



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO 132 OF 2020

CIC GENERAL INSURANCE CO. LTD.....APPELLANT /APPLICANT

VERSUS

VERONICA GATHONI NDUNGU & ANOTHER.....RESPONDENT

RULING

1. In its **Notice of Motion** dated **16th November 2021** the applicants pray for orders that;

a) In association of the orders issued in NAKURU HCA NO 26 of 2019 as stated in ruling issued herein on the 4th November 2021, this honourable court does confirm stay of execution of the judgement /decree issued in the declaratory suit, NAKURU CMCC NO. 107 OF 2019 pending hearing and determination of both appeals.

b) Costs be provided for.

2. The application is premised on the grounds on the face of it and the sworn affidavit of Erastus Mbaka, its senior legal officer sworn on the same date.

3. The issues averred in the affidavit are not new to this court. The parties were involved in a primary suit to wit NAKURU CMCC NO 1008 OF 2016 in which judgement was given in favour of the respondents. The said respondents filed a declaratory suit namely NAKURU CMCC NO 107 OF 2019 to compel the respondents to settle the decree in the primary suit.

4. Two appeal arose therefrom namely NAKURU CIVIL APPEAL NO. 26 OF 2019 which is being handle by my sister Hon. Justice Ngetich and this matter before this court.

5. Justice Ngetich on the 22nd July 2021 gave a conditional stay which included depositing of the decretal sum within 30 days in a joint account of both advocates on record.

6. This court on 4th November 2021 reviewed its orders dated 24th June 2021 in respect to the decree in NAKURU CMCC NO 107 OF 2019 so as to align it with those of Hon Justice Ngetich. I went on to implore the parties that owing to the fact that the issues in the two appeals are generally similar including the parties, there was need to have the same handled by one court.

7. From the current application, the applicant complain is that the respondents have desired to execute against it despite the stay orders on record. That the main reason cited by the applicant is that no specific orders were issued stay execution in NAKURU CMCC NO 107 OF 2019. This according to the applicant runs contrary to the orders already on record.

8. The respondents have filed grounds of opposition dated 18th November 2021 and the replying affidavit by Boniface Momanyi Nyachae counsel for the respondent sworn on the same date. The substantive argument by the respondents is that the application offends the provisions of sections 6 and 7 of the Civil Procedure Act, that is, the same is *resjudicata*.

9. The respondents aver that it is simply seeking a review of the orders issued on 24th June 2021 and 4th November 2021. He went on to state that since the applicant did not seek leave to file its appeal the same ought to be struck out.

Analysis and determination

10. The court as stated above is well seized of this matter. There is no doubt that there are two sets of appeals herein, namely this one and Appeal no .26 of 2019.

11. This court already gave its directions stating that the proper cause is for the two appeals to be consolidated if necessary or at least be heard by one court. In giving the above directions on 4th November 2021 i aligned myself with Justice Ngetichs ruling of 22nd July 2021 in which it had given conditional stay of execution.

13. For the respondents to attempt to execute against the applicant, this court having aligned itself with the orders of 22nd July 2021 in Appeal no. 26 of 2019 would be legally wrong. The issue of NAKURU CMCC NO. 1008 OF 2016 AND 109 OF 2019, that is the primary suit and the declaratory suit in my view are mutually the same at the end of the day. This is for the simple reason that the decretal amount is still the same as awarded by the trial court. The declaratory suit is simply an enforcement process that is compelling the applicant to settle its obligation towards the insured.

14. This court would only find the respondent eligible to execute if the applicant has not complied with the orders of 22nd July 2021 in which this court relied on when reviewing its earlier decisions. For now, i do not find any reason to issue another stay of execution as the same has already been dealt with as stated above.

15. The issue of whether the applicant sought the leave of the court before filing the appeal or not is not for determination now but another forum. This court cannot strike out the appeal as what is before this court is simply asking the court to grant stay of execution.

16. In the premises, this court does not find any merit in the application as there are already stay orders on record. The orders cover both the primary and the declaratory suits. In short the application as submitted by the respondents is *resjudicata*. The only issue is to ensure compliance with the orders of 22nd July 2021 issued in NAKURU HCA NO 26 OF 2019. If this has been done then the parties should move ahead and comply with prayers 4 thereof, namely setting this matter for hearing.

17. Each party shall bear its own costs.

DATED SIGNED AND DELIVERED AT NAKURU VIA VIDEO LINK THIS 10TH DAY OF FEBRUARY 2022.

H K CHEMITEI.

JUDGE