



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 89 OF 2018

MOSES KARANJA.....PLAINTIFF

-VERSUS-

XPLICO INSURANCE COMPANY LIMITED.....DEFENDANT

1. BISMARCK BARUA CHAI

2. SINAMOYO OSCAR DIDA.....INTERESTED PARTIES

RULING

1. This ruling is in respect of the Interested Parties' notice of motion application dated 12th November, 2019 brought under the provisions of **Sections 1A, 3, 3A and 63 (e)** of the **Civil Procedure Act Cap 21, Order 1 Rule 10(2)** of the **Civil Procedure Rules** and all other enabling provisions of the law. It seeks for orders that:-

a) This honourable court be pleased to enjoin the Interested Parties in this suit

b) This Honourable court be pleased to vary, set aside and/or vacate the ex-parte orders issued on 2nd November, 2018 staying execution of the Plaintiff's Judgment and decree in Kilifi SPMCC No.263 of 2015 Bismark Barua Chai & Another –versus- Moses Karanja.

c) That costs of this application be provided for.

2. The reasons given by the Interested Parties in the grounds on the face of the application are that they successfully obtained a Judgment against the Plaintiff herein in **Kilifi SPMCC No.263 of 2015**, which Judgment has never been appealed against hence remains valid. He also states that the Plaintiff herein failed to satisfy the decree issued in favour of the Interested Parties and consequently the Interested Parties applied for execution. Further that the Interested Parties are not privy to the policy of insurance between the Plaintiff in this case and his insurer having noted that a dispute between the two has ensued.

3. Be that as it may, it is the Interested Parties' case that since the inception of the suit herein, the Plaintiff has for a period of over one (1) year failed to fix it for hearing and the protracted delay is prejudicial to the Interested Parties. In addition, the Interested Parties submitted that the plaintiff obtained an irregular order of stay without serving them which means they were condemned unheard.

4. The affidavit of **Bismark Barua Chai** sworn in support of the application elucidates the grounds on the face of the application as summarized above.

5. The Plaintiff opposed the application through his own affidavit sworn on **31st December, 2019** and filed on **13th January, 2020**. His contentions are that the Interested Parties lack the requisite locus to seek for the orders sought and the suit herein causes no prejudice to them for the reason that it seeks to compel the insurer to settle all the third party claims against him. He concedes that he was served with summons and pleadings in the primary suits filed by third parties and he informed his insurer (the defendant herein) who duly appointed advocates on his behalf. That those advocates filed defences in the primary suits but at some point ceased from acting without notifying him. Consequently, the third parties obtained ex-parte Judgments which they now seek to execute. The Plaintiff averred that he filed the instant suit after the defendant declined instructions and since he had valid insurance policy cover at the time of the accident he had a valid insurance policy cover, he believes that execution should not be meted against him and the stay orders granted herein should avail him the protection he is entitled to under Cap 405.

6. Pursuant to directions issued by this court on **8th December, 2020** the application was canvassed by way of written submissions with the

intended interested third parties filing their submissions on 2nd March, 2021 while the Plaintiff/Respondent filed his on 25th March, 2021.

Intended Interested Parties' submissions

7. After summarizing the history of their suit, the proposed Interested Parties singled out two points for determination, that is, *whether they should be enjoined as Defendants and whether the ex-parte orders for stay of execution should be varied and/or set aside.*

8. On the first issue, it is submitted that this court has wide discretion under **Order 1 Rule 10(2)** of the **Civil** to order the name of a person who seeks to be joined or whose presence is necessary to enable the court effectually and completely adjudicate upon and settle all question questions involved in the suit, to be added as a party at any stage of the proceedings. It is submitted that in this case, by dint of being the decree holders in the primary suit, **Kilifi SPMCC No.263 of 2015**, the proposed Interested Parties have a stake and/or interest in this suit since whatever order the court will make will in one way or the other affect them. Interestingly, they seek to be enjoined as the 2nd and 3rd Defendants respectively.

9. On whether the ex-parte orders for stay should be set aside, it is submitted that the orders were deliberately not served upon the Interested Parties and having issued in the first instance in their absence, they were condemned unheard. Further, that owing to the fact that they are not privy to the insurance policy, it is submitted that there is no reason they should be prevented from realizing the decretal sum. Lastly, the proposed Interested Parties feel that the delay exhibited in prosecuting this suit is a likely collusion between the Plaintiff and the Insurer to defeat the primary suits filed against them hence the stay orders cushioning them should be vacated. The court was however invited to consider various cases in which similar orders as herein were sought similar issues considered and granted, to wit, the cases of **Gateway Insurance Company Limited –vs- Gathonga Joseph [2017] eKLR**, **Madison Insurance Company Limited –vs- Andrew Kariuki & Another [2018] eKLR** and **Gemnia Insurance Company Limited –vs- Ismael Bwanamkuu Omar & 3 others (suing as the legal administrators of the estate of Diana Atieno Omodi and Ayub Mumba Malanga) [2018] eKLR.**

Plaintiff/Respondent's Submissions

10. Similarly, the Plaintiff/Respondent submitted on the two issues as the applicants, that is, on whether the Interested Parties should be enjoined to the suit and whether the orders issued on 2nd November, 2018 for stay of execution should be varied and/or set aside.

11. As regards the first issue, it is submitted that the Applicants have not met the legal threshold for being enjoined in the suit for the reason that they do not have interests in the insurance contract claim between the insurer and the insured, In any event, the Applicants have not shown how their involvement in the suit is necessary so as to effectually and completely adjudicate upon and settle all questions involved in the suit. In the view of the Respondent, allowing the application would be contrary to the provisions of **Section 10(1)** of the **Insurance (Motor Vehicles Third Party Risks) Act Cap 405**, which protects the insured from liability accruing from Judgment/decrees and places the obligation to the insurer. These submissions were supported by the cases of **Heritage Insurance Co. Ltd & another –vs- Gladys Kayalo Mmbo [2019] eKLR** and **Brek Sulum Hemed –vs- Constituency Development Fund Board and Kenya Rural Roads Authority.**

12. Secondly, it was submitted that lifting the orders of stay will render the declaratory suit nugatory, an academic exercise which in the long run will prejudice the Plaintiff/Respondent. The orders for stay of execution can only be lifted once the court makes a final determination on the matter. In any event, the conclusion of the present suit is advantageous to the Applicants in that it will save them the burden of filing a declaratory suit later. They will therefore benefit directly if the suit is concluded, hence and suffer no prejudice at all. That line of argument is supported by reliance on the cases of **Gichere Ingrid –vs- CIC General Insurance Ltd & another [2020] eKLR** and **Charles Makenzi Wambua –vs- Africa Merchant Assurance Co. Ltd & another [2014] eKLR.**

Analysis and Determination

13. I have given due consideration to the application dated 12th November, 2019 the grounds in support and in rebuttal of the application and the rival submissions as well as the cited authorities therein and I am of the view that the issues arising for determination are that;

a) Whether the Applicants should be joined as parties to this suit;

b) Whether the orders of stay of execution granted on 2nd November, 2018 affecting Kilifi S.P.M.C.C No.263 of 2015 should be reviewed and set aside.

a) Whether the Applicants should be joined as parties to the suit.

14. In deciding whether a party should be enjoined as a party to a suit, courts have often used the provisions of **Order 1 Rule 10(2)** of the **Civil Procedure Rules** which provides as follows:-

2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.

15. Would the joinder of the applicants to this suit enable the court effectually and completely adjudicate upon and settle all questions involved in the suit?

16. On this issue of whether the Applicants should be enjoined as parties to this suit, the Applicants submitted that since they are decree-holders in the primary suit being **Kilifi S.P.M.C.C No.263 of 2015**, they are adversely affected by the orders issued by this court yet they are not privy to the contract of insurance between the Plaintiff and the Defendant and the ultimate determination of the suit will in one way or the other affect them.

17. Further submission are they were never served with pleadings in this suit thus the orders for stay were granted ex-parte in contravention of right to a fair hearing. Therefore, unless they are joined as parties the suit will continue without their participation when they have a stake in the suit. Their prayer is for the court to have them joined as 2nd and 3rd Defendants respectively.

18. On the part of the Plaintiff/Respondent, he contends that the Applicants are not privy to the insurance contract between him and the insured. He submits that, they have not shown how their presence in the suit will assist the court to effectually and completely adjudicate as between the parties on matters before this Court.

19. In determining whether the applicants should be enjoined in this suit as Interested Parties, this court is guided by several decisions of the courts including the Supreme Court in the case of **Trusted Society of Human Rights Alliance VS. Mumo Matemu and 5 Others [2014] eKLR**, where it was held as follows regarding joinder of an Interested Party:-

“Consequently, an interested party is one who has a stake in the proceedings though he or she was not a party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made either way. “Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings and champion his or her cause.” [emphasis added.]

20. In the event of a dispute between an insurer and insured, I am of the view that such dispute also affects other parties who are not privy to the Insurance Contract. This conclusion is drawn from the provisions of **Section 10 of the Insurance (Motor vehicle 3rd Party Risk Act)** which provides as follows:-

“5. No sum shall be payable by an Insurer under the foregoing provisions of the Section if in an action commenced before, or within three months after, the commencement of the proceedings. In which the Judgment was given, he has obtained a declarant in that, apart from any provision contained in the policy he is entitled to avoid it on the ground that it was obtained by the non-disclosure of a material fact, or by a representation of fact which was false. In some material particulars, or, if he has avoided the policy on that ground, that he was entitled so to do apart from any provision contained in it:

“provided that an Insurer who has obtained such a declaration as aforesaid in an action shall not thereby become entitled to the benefit of this sub-section as respects any Judgment obtained in proceedings commenced before the commencement of that action unless before or within fourteen days after the commencement of that action he has given notice thereof to the person who is the plaintiff in the said proceedings specifying the non-disclosure or false representation on which he proposes to rely, and any person to whom notice of such action is so given shall be entitled, if he thinks fit, to be made a party thereto. [emphasis added]

21. The above provision of the law requires that a Plaintiff be served with a notice after the commencement of a declaratory suit and, upon being served the Plaintiffs in the primary suit may elect to seek leave to be made a party to the declaratory suit between the insurer and the insured. A similar finding was made in the case of **Gateway Insurance Company Limited v Moses Jaika Luvai [2008] eKLR**, where Ibrahim J (as he then was) in regard to **Section 10** hereof above, stated as follows:-

“the aforesaid provision is clear and speaks for itself. The Plaintiff in the suits which the insurer seeks to avoid liability under Section 10(1) by way of a declaratory suit must be notified of the institution of the declaration suit and after which the said plaintiffs are entitled to be made parties to the Insurer’s suit if they think fit.

The provision is mandatory and Court has no discretion on the matter. The discretion and election lies with the plaintiff who have sued the Insured for damages and losses arising from motor accidents. It is a right which none of the parties or the Court can take away.” [emphasis added].

22. The difference between the above cited case as well as most cases cited by the Respondent and the present case is that in the instant case, it is not the Insurer/Insurance Company that has sued seeking to avoid the policy but the insured claiming that the insurer has constructively avoided her obligation under the policy by failing to adequately defend the claims by third parties against himself (the insured). As such, the Plaintiff/Respondent seeks a declaration that the Defendant is bound under the policy, and obliged to honour claims by third parties like the Applicants herein, and to a further declaration that the Plaintiff is not entitled to settle any claim thereof.

23. In such circumstances, and in my humble view, there is no doubt that the ultimate decision this court make in the instant suit will affect the rights and interest of the applicants herein. Therefore, needless to say, the applicants have a stake and/or interest in this case having stated herein that the suit is majorly anchored on the Provisions of **Section 10 of the Insurance motor vehicle 3rd Party Risk) Act** which makes it mandatory for the Insurer to settle Judgments in respect of persons it has insured against claims by third parties. The Applicants are such contemplated third parties who are currently affected by the orders of stay of execution issued herein. In any event, it would not be in the interest of justice for the applicants to file a separate suit to ventilate their grievances against the plaintiff as this would amount to a multiplicity of suits.

24. However, although the Applicants have satisfactorily demonstrated that they have an identifiable stake or interest in the instant case, it is worthnoting that the court has discretion to define the parameters within which the applicants can participate in the case. Their prayer was for them to be enjoined as the 2nd and 3rd Defendants respectively. But in my view the Applicants can adequately canvass their interests as Interested Parties as opposed to being enjoined as defendants. I say so because looking at the prayers sought in the plaint dated 1st November, 2018, they applicants lack the *locus classicus* to oppose the grant of the declaratory orders sought.

25. Having said that much, I find merit in this prayer for joinder and I allow it with an order that the applicants shall be enjoined in this suit as Interested Parties.

b) Whether the orders for stay of execution issued on 2nd November, 2018 should be varied and/or set aside.

26. On this issue, the Applicants submitted that they were never served with the application seeking those orders and as such the orders which were issued ex-parte had condemned them unheard. Further, it was submitted that the indolence exhibited by the Plaintiff in the matter is prejudicial to them notwithstanding that they are not privy to the insurance contract and should not be prevented from proceeding with execution. The Respondent/Plaintiff on the other hand intimated that the entire suit and the orders to be made stand to benefit the applicants directly in that they will not have to file another declaratory suit. According to the Respondent/Plaintiff, lifting the stay orders would prejudice him and which is in contravention of the Provisions of **Section 10 of the Insurance motor vehicle 3rd Party Risk) Act** which shields him from claims by third parties and possible execution, and obliges the Defendant to honour such claims.

27. I have read through the application dated 1st November, 2018 in which the orders for stay of execution were granted and it reiterates the Plaintiff's assertion as captured herein. I wish to point out that although the application was brought under provision of **Order 42 Rule 6 of the Civil Procedure Rules**, stay of execution is governed under **Order 21 of the Civil Procedure Rules, 2010**. However, that provision does not specifically provide for stay of execution pending the hearing and determination of a declaratory suit.

28. In my view, whether or not to grant stay of execution pending the determination of a declaratory suit would be an exercise of this courts inherent jurisdiction. I note that applicants are persons covered under **Section 4(1) of the Insurance motor vehicle 3rd Party Risk) Act** and the liability of the Defendant in this suit is also preserved against the third parties so that they could as well sue the defendant herein by way of a declaratory suit to recover the respective sums in the decree issued in their favour.

29. The Defendant is bound under law to settle such decree and it is therefore my view that if this suit is heard and determined expeditiously, then the Interested Parties will not be prejudiced in anyway as the plaintiff will have carried their burden and saved them the time and resources of suing the Insurance Company. I am also alive to the fact that the claim by the Interested Parties is preserved as against the Plaintiff herein and the Insurance Company in the sense that if further delay is exhibited by the Plaintiff in prosecuting the suit herein, the Interested Parties will be at liberty to move the court to have the stay orders set aside.

30. For the reasons set above, I direct that the stay orders granted on 1st November, 2018 remain in force on condition that the Plaintiff expedites the hearing of the suit. The Plaintiff is directed to set down the suit for hearing within 30 days hereof since it is apparent after the stay orders were granted, he went to a slumber only to be awakened by the instant application.

31. The costs of the instant application shall be borne by the Plaintiff/Respondent.

It is hereby so ordered.

SIGNED, DATED and DELIVERED VIRTUALLY at MOMBASATHIS 2ND DAY OF JUNE , 2021.

D. O. CHEPKWONY

JUDGE

In the presence of:

M/S Takah counsel holding brief for Mr. Mutubya counsel for applicant

Mutubya counsel for Applicant

No appearance for Respondent

Court Assistant - Winnie