



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**CIVIL SUIT NUMBER 30 OF 2020**

**ROSE WAIRIMU.....PLAINTIFF**

**VERSES**

**XPLICO INSURANCE COMPANY LIMITED.....DEFENDANT**

**AND**

- JOYCE NJERI (Suing AS THE MOTHER AND NEXT FRIEND OF MARY NJERI).....1<sup>ST</sup> INTERESTED PARTY**
- JOYCE NJERI KIMANI(Suing as the next friend of SAMUEL KIMANI).....2<sup>ND</sup> INTERESTED PARTY**
- GLADYS WANJIRU KIMONDO(Suing as the mother and next friend of Margaret Muthoni).....3<sup>RD</sup> INTERESTED PARTY**
- JOYCE NJERI KIMANI (Suing as the mother and next friend of FAITH WANGARI) .....4<sup>TH</sup> INTERESTED PARTY**
- GLADYS WANJIRU KIMONDO .....5<sup>TH</sup> INTERESTED PARTY**
- GEOFFREY KABU KANYI.....6<sup>TH</sup> INTERESTED PARTY**
- CHARLES WERU.....7<sup>TH</sup> INTERESTED PARTY**
- DIVINA KERUBO.....8<sup>TH</sup> INTERESTED PARTY**
- JOSEPH KARIUKI MAINA.....9<sup>TH</sup> INTERESTED PARTY**
- JOSEPH KIMANI KARIUKI.....10<sup>TH</sup> INTERESTED PARTY**
- SARAH WANJIRI KAMAU.....11<sup>TH</sup> INTERESTED PARTY**

## RULING

1. The applicant vide a Notice of Motion dated 30<sup>th</sup> June 2020 brought under **Section 1A ,1B & 3A of the Civil Procedure Act and Order 51 Rule 1 of the Civil Procedure Rules** sought for the following orders;

(i) Spent.

(ii) Spent

(iii) Spent

(iv) **THAT pending the hearing and determination of this suit, there be a stay of execution in Nakuru CMCC Nos. 385, 386 & 389 all of 2019.**

(v) **THAT pending the hearing and determination of this suit, there be a stay of proceedings in Nakuru CMCC Nos. 384, 385, 386, 387, 388, 389, 39, 391, 391, 392, 393 and 394 all of 2019.**

(vi) **THAT the costs hereof be borne by the defendant.**

2. The application is premised on grounds that at all material times relevant to this suit, the plaintiff was the lawful owner of motor vehicle registration number KBC 842L Toyota Matatu and had insured the said vehicle with the defendant under policy number XPL/O20001692, That it was a term of the said policy/contract of insurance between the plaintiff and the defendant express and or implied that the defendant would indemnify the plaintiff in respect of any claim respecting death or bodily injury respecting fare-paying passengers being carried on the said vehicle, alighting therefrom, boarding thereon or any pedestrian or third party vehicle that would come into contact with the said vehicle leading to death, injury or any other form of damage to the said third parties. That it was also a term of the said policy/contract of insurance between the plaintiff and the defendant express and or implied that the defendant would settle all claims and or judgments respecting any injury, death or material damage of a third party arising from an accident respecting the said motor vehicle.

It was also a term of the said policy or contract of insurance between the plaintiff and the defendant express and or implied that the defendant would offer legal representation to the plaintiff in respect of any suit filed in any court representing any claim arising from the said motor vehicle.

3. That the plaintiff paid all premiums to the defendant as and when they fell due and paid all excess fees and all charges due to the defendant as and when they fell due.

4. On 24<sup>th</sup> January, 2019 during the pendency of the contract/policy of insurance between the plaintiff and the defendant, the aforesaid motor vehicle registration number KBC 842L was involved in a self-involving accident at Mbaruk at Echariria Centre within Nakuru County wherein several passengers were injured. As a result of the said accident, the 1<sup>st</sup> to 11<sup>th</sup> interested parties herein who were passengers in the aforesaid motor vehicle sustained several degrees of injuries as a result of which the said 1<sup>st</sup> to 11<sup>th</sup> interested parties herein respectively filed Nakuru CMCC Nos. 384, 385, 386, 387, 388, 389, 390, 391, 392, 393 and 394 all of 2019 against the plaintiff.

5. That the defendant herein registered the said claims under claim reference number 002465/PSV and appointed M/s Kamoing & Co. Advocates to defend the plaintiff in the said suits. However, the defendant did not appoint defence advocates on time and some ex-parte judgment were obtained wherein the defendants failed to pay thrown away costs despite promising to do so.

6. That out of the aforesaid suits filed against the plaintiff ex-parte judgments were obtained against the plaintiff in Nakuru CMCC Nos. 385, 386 and 389 all of 2019 on account of failure by the defendant to

offer legal representation on time.

7. In a Ruling dated 31<sup>st</sup> October, 2019 in the said matters the plaintiff was allowed to file defences on condition that Kshs. 15,000.00 per matter was paid as thrown away costs.

8. The said thrown away costs were not paid as expected as a result which final judgments were obtained against the plaintiff on 29<sup>th</sup> June, 2020 in the said matters.

9. That the plaintiff has now been threatened with execution in respect of the said matters as the defendant had no intention of settling the same though the same is its obligation. That the defendant was in breach of the terms of insurance between it and the plaintiff.

10. That the plaintiff was now at risk of being rendered completely bankrupt and destitute through attachments and executions unless the defendant met its obligation under the contract; that the plaintiff was also entitled to legal protection as it was impermissible for the defendant to literally rob the plaintiff by collecting premiums, excess fees and other charges then fail to meet its obligation of satisfying judgment against her thereby exposing the plaintiff to untold suffering including attachments that would completely ruin the plaintiff.

11. That the court has discretion to protect the insuring public from a rogue practice where insurance companies collect premiums, excess fees and other charges from the public then leave the insured to their devices to face auctioneers and be bankrupted as if the same is not their business.

12. The application is supported by the annexed affidavit of Rose Wairimu which was sworn on 30<sup>th</sup> June 2020. She reiterates the grounds on the face of the application and attached copies of certificates of insurance as **Exhibit 1**, copies of premium receipts as **Exhibit 2**, copy of the police abstract proving that the insured motor vehicle was involved in an accident on 24<sup>th</sup> January 2019 as **Exhibit 3**, copies of the pleadings ascertaining that the 1<sup>st</sup> to 11<sup>th</sup> interested parties herein were passengers in the insured motor vehicle as **Exhibit 4**, copies of correspondences and defence showing that the firm of M/s Kamoing was appointed to defend the defendant as **Exhibit 5 and 6** respectively and copies of ex-parte judgments as **Exhibits 7**.

13. The application is opposed by the defendant who through their legal officer Viola Odipo swore a Replying Affidavit on 26<sup>th</sup> October 2020 denying that the Defendant/ Respondent had ever issued any insurance policy cover to the Plaintiff/Applicant herein. She also claimed that the policy cover alleged to have been issued by the defendant respondent to the applicant was a scam.

14. That upon perusal of the insurance company's data system, the alleged policy number in favour of motor vehicle Registration number KBC 842L could not be traced. She also denied any knowledge on the part of the Defendant/ Respondent of the alleged accident involving Motor Vehicle Registration Number KBC 842L.

15. She deponed that Applicants had never paid any insurance premiums to the Respondent in respect to the motor vehicle Registration number KBC 842 L. She denied that the respondent had at any time appointed advocates to represent the Plaintiff herein in Nakuru CMCC No. 384-394 of 2019.

16. That the respondent was not informed of any threat of execution whatsoever and in any event the Applicants had not laid any conclusive evidence to confer liability upon the Respondent to settle the decretal sums in Nakuru CMCC No. 384-394 of 2019, that the Applicants were seeking to unlawfully benefit at the expense of the Respondent. The respondent's prayer was for the dismissal of the application with costs.

17. The applicant swore a Supplementary Affidavit on 3<sup>rd</sup> November, 2020 and deponed that paragraphs 3 to 7 of the respondent's Replying Affidavit to the effect that denying issuing insurance policy with respect to KBC 842L, denying knowledge of the accident, denying that the applicant paid any premiums,

denying that it appointed an Advocate to represent the applicant in Nakuru CMCC Nos. 384 — 394 of 2019; were simply scandalous.

18. She stated that the documents annexed to her Supporting Affidavit demonstrated that the respondent issued her a number of Insurance Certificates for Motor Vehicle Registration Number KBC 842L for a number of periods, receipts by the defendant in acknowledgement of payment of premiums. That the contention that it was a scam ought to have been accompanied by criminal complaint by the respondent for forgery or altering false documents but none has been lodged by the defendant.

19. That the documents annexed in her annexed pleadings in the supporting Affidavit demonstrate that the defendant appointed the firm of Kamoing to represent her in Nakuru CMCC No. 384 - 394 of 2019 and no evidence had been placed before court to suggest that the respondents letters were falsified and neither the affidavit by M/s Kamoing & Co. Advocates to suggest that her instructions or pleadings were falsified. The interested parties Replying Affidavit is not on record.

## **SUBMISSIONS**

20. The interested parties submitted that applicant admitted being the lawful owner of Motor Vehicle Registration Number KBC 842L which motor vehicle was involved in a grisly road accident on 24<sup>th</sup> January 2019 as a result of which the interested parties sustained severe injuries. They submitted that they should be allowed to enforce the judgment of the trial court in Nakuru CMCC No 384 - 394 all of 2019 against the applicant as it would be unfair and unjust for them to wait for the determination of this present suit pitting the applicant and respondent. It was their humble submission that the applicant is not entitled to stay orders and that the discretionary relief of stay of execution is designated for the benefit of both parties so that none of the parties would be worse off by virtue of an order of the court, that none is disadvantaged but to ensure substantive justice is administered fairly and justly to all parties. They relied on the case of **Silverstein vs Chesoni (2002) IKLR 867**, where the court held that:

*“The issue of substantial loss is the cornerstone of both jurisdictions”.*

They also relied on the case of **Shell Ltd Vs Kibiru & Anor, Civil Appeal No. 97 of 1986** where it was held:

*“The application for stay made before the High Court failed because the 15 of the conditions was not met. There was no evidence of substantial loss to the applicant, either in the matter of paying the damages awarded which would cause difficulty to the applicant itself, or because it would lose its money, if payment was made since the respondents would be unable to pay the money”.*

21. They submitted that the applicant had not established that she would suffer substantial loss if the stay orders were to be denied. That In the case of **Machira T/A Machira & Co Advocates Vs East African Standard (NO 2) (2002) 2 KLR 63**, the court held:

*“In this kind of applications for stay, it is not enough for the applicant to state that substantial loss will result. He must prove specific details and particulars or tangible loss is shown to the satisfaction of the court, the court will not grant a stay”.*

That they should not be denied the right to enjoy the fruits of their judgement and should not be kept away from accessing their money. They submitted further that should the court issue stay orders, then the applicant should be ordered to deposit the entire decretal sum in respect of Nakuru CMCC 384 - 394 all of 2019.

22. The applicants filed their submissions on 28<sup>th</sup> January 2021 and reiterated all averments in their grounds on the face of the application, Supporting Affidavit and the Supplementary Affidavit. In addition they relied on the case of **Apollo Ogunda vs Africa Merchant Assurance Co. Ltd, & Others Nakuru HCCC No. 100 of 2013** where execution was stayed in the parent suits Nakuru CMCC No. 666 of 2017, and stayed proceedings in Nakuru CMCC Nos. 254, 258 and 1186 all of 2017 filed against the insured

(plaintiff) pending the hearing of the said suit Nakuru HCCC No. 100 of 2013 by the insured plaintiff who had sought a declaration that judgment in the said suits be satisfied by his insurer M/s Africa Merchant Assurance Co. Ltd.

23. They also relied on the case of **Fredrick Gathungu Njenga vs Africa Merchant Assurance Co. Ltd. & Others Nakuru HCCC No. 65 of 2015** where similar stay orders were made in Nakuru CMCC No, 549 of 2017 pending the hearing and determination of the case Nakuru HCCC No. 65 of 2015 seeking a declaration that the defendant the plaintiff's insurer was obligated to satisfy the said judgment in the parent suit. Also in the case of **Samuel Githinji Mwangi vs Xplico Insurance Co. Ltd. & Others** Nakuru HCCC No. 12 of 2017 where the court stayed execution in Nakuru CMCC No. 948 of 2015 (parent suit) a compensatory suit against the plaintiff the insured pending hearing and determination of the suit Nakuru HCCC No. 12 of 2017 a suit seeking a declaration that the parent suit (compensatory suit) should be satisfied by the plaintiff's insurers the defendant therein.

24. They also placed reliance on the case of **Gerald Wachira T/A Wachira, Sawmills vs Blue Shield Insurance Co. Ltd.** Where it was declared that the defendant was bound to satisfy judgement in the parent suit Molo SRMCC NO. 231 OF 1994 which had been filed against the insured plaintiff as it was contractual obligation of the said insurer to satisfy the judgement on behalf of the plaintiff.

25. They submitted that in the matter before court it is contractual obligation of the defendant to satisfy the judgement in Nakuru CMCC NOS. 384-394 all of 2019 on behalf of the applicant. They submitted that pending hearing and determination of this suit it was only appropriate that order 4 and 5 of the application be granted.

26. The defendant herein did not file its submissions.

#### **ANALYSIS AND DETERMINATION**

27. Having considered the application, the parties' affidavits and submissions it is my view that the following issues fall for determination:-

***a) Whether the prayers sought herein are merited.***

***b) Whether the grant of the orders sought herein will be prejudicial to the interested parties.***

28. The applicant has demonstrated *prima facie* that her motor vehicle was insured by the respondent at the time of the accident. That respondent has merely denied this calling it a scam without the attendant action of reporting it to the police for prosecution of the applicant. To that end the applicant has established a *prima facie* case against the respondent.

29. The applicant has also demonstrated that ex-parte judgments were issued against her in the CMCC 384 - 394 all of 2019 and stay of execution in Nakuru CMCC 385,386 & 389 all of 2019. The execution of those judgments against her would clearly cause her to suffer substantial financial loss.

30. True, the interested parties are entitled to the enjoyment of the fruits of their judgment. It is also true that the dispute here is between the applicant and the respondent but it cannot be denied that if it is established that the respondent has insured the motor vehicle the respondent is legally bound to satisfy the decrees in their respective cases. More harm will be done if the execution is allowed to proceed against the applicant only for that to be reversed after the hearing. To this end I agree with the holding in **Fredrick Gathungu Njenga vs Africa Merchant Assurance Co.ltd & others Nakuru HCCC No. 65 of 2015** the court held that:-

*“Issues between the insured and the insurance company under section 5 and 10 of the insurance third party risks chapter 403 laws of Kenya are best canvassed in a full hearing when the court makes declaration as to which party ought to satisfy the decree. Pending such determination, it is my considered view that an order of stay of execution ought to be issued”*

31. It is only fair in a case such as this where the applicant has demonstrated *prima facie* that she paid the insurance premiums and had a valid certificate of insurance at the material time. It is my considered view that it would not be appropriate to order the applicant to deposit the entire decretal sum pending the hearing of suit.

32. The application is merited and it is allowed.

33. Costs in the cause.

**DATED at NAKURU this 30<sup>TH</sup> day of MARCH, 2021.**

**DELIVERED via EMAIL this 14<sup>TH</sup> day of JUNE, 2021.**

**Mumbua T. Matheka**

**Judge**

Court Assistant Edna

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