



Superstar Parcels Limited v Xplico Insurance Co Limited; Mutemi (Suing as the personal representative of the Estate of Emmanuel Mutinda Mutemi (Deceased) (Interested Party) (Civil Suit E007 of 2022) [2023] KEHC 23831 (KLR) (22 September 2023) (Ruling)

Neutral citation: [2023] KEHC 23831 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT E007 OF 2022
OA SEWE, J
SEPTEMBER 22, 2023**

BETWEEN

SUPERSTAR PARCELS LIMITED APPLICANT

AND

XPLICO INSURANCE CO LIMITED RESPONDENT

AND

**MWENDA MUTEMI (SUING AS THE PERSONAL REPRESENTATIVE
OF THE ESTATE OF EMMANUEL MUTINDA MUTEMI
(DECEASED) INTERESTED PARTY**

RULING

1. The Notice of Motion dated 17th February 2022 was filed by the plaintiff under Article 159 of the [Constitution](#) of Kenya, 2010, Sections 1A, 1B, 3A of the *Civil Procedure Act* and Order 22 Rule 22 of the [Civil Procedure Rules](#) for orders that:
 - (a) Spent
 - (b) Spent
 - (c) pending the hearing and determination of this suit, the Court be pleased to issue an order of stay of execution of the whole of the judgment and decree passed in Mombasa Chief Magistrate's Civil Case No. 2116 of 2017: Mwenda Mutemi (suing as personal representative of the estate of Emmanuel Mutinda Mutemi) v Superstar Parcels and Chaka Shehi.
 - (d) That costs of the application be borne by the defendant.



2. The application was supported by the affidavit of one of the directors of the plaintiff, Mr. Ayub Suleiman Omar, sworn on 17th February 2022, in which it was averred that, by a policy of insurance No. 080/000075/14/05/020 TPO, the defendant agreed to indemnify the plaintiff from liability in relation to the use of Motor Vehicle Registration No. KBK 051L Nissan Diesel in consideration of the premium then paid by the plaintiff. Mr. Omar further averred that on or about 4th November 2014, during the currency of the insurance policy, the said motor vehicle was involved in a road traffic accident with Motor Cycle Registration No. KMDJ 100L, thereby causing fatal injuries to the deceased, Emmanuel Mutinda Mutemi.
3. It was further deposed by Mr. Omar that the defendant was duly notified of the accident and the ensuing suit, filed by the interested party on behalf of the estate of the deceased; being Mombasa SRMCC No. 2116 of 2017 in which a decree was passed against the plaintiff for Kshs. 2,317,000/=. He added that, on the strength of the policy aforementioned, the plaintiff had legitimate expectation that the defendant would fully indemnify and/or absolve it from the interested party's claim for damages and costs; but that the defendant without any justifiable cause, has refused and/or neglected to pay the decretal sum. Hence, the plaintiff was constrained to file the instant declaratory suit upon a Notice of Proclamation being served on it by M/s Ndutumi Auctioneers dated 14th February 2022. A copy thereof was annexed to the plaintiff's Supporting Affidavit as Annexure ASO 6 along with other documents.
4. Thus, the plaintiff is apprehensive that if an order of stay of execution is not granted, it stands to suffer grave and irreversible prejudice too onerous to be remedied in any other way considering the threat of losing its only source of income. He added that if the interested party is allowed to proceed with execution of the decree as proposed, the plaintiff will have been punished for the defendant's breach of a valid policy of insurance and therefore it will not only be prejudiced but the suit herein will be rendered moot and a mere academic exercise. He therefore deposed that it is prudent and in the interest of justice that the orders sought by the plaintiff be granted.
5. While there appears to be no response to the application by the defendant, the interested party opposed the application *vide* his Replying Affidavit sworn on 1st March 2022. He pointed out that he is not a party to the insurance agreement between the plaintiff and the defendant and that, although judgment was delivered way back in 2017, not a single cent has been paid to the estate of the deceased. He therefore took issue with the fact that the estate has suffered and continues to suffer as the plaintiff and the defendant trade accusations. He therefore prayed for the dismissal of the application with costs.
6. The only procedural provision cited by the plaintiff for purposes of Order 51 Rule 10 of the [Civil Procedure Rules](#) is Order 22 Rule 22, which states as follows in Sub-rule (1):

“The court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time to enable the judgment-debtor to apply to the court by which the decree was passed, or to any court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay the execution, or for any other order relating to the decree or execution which might have been made by the court of first instance, or appellate court if execution has been issued thereby, or if application for execution has been made thereto.”
7. Clearly, the circumstances hereof do not lend themselves to the strictures of the aforesaid rule. This is a declaratory suit as between the plaintiff and its insurer and therefore has very little, if anything, to do with the execution of the lower court's decree. The plaintiff also invoked Article 159(2) of the [Constitution](#) as well as Sections 1A, 1B, 3A of the *Civil Procedure Act* but these are provisions that do



not, in themselves give the requisite procedural guidelines for such an application. Thus, in *Michael Mungai v Housing Finance Co. (K) Ltd & 5 Others* [2017] eKLR, the Supreme Court held that:

“Justice has to be sought within the justice system, which has rules and regulations that govern how one pursues his cause of action. It is not enough for a person to plead pursuit of justice and approach a court of law. Before one approaches a court in pursuit of justice, he or she must be cognizant that he has a justiciable cause of action. Even with such a cause of action, one has to follow the legal regime that informs him as to which court to approach, and in which manner: hence the rules of procedure in our statute books...Before a Court of law can invoke Article 159 of the *Constitution* and focus on substantive justice, the Court must at the first instance be properly moved and there must be before it a legitimate and cognizable cause of action. In the case of *Raila Odinga v I.E.B.C. & Others* [2013] eKLR this Court said that Article 159(2)(d) of the *Constitution* simply means that a court of law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the court...”

8. The foregoing notwithstanding, Order 40 Rule 1 of the *Civil Procedure Rules*, recognizes that:

“Where in any suit it is proved by affidavit or otherwise that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongly sold in execution of a decree ... the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.” (emphasis added)

9. In addition, Section 63(e) of the *Civil Procedure Act* gives the Court the powers to make “...such other interlocutory orders as may appear to the court to be just and convenient.” Thus, looking at the application from the prism of Section 63(e) of the *Civil Procedure Act* and Order 40 Rule 1 of the *Civil Procedure Rules*, the issue for determination is whether sufficient cause has been shown for the issuance of an order of stay execution as sought by the plaintiff.

10. For the general purposes of Order 40 Rule 1, it was held thus in *Giella v Cassman Brown & Co. Ltd* [1973] EA 358:

“The conditions for the grant of an interlocutory injunction are ...well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

11. As to what amounts to a prima facie case, the Court of Appeal, in *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* [2003] KLR 123 held that:

“A prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”



12. At this point, the Court need not examine the merits of the plaintiff's case too closely; but it must, nevertheless, be satisfied that there is a right as claimed by the plaintiff which has been infringed by the defendant. The Court of Appeal made this point in Nguruman Limited v Jan Bonde Nielsen & 2 Others, Civil Appeal No. 77 of 2012, when it held that:

“We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right, which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right, which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed.”

13. In the case at bar, the plaintiff has demonstrated that it took out a policy with the defendant in respect of the subject motor vehicle, pursuant to which the defendant was obliged to indemnify it against third party risks. A copy of the Certificate of Insurance as well as a receipt issued by the defendant were annexed to the plaintiff's Supporting Affidavit and marked Annexures ASO 1 and ASO 2. The policy was to expire on 14th May 2015 and was therefore in force when the accident in occurred. Accordingly, the plaintiff has demonstrated a *prima facie* case worth calling upon the defendant to respond to. It is instructive that Section 10(1) of the Insurance (Motor Vehicles Third Party Risks) Act stipulates that:

“If, after a policy of insurance has been effected, 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, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.”

14. There being no response to the instant application, by the defendant, I am satisfied that the plaintiff has a genuine cause for complaint. Thus, the plaintiff has demonstrated, on a *prima facie* basis, that “...there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

15. In addition to the foregoing, the plaintiff has demonstrated that an attachment was proclaimed over its property and that, were it not for the interim orders given herein on 18th February 2022, the same would have been seized and sold in execution of the lower court's decree. I am therefore satisfied that the plaintiff has shown that it stands to suffer irreparably should the attached property be sold in execution. I accordingly agree with the position taken by Hon. Omondi, J. (as she then was) in Apollo Ogunda v Africa Merchant Assurance Co. Ltd & 4 Others (*supra*) that:

“The tragedy and prejudice is that, were this suit against the Respondents to succeed, and were this Court to find that the Respondent has no basis for repudiating the contract, then I don't think the applicant would even have a way of recovering the property which will already have been sold to satisfy the judgment on CMCC No. 666 of 2011.”



16. Thus upon balancing the interests of the plaintiff, the defendant and the interested party, I am convinced that no inconvenience or prejudice will be visited on either the defendant or the interested party for which costs and interest would not be adequate recompense. On the other hand, the plaintiff risks suffering immense prejudice should the attached property be sold in execution in respect of a peril for which it took out an insurance cover with the defendant. It is also manifest that the application was brought without undue delay, granted that it was filed on 18th February 2022, in response to the proclamation of attachment on 14th February 2022.
17. In the light of the foregoing, I am satisfied that the plaintiff's application dated 17th February 2022 is meritorious. The same is hereby allowed and orders granted as hereunder:
- (a) That pending the hearing and determination of this suit, an order of stay of execution of the whole of the judgment and decree passed in Mombasa Chief Magistrate's Civil Case No. 2116 of 2017: Mwenda Mutemi (suing as personal representative of the estate of Emmanuel Mutinda Mutemi) v Superstar Parcels and Chaka Shehi be and is hereby granted.
- (b) That costs of the application be borne by the defendant.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 22ND DAY OF
SEPTEMBER 2023**

OLGA SEWE

JUDGE

