULA ..... APPELLANT

AND

INVESCO INSURANCE CO. LTD ..... 1ST RESPONDENT

ESTHER AVISA BETI (SUING IN HER OWN CAPACITY AND AS THE ADMINISTRATOR OF THE ESTATE OF JACKSON KIGUDWA ADAMBA (DECEASED) ..... 2ND RESPONDENT

(Being an appeal from the Ruling of Hon. L. Kassan CM in Kakamega CMC Civil Suit No. 4 of 2022)

JUDGMENT

Background Of The Appeal

1. The 2nd respondent sued the appellant in Civil Suit No 179 of 2015 for general and special damages together with interest and costs of the suit following the death of her husband who was riding as a passenger in motor vehicle registration number KBK 831F registered in the name of the appellant. Judgment was subsequently delivered and the 2nd respondent was awarded an aggregate award of Kshs 2,097,704/- together with interests and costs of the suit.

2. The appellant pro did not contest the decree but chose to file a declaratory suit, Civil Suit No 4 of 2022, against the 1st respondent as the defendant and the 2nd respondent as the interested party. Before the suit could be determined, the appellant filed a notice of motion application dated January 14, 2022 seeking stay of execution of the decree issued in Civil Suit No 179 of 2015, hereinafter called the primary suit, pending the hearing and determination of the declaratory suit.

3. In a ruling delivered on June 8, 2022, the trial court granted an order of stay of further proceedings in Civil Suit No 179 of 2015 pending the determination of Civil Suit No 4 of 2022 on condition that the appellant secures a bank guarantee for the decretal sum then outstanding in the sum of Kshs 2,992,445.87/-.

4. Aggrieved with the ruling, the appellant lodged a memorandum of appeal dated June 27, 2022 challenging the decision on the grounds that: -

    a. THAT the learned trial magistrate erred in law and in fact in ordering the appellant to secure a bank guarantee for the decretal sum in Civil Suit No 179 of 2015 for:

        i. The ruling is against the spirit and tenor of section 10(1) of *cap 405* laws of Kenya

        ii. Failed to appreciate that the 1st defendant is in terms of section 10(1) of *cap 405* the statutory defendant in kakamega CMCC No 179/2015 and with the burden to settle 3rd party claims arising from the insurance policy in place at the time of the accident.

        iii. That the order is illegal as it is negating section 10(1) of *cap 405* Laws of Kenya

        iv. Failed to appreciate the provisions of section 4(1) and 10(1) of *cap 405*.

    b. THAT the learned trial magistrate erred in law and in fact in shifting the burden of settling the decree in CMCC No 179/2015 from the 1st respondent to the appellant hence rendering CMCC No 4 of 2022 nugatory.

    c. THAT the learned trial magistrate erred in law and in fact in failing to appreciate the orders in issue would in fact occasion great injustice to the appellant having complied with section 4(1) of *cap 405* Laws of Kenya and was against public policy.

    d. THAT the learned trial magistrate misapplied principles of grant of stay of execution and applied the issue of security which interfered with his unfettered discretion.

5. It was directed that the appeal be canvassed by way of written submissions which directions were duly complied with by the appellant and the 2nd respondent but not by the 1st respondent. It is equally noted that the 1st respondent has not been attending the proceedings herein.

Appellant's Submissions

6. The appellant submits that in terms of sections 4(1) and 10(1) of the *Insurance (Third Party Risks) Act*, cap 405 Laws of Kenya, it is the duty of the insurer to satisfy judgments against persons insured. He argues that by an insurer issuing a policy insurance, it means that the rights and obligations of the insured are automatically transferred to the insurer unless it is proved otherwise and cites the case if Ogada Odongo v Phoenix of EA Insurance Co Ltd Kisumu HCC 132 /2003 in that regard.

7. It is further argued that the order of the trial court directing him to provide a bank guarantee for the decretal sum negates the principles outlined in sections 4(1) and 10(1) of the Insurance *(Third Party Risks) Act*, cap 405 Laws of Kenya.

2nd Respondent's Submissions

8. It is the submission by the 2nd respondent that in the application seeking the stay, the appellant never stated that he was or would be incapable of satisfying the decree and that his only complaint was that the obligation to satisfy the decree lay with the insurance. She asserts that nothing prevents the appellant from settling the decretal sum and then suing the defendant for compensation or reimbursement. The

decision in *Njeru Patrick v Invesco Insurance Co Ltd* (2021) eKLR was cited for the proposition of the law that while the policy of insurance makes the insurer assume the decretal obligations of the insurer, it does not take away the obligation to the judgment debtor but complements that obligation especially where the insured may not be of financial capacity to meet the decree

Issues for Determination

9. The court has perused the grounds of appeal, the pleadings, proceedings and ruling of the lower court and the submissions by the parties and discerns the issue for determination to be whether in granting a conditional stay of execution of the decree in the primary suit the trial court fell into error.

10. The appellant contends that because his motor vehicle, registration number KBK 831F, was duly insured by the 1st respondent in terms of section 5 of the cap 405, the provisions of section 10(1) of the *Insurance (Motor Vehicles Third Party Risks) Act*, (henceforth "the act"), ought to suffice in absolving him from any decretal obligations which he contends rests with the 1st respondent.

11. Section 10(1) of the *Act* imposes the duty on every insurer to settle every decretal amount passed against its insured so long as a policy of insurance has been effected and judgment, in respect of any such liability as is required to be covered by a policy under paragraph (b) of Section 5 (being a liability covered by the terms of the policy), is obtained against any person insured by the policy, notwithstanding that the insurer may be entitled to avoid or cancel, or may have, in fact, avoided or cancelled, the policy, the insurer shall, subject to subsections 2 and 4 and the proviso thereto.

12. It is the obligation of an insurer imposed by section 10(1) that creates the cause of action against the insurer to be pursued by what has become known as a declaration suit. That is what the appellant sought to do by the suit before the trial court. It is the kind of a suit that is executory in nature. Its only purpose is to declare that on the basis of the spirit and tenure of the Act, the obligation of the insurer has crystalised. The declaration may be sought by either the insured, as the judgment debtor, or by the decree-holder himself. It is, however, before the declaration issues by the court remains a claim to be proved. While the matter pends, the decretal obligations remain squarely rested against the insured and it is thus not usual for an insured to apply for an order staying the decree in the primary suit pending the hearing and determination of the declaratory suit. That is the route the appellant took. In doing so, he invoked the oxygen principles and order 22 Rule 25 of the *Civil Procedure Rules*. That Rule stipulated: -

> " [Order 22, rule 25.]
>
> Stay of execution pending suit between decree-holder and judgment-debtor.
>
> 25. Where a suit is pending in any court against the holder of a decree of such court in the name of the person against whom the decree was passed, the court may, on such terms as to security or otherwise, as suit it thinks fit, stay execution of the decree until the pending suit has been decided." (Emphasis provided)

13. The law leaves no doubt that the grant of stay under the Rule is discretionary upon the court. When an appellate court may interfere with a discretionary order is now well established and trite. The court must be satisfied that the trial court misdirected himself in law; that he misapprehended the facts; that he took account of considerations of which he should not have taken account; that he failed to take account of considerations of which he should have taken account, or lastly, that his decision, albeit a discretionary one, is plainly wrong

14. In this appeal, the fault on the trial court goes that the court misapprehended the tenure, letter and spirit of the section 10 of the Act and generally cap 405 by the order that the appellant deposits a bank guarantee for the due performance of the decree in the event that the suit fails. Every time a court is called upon to stay a decree, it is being asked, and ought to appreciate that, the applicant seeks that a crystalised property right is being sought to be held back from the owner. The court thus has the delicate duty to balance the property rights vested in the decree holder as against an equally important right of the applicant to have access to justice unhindered or constrained. In a monetary decree, like that in the instant matter, the delicate balance is achieved when the decretal sum is put at the disposal of either party so that at the end of the litigation, the person entitled to the sum is not called upon to start the process of execution/recovery afresh.

15. In the context of this matter, should the suit succeed, the appellant will merely walk to his bank and take back the lien upon which the guarantee was given while if the suit fails, the 2nd respondent will equal walk to the bank and demand that the guarantee be fulfilled. The court on the other hand will not have to set aside resources to undertake the enforcement proceedings. It is to this court, therefore, rational and judicious that every time a court sets out to stay a monetary decree, it needs and ought to impose conditions that make available the sum to the party that turns out entitled. On that basis the court finds that there was never a misapprehension of the law nor principles applicable and that the trial court was apt in only taking into account what was relevant for consideration.

16. It is equally the finding by the court that in imposing the condition the court did, it did not determine, preemptively, that the appellant had to meet the decree. What the court did was to give a reprieve to the appellant to have his dispute resolved and in doing so delay the 2nd respondent from utilizing his proprietary rights in the decree. The court find that the exercise of discretion was accurate and not injudicious to invite interference on appeal.

17. However, noting the importance of the right to access justice, and be heard on the merits, it may be trifling to limit the security to only bank guarantee noting that the same is a facility to be granted by the bank at a cost. It is to this court just to widen the options and to give the appellant the liberty to avail any other security including a title deed, log book, insurers bond or cash. The ruling of the trial court is thus modified to the extent that any of the four forms of the security, as will be available to the appellant, be provided within 30 days from the date of this judgment. For avoidance of doubt, if none shall have been provided as aforesaid, the 2nd respondent shall be at liberty to execute her decree.

18. Accordingly, for the reasons set out above, this appeal is merited to the limited extent that options for security is availed to the appellant. Having succeeded to that limited extent, the court considers that each party shall bear own costs.

DATED, DELIVERED AND SIGNED AT KAKAMEGA THIS 12TH DAY OF MAY 2023.

PATRICK J. O. OTIENO

JUDGE

In the presence of:

No appearance for the Appellant

Aligula for Kegei for the 2nd Respondent

Court Assistant: Polycap