



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL SUIT NO. 31 OF 2020

ISAACK WAKOLI.....PLAINTIFF

VERSUS

XPLICO INSURANCE COMPANY.....DEFENDANT

RULING:

1. The applicant filed this application under a notice of motion dated 9th September, 2020 seeking for orders that:-

i. A temporary stay of execution do issue exparte in the interim and/or further execution against the judgment/decree in Eldoret Cmcc No. 1117 of 2018 and all consequential orders and/or proceedings arising therefrom pending the hearing and determination of this application interparties.

ii. In the interim the motor vehicle registration number KBU 316E TOYOTA WISH be released to the applicant on a running attachment basis pending the hearing and determination of this application interparties.

iii. The warrants of attachment of moveable property issued to IGARE AUCTIONEERS in execution of a decree for money be set aside pending the hearing and determination of the declaratory suit.

iv. A temporary stay of execution and/or further execution against the judgment/decree in Eldoret Cmcc No. 1117 of 2018 and all consequential orders and/or proceedings arising therefrom do issue pending the hearing and determination of the declaratory suit.

2. The application is based on the grounds that the decree holder in Eldoret Cmcc No. 1117 of 2018 has obtained warrants of attachment, proclaimed and attached the applicant's motor vehicle registration number KBU 316 TOYOTA WISH to the detriment of the applicant in satisfaction of a decree.

3. The applicant is the judgment debtor and the owner of motor vehicle registration number KBU 316 TOYOTA WISH which had a valid insurance policy with the defendant herein with policy number ELD/070/016048/2018/01 TPO.

4. The decree holder in Eldoret Cmcc No. 1117 of 2018 has commenced execution proceedings in satisfaction of the said decree and has attached the applicant's motor vehicle registration number KBU 316 TOYOTA WISH which was to be sold by public auction on 10/9/2020.

5. Further, that the applicant is liable to be indemnified by the respondent under Section 10 of the Insurance (Motor Vehicles Third Party Risks) Act Cap 405 Laws of Kenya by dint of having a valid insurance policy with the respondent herein.

6. Lastly, that the applicant has instituted a declaratory suit against the respondent to compel it liquidate the decretal amount of Kshs. 501,099 plus any incidental costs that might have arisen.

7. The application is not opposed. It was agreed that the application be canvassed by way of written submissions.

8. The applicant submitted that the power of the court to grant or refuse an application for stay of execution is discretionary in nature.

9. That the court will consider special circumstances of the case and its unique requirements and whether justice will be dispensed to all the parties.

10. That in the instant suit, execution process has commenced against the applicant who has clearly demonstrated that the defendant who

were his insurers ought to indemnify him against liability that might arise out of the insurance policy.

11. The interested party submitted that it is not in dispute that the motor vehicle registration number KBU 316E Toyota wish belongs to the plaintiff herein and that the same was involved in an accident resulting in a suit filed via ELDORET CMCC NO. 1117 OF 2018.

12. That the application is premature and untenable in law because a declaratory suit is only ripe for filing for indemnification upon the insured satisfying the decretal amount.

13. Secondly, that the applicant has moved the court under the wrong provisions of the Civil Procedure Rules and therefore is not entitled to the reliefs sought. The interested party relied on the case of ***Kivanga Estates Limited vs. National Bank of Kenya Limited(2017)eKLR.***

14. The respondent did not file their written submission. The plaintiff's claim against the defendant in the main suit is for declarations that the defendant is bound by the insurance contract entered into with the plaintiff to settle any claim arising from an accident involving the third party herein, which contract is governed by Cap 405, Insurance Motor Vehicle 3rd Parties Risk Act.

15. It is not denied that the plaintiff insured his motor vehicle subject of these proceedings with the defendant and a decree in favor of the interested party herein was passed against the plaintiff.

16. Under section 10(1) of the Insurance Motor Vehicle 3rd Parties Risks Act Cap 405, where the owner of motor vehicle has taken out a policy of insurance which purports to indemnify him and other authorized persons in respect of liability to third parties intended to be protected under Section 5(b) of the Act for injuries or death to them in the use of the Motor Vehicle on the road; and

a) a judgment in respect of liability as is required to be covered is obtained against such owner of motor vehicle (the insured);

b) Then, notwithstanding that the insurer may in accordance with the terms of the insurance contract be entitled to avoid or may even have avoided the policy or liability (under Section 8), or would have restricted or limited the liability as per the terms of the policy (under section 16);

c) Nevertheless, the insurer is under mandatory statutory liability first to pay the full judgment sum to the persons entitled to the benefits of the judgment (the injured or estate of the deceased); and

d) Thereafter, the insurer may recover the due sum so paid to the third party under a clause in the terms of the insurance contract, if any under the Act (as per the proviso to Section 8) or a statutory obligation or liability created against the insured under the Act (as per provision to Section 10).

17. The purpose of the above provisions and Cap 405 is to ensure that a third party injured by an insured motor vehicle gets compensated for his suffering, loss or inconvenience if either the owner or driver of the accident motor vehicle happened to be of no means to settle the claims. **Sir Clement De Lestang, J.A. in *New Great Insurance Co. of India Ltd – Vs - Lilian Everlyne Cross & Another (1966) EA, 90 at page 104* observed that:**

“Generally speaking the Act seeks to achieve that object (of making provision against third party risks arising out of the use of motor vehicle on the roads) not by placing the whole burden of compensating third parties injured in accidents on the insurers but by combination of two means namely:

1. By making it obligatory, on pain of punishment, for any person who uses or causes or permits any other person to use a motor vehicle on the road, to have in relation to the user of the vehicle a policy of insurance which satisfies the requirements of the Act, and

2. restricting the right of insurers to avoid liability to third parties.”

18. Thus, both the owner of a motor vehicle who authorizes its use on the road and its insurer are mandated to respect each other's calling under the law, to avoid a situation where the legal provision may not serve its intended purpose. ***Lord Denning in *Escoigne Properties Ltd – Vs - I.R. Commissioners (15) [1958] A.C at 565* stated that,***

“A statute is not named in a vacuum, but in a framework of circumstances, so as to give a remedy for a known state of affairs. To arrive at its true meaning, you should know the circumstances with reference to which the words were used, and what the object was, appearing from those circumstances, which parliament had in view.”

19. The Court should therefore ensure that the intention and purpose of the legislative, where the words of the Act are not so expressly clear, is allowed by:- “suppressing the mischief intended to be addressed and advance the remedy, and to suppress subtle invention and evasions for continuance of the mischief, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico.*” Per ***Heydoni case (1584) 3 Co. Rep 70 [1957] All ER 2.91***

20. It is not in dispute that the applicant had insured the subject motor vehicle with the respondent. It is also not in dispute that at the time of the accident the insurance policy was still valid. The application is therefore merited and is allowed as prayed.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 3rd day of March, 2021.

In the absence of:-

Mr. Kagunza for the Respondent

Mr. Oduor for the Applicant

Gladys - Court Assistant