REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL CASE NO. E002 OF 2021

SILVIA KADIMA...PLAINTIFF/APPLICANT

VERSUS

KENYA ORIENT INSURANCE LIMITED..DEFENDANT/RESPONDENT

AND

DAVID KIPCHIRCHIR CHUMBA..1ST INTERESTED PARTY

IGARE AUCTIONEERS...2ND INTERESTED PARTY

RULING

[1] The Notice of Motion dated **21 January 2021** was filed herein by the plaintiff, **Silvia Kadima,** pursuant to, **Sections 3, 3A** and **63(e)** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya** and **Order 40 Rules 1(a), 2(1) and Order 22 Rule 51** of the **Civil Procedure Rules, 2010**. The Plaintiff's prayers in the said application are spent except prayers (e) and (f) thereof, by which she seeks the following orders:

> **[e]** That there be stay of execution of the decree issued in **Eldoret CMCC No. 136 of 2018** and all consequential orders pending the hearing and determination of this declaratory suit;
>
> **[f]** That the defendant/respondent be condemned to pay the costs of the application.

[2] The application is predicated on the grounds that the plaintiff is the registered owner of **Motor Vehicle Registration No. KCN 652S**; and that the 1st interested party has instructed the 2nd interested party to issue a Proclamation of Attachment on the basis of which an attachment has already been levied over the said motor vehicle. It was further the contention of the plaintiff that she is liable to be indemnified by the defendant pursuant to **Section 10** of the **Insurance (Motor Vehicles Third Party Risks) Act, Chapter 405** of the **Laws of Kenya**; and therefore that she stands to suffer irreparable loss and damage unless the orders sought are granted.

[3] The application is supported by the plaintiff's own affidavit, sworn on **21 January 2021** to which she annexed a copy of the Registration Certificate for **Motor Vehicle Registration No. KCN 652S**, **Subaru Forester**, as well as a copy of the Proclamation of Attachment of Movable Property, dated **26 November 2020**. She asserted that she had taken out a valid comprehensive insurance cover for the subject motor vehicle; and that the accident that gave rise to the lower court suit occurred during the validity of the said policy. It was further the contention of the plaintiff that the defendant has already indicated its readiness to satisfy the claim.

[4] The 1st interested party responded to the application vide his Replying Affidavit sworn on **29 January 2021**. He confirmed that he sued the plaintiff in **Eldoret CMCC No. 136 of 2018** for general and special damages in respect of injuries that he sustained in a road traffic accident involving **Motor Vehicle Registration No. KCD 922Q**; that, at the material time, the plaintiff was the legal and beneficial owner of the said motor vehicle; and that a statutory notice was duly served on her insurers as by law required. She exhibited a copy of the statutory notice as **Annexure DC2** to the Replying Affidavit.

[5] The 1st interested affirmed that the suit was defended; and that it proceeded to full hearing, culminating in a judgment dated **12 June 2020**; which judgment was in his favour. He added that, as the defendant did not honour the decree, his Advocates instructed **M/s Igare Auctioneers**, the 2nd interested party, to proceed with execution by way of attachment and sale of the plaintiff's movable property. He therefore confirmed that a Proclamation dated **26 November 2020** was indeed issued by the 2nd interested party as indicated by the plaintiff.

He complained that he is being denied the enjoyment of the fruits of his judgment for no justifiable cause; and that he has nothing to do with the dispute between the plaintiff and the defendant. It was further the assertion of the 1st interested party that the plaintiff was indolent and is to blame for not making a follow-up with the defendant to ensure prompt settlement of the claim; and that, as matters stand, the application has been overtaken by events.

[6] The application was canvassed by way of written submissions; and on the plaintiff's part, written submissions dated **5 March 2021** were filed on her behalf by **M/s Njiru Kibaru & Company Advocates**. Counsel, **Ms. Kibaru**, reiterated the plaintiff's stance that having fully paid the premiums due on account of the subject motor vehicle, she is entitled to indemnity by the defendant vide **Section 10(2)** of the **Insurance (Motor Vehicles Third Party Risks) Act.** She pointed out that the defendant took it upon itself to engage the firm of Advocates that defended the suit before the lower court; and that having failed to appeal or file a declaratory suit in respect of the ensuing judgment, it is bound to settle the decree. Accordingly, counsel submitted that good cause has been shown for stay and prayed that the instant application be allowed and the orders sought granted pending the hearing and determination of this declaratory suit between the plaintiff and her insurers.

[7] On behalf of the 1st interested party, **Mr. Mwinamo** filed his written submissions herein on **11 February 2021.** His stance was that, the plaintiff's insurers having failed to satisfy the decree, it was well within the 1st interested party's rights to apply for execution as he did. He added that the 1st interested party should not be denied the fruits of his judgment on account of a dispute between the plaintiff and her insurers. He concluded his submissions by stating that, as matters stand, the only option available to the plaintiff to secure the release of her attached motor vehicle is to pay the decretal sum.

[8] **Ms. Wesonga** for the defendant intimated that she is not opposed to the plaintiff's application; and therefore she neither filed a response thereto nor put in written submissions. I also note that the defendant has already filed a Defence to the suit denying liability herein.

[9] Having given careful consideration to the application, the parties' respective affidavits as well as the written submissions filed herein, there is no dispute that the plaintiff is the judgment debtor in **Eldoret CMCC No. 136 of 2018**; a matter in which the 1st interested party had sued the plaintiff for compensation in damages for injuries suffered in a road traffic accident involving the plaintiffs motor vehicle. The plaintiff has filed this suit against her insurer, **Kenya Orient Insurance Co. Ltd,** pursuant to **Section 10** of the **Insurance (Motor Vehicles Third Party Risks) Act,** seeking a declaration that the defendant is legally bound to satisfy the decree to the extent apportioned her by the trial court along with interest and costs of the lower court suit. She also prayed for damages for breach of contract as well as costs of the instant suit.

[10] It is further not in dispute that the 1st interested party has levied attachment on the plaintiff's motor vehicle in satisfaction of the decree; which attachment was effected through the 2nd interested party. A copy of the Proclamation was annexed to the application in proof thereof. Thus, the only issue that emerges for consideration is the question whether, in the circumstances, the plaintiff is entitled to an order of stay of execution of the decree issued in **Eldoret CMCC No. 136 of 2018** and all consequential orders pending the hearing and determination of this declaratory suit.

[11] Whereas the application is expressed to have been brought under **Order 22 Rule 22** of the **Civil Procedure Rules**, in my considered view that provision is irrelevant. It caters for stay of execution in situations where a decree has been sent to another court for purposes of execution; which is not so herein. It provides in **Sub-rule (1)** that:

> **"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."**

[12] In this matter, no decree has been sent to this Court for purposes of execution. Moreover, this is not an appeal from the judgment and decree of the Senior Resident Magistrate in **Eldoret CMCC No. 136 of 2018**. It is plain therefore that **Order 22 Rule 22** is inapplicable to the facts hereof. One of the other provisions cited by the applicant is **Order 40 Rule 1** of the **Civil Procedure Rules,** which stipulates 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)**

[13] In this suit, the dispute is not, strictly speaking, over the attached motor vehicle; but revolves around the question whether the defendant is liable to indemnify the plaintiff in respect of the peril that yielded the lower court decree. However, since the attached motor vehicle is alleged to be the insured motor vehicle, I would agree that, in a sense, the subject matter of the suit is indeed in danger of being sold in execution of the lower court decree before this dispute is heard and determined. Accordingly, **Order 40 Rule 1** of the Civil Procedure Rules is applicable to this matter. Moreover, the plaintiff also invoked the Court's jurisdiction under **Section 63(e)** of the **Civil Procedure Act** which gives the Court the powers to make **"…such other interlocutory orders as may appear to the court to be just and convenient."** Hence, 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.

[14] Needless to say that it is in the discretion of the Court to grant stay of sale for purposes of **Order 40 Rule 1** of the **Civil Procedure Rules**; but as is always the case, such discretion must be exercised judiciously and on the basis of established principles. Thus, in **Giella vs. Cassman Brown & Co. Ltd** (supra), it was held that:

"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."

[15] As to what amounts to a *prima facie* case, the Court of Appeal, in Mrao Ltd vs. 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."

[16] At this point, the Court need not examine the merits of the plaintiff's case too closely; but it must, nevertheless, be apparent that there is a right which has been infringed by the defendant. The Court of Appeal made this point in Nguruman Limited vs. 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."

[17] From the standpoint of Section 10(1) of the Insurance (Motor Vehicles Third Party Risks) Act, it would appear that the plaintiff has a genuine cause for complaint, for that provision gives her a definite cause of action against her insurers. Nevertheless, the plaintiff needed to go further and exhibit a copy of the insurance policy to demonstrate that her claim is not frolicsome. This is because the defendant has plainly denied that there was any such agreement of indemnity between it and the plaintiff. I have looked at the documents annexed to the instant application and noted that there is no such policy or cover note, yet at paragraph 3 of the Supporting Affidavit, the plaintiff averred that a copy of a valid comprehensive insurance cover for Motor Vehicle Registration No. KCD 922Q was annexed to the said affidavit as Annexure SD2. As a matter of fact, neither of the two documents annexed to the Supporting Affidavit are appropriately marked for identification as required by Rule 9 of the Oaths and Statutory Declarations 15 of the Laws of Kenya.

[18] I have gone further and looked at the plaintiff's Bundle of Documents filed with the Plaint for purposes of Order 3 Rule 2(d) of the Civil Procedure Rules. Again, no such agreement has been filed, notwithstanding that in the plaintiff's List of Documents dated 21 January 2021, a copy of the insurance certificate is listed as item No. 2.

[19] Secondly, and perhaps more importantly, the plaintiff utterly failed to show some nexus between the attached motor vehicle and her pending suit against the defendant. This is significant because in the instant application she has made reference to two different motor vehicles. For instance, in the Certificate of Urgency and paragraph (a) of the Notice of Motion dated 21 January 2021, the subject motor vehicle is described as Registration No. KCN 652S; yet in the Supporting Affidavit the attached motor vehicle is shown, at paragraphs 2 and 3 to be Motor Vehicle Registration No. KCD 922Q. But even assuming that the correct number is the latter one, going by the Proclamation of Attachment dated 26 November 2020, it is baffling that the plaintiff chose to annex her log book for Motor Registration No. KCN 625S instead of the log book for the attached motor vehicle. Again, for purposes of the Plaint, the plaintiff filed copies of Storage Inventory and correspondence relative to Motor Vehicle Registration No. KCN 652S as opposed to Motor Vehicle Registration No. KCD 922Q.

[20] Thus, on a *prima facie* basis, there appears to be no nexus between the attached motor vehicle and the defendant. That being the case, there would be no basis for giving thought to the question whether the plaintiff stands to suffer irreparable harm or even whether the balance of convenience is in her favour. This is because the three-point test laid down in the Giella Case (supra) is applied in a sequential manner. This was the position taken by the Court of Appeal in Nguruman Limited vs. Jan Bonde Nielsen & 2 Others (supra) and here is what the Court of Appeal had to say:

"In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

(a) establish his case only at a prima facie level,

(b) demonstrate irreparable injury if a temporary injunction is not granted, and

(c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd v. Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration..." *(emphasis added)*

[21] In the light of the foregoing, I am far from convinced that a good case for has been made out by the plaintiff for grant of stay of sale under either under **Section 63(e)** of the **Civil Procedure Act** or under **Order 40 Rule 1** of the **Civil Procedure Rules**. Accordingly, her application dated **21 January 2021** is hereby dismissed with an order that the costs thereof be in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 4TH DAY OF MAY 2021

OLGA SEWE

JUDGE