



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAROK**

**CIVIL CASE NO. E003 OF 2021**

***(CORAM: F.M. GIKONYO J.)***

**LABAN NYANGARORA OBACHI.....PLAINTIFF**

**VERSUS**

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

**HELLEN CHERUTO SAINA and KIPKEMBOI SAINA**

**(Suing as the legal/ personal representatives and administrators of the estate of the late FRANCIS KIMURGOR KEMBOI).....INTERESTED PARTIES**

**RULING**

**Stay of Execution**

[1] The significant order sought in the Notice of Motion dated 5<sup>th</sup> May, 2021 is stay of execution in NAROK CMCCC NO. 148 OF 2019 pending the hearing and determination of this suit.

[2] The interested parties were the Plaintiffs in NAROK CMCCC NO. 148 OF 2019 in which they obtained judgment for damages against the Plaintiff/Applicant herein.

[3] Upon filing this application, this court gave interim orders on 07/05/2021 for temporary stay pending hearing inter parties. The said orders were extended on 20/05/2021.

[4] This court directed that the application for stay be served immediately. Upon service, the Respondents to file their replies within 7 days thereof.

[5] The Motion is supported by grounds set out in the motion and the supporting affidavit. It is discernible from these filings that the applicant's arguments are: -

- (i) That the Plaintiff/Applicant was the owner of matatu registration number KCH 778P.**
- (ii) That on 7<sup>th</sup> April 2019 the said *matatu* was involved in an accident at Silanka area along Mulot-Narok road in which Francis Kimurgor Kemboi was fatally injured.**
- (iii) That the Plaintiff/ Applicant had a valid policy of insurance with the defendant/Respondent in respect of his *matatu* as at the time of the accident.**
- (iv) That the Plaintiff/ Applicant duly reported the accident to the Defendant /Respondent in accordance with the conditions of his insurance policy.**
- (v) The interested parties filed a suit for damages vide NAROK CMCC NO. 148 OF 2019.**
- (vi) Upon receiving the summons to enter appearance in respect of the interested parties' suit, the plaintiff immediately transmitted them to the Defendant who appointed an advocate to represent the Plaintiff/applicant.**

- (vii) The suit proceeded to trial and the court rendered judgment against the Plaintiff for a total of Kshs. 2,515,210.
- (viii) The defendant has failed to settle the decretal sum in its entirety.
- (ix) The interested parties consequently, have obtained warrants of execution against the plaintiff and proceeded to proclaim the Plaintiff's property for execution.
- (x) According to the applicant, the imminent danger of execution hence, the need for stay of execution.
- (xi) That the court should grant stay of execution in the interest of justice.

## ANALYSIS AND DETERMINATION

[6] I have considered the application and the affidavit in support of the application as well as the annexures attached thereto.

[7] Neither the Defendant/Respondent, nor the Interested Parties filed a replying affidavit despite having been served with the application. Nonetheless, I will consider the application on merit.

[8] The issue before me is *whether the applicant is deserving of the stay order*.

[9] The Plaintiff/Applicant relies on the grounds that his motor vehicle registration No. KCH 778 P was insured by the defendant/Respondent at all material times. The contract of insurance was that the defendant would indemnify the plaintiff/Applicant against any loss or injury occasioned to a 3<sup>rd</sup> party as a result of any accident involving the said vehicle. When the vehicle was involved in an accident and decree issued in NAROK CMCC No.148 of 2019, the Defendant/Respondent failed to honour the terms of the contract.

[10] The plaintiff /Applicant has filed this declaratory suit against the defendant and prays for stay of execution pending hearing and determination of the suit.

### Principles for Grant of Stay of Execution

[11] According to Order 42 rule 6 of the *Civil Procedure Rules*: -

*(2) No order for stay of execution shall be made under sub rule (1) unless—*

*(a) The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and*

*b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.*

### Timeliness of Application

[12] On the timeliness of the application; it is apparent it has been brought without inordinate delay. According to the supporting documents which have not been disputed, the execution proceedings were commenced in March 2021. The application was filed on 7<sup>th</sup> May 2021. It is therefore in my finding that it has been brought timeously.

### Substantial loss

[13] The core of such application is proof that substantial loss will result if the order of stay of execution is not granted. Substantial loss as was stated in *Sewankambo Dickson Vs. Ziwa Abby HCT-00-CC MA 0178 of 2005*, the High Court of Uganda at Kampala: -

*“... refers to any loss, great or small, that is real worth or value, as distinguished from a loss without value or loss that is merely nominal”.*

[14] A declaratory suit under the Insurance (Motor Vehicle Third Party risks) Act, enforces the statutory obligation of the insurer to pay the judgment obtained by a third party who suffered injuries as a result of use of the insured vehicle on the road. Some commentators say such is in execution of the judgment obtained by the third party against the insurer. From the facts disclosed in the papers filed, the applicant claims to have had an insurance policy on the motor vehicle in question for the benefit of third parties who may suffer injury as a result of its use on the road. Thus, on *prima facie* basis, and without any other explanation, sale of the attached property in execution of the decree obtained by the third parties would occasion the Applicant substantial loss.

### Security for Due Performance

[15] The Applicant has submitted that the order for security ought to be directed at the defendant. The applicant is the person who has applied for stay of execution in order to avert substantial loss from occurring. Further, it would be prejudicial to the interested parties who have right to the fruits of their judgment to direct provision of security to a person who has not sought protection of the court through stay of

execution of the said judgment. The applicant should reckon that justice cuts both ways and should bear the pain. Security is absolutely necessary in this case as third parties have a judgment whose execution will be stayed.

[16] What security should be provided by the Applicant as a condition of stay of execution?

[17] I am aware that the decree herein stands at over 2.7 million plus interest until payment in full. This is quite substantial sum of money. And as was stated in the case of *Sewankambo Dickson Vs. Ziwa Abby (supra)*: -

**“...insistence on a policy or practice that mandates security, for the entire decretal amount is likely to stifle possible appeals – especially in a Commercial Court, such as ours, where the underlying transactions typically tend to lead to colossal decretal amounts”.**

[18] Therefore, I will order provision of security that will not stifle right to access remedy in court.

[19] I do note also another source of prejudice to the Interested Parties; delay in the conclusion of the declaratory suit between the applicant and the insurer. To avoid, any such eventuality, I will also set specific conditions of stay which are aimed at expediting the hearing of the declaratory suit. See *Vishram Ravji Halai vs. Thornton Turpin (1963) Ltd, Civil Application 15 of 1990 (UR)*

[20] For the above reasons, I allow the application dated 5<sup>th</sup> May 2021 specifically, a stay of execution of the decree in the primary suit on the following conditions:

- i) The applicant shall deposit in court a bank guarantee of Kshs. 500,000 within 30 days of today.**
- ii) The applicant shall serve summons and file an affidavit of service-if they have not yet served- within 7 days of today.**
- iii) The applicant shall set down the suit for hearing within 45 days. Towards this end, the court will assign this case a date for mention for further directions.**
- iv) In the event of default in any of the foregoing conditions, the stay order shall lapse automatically.**
- v) Each party to meet their own costs of this application.**

Dated, signed and delivered at Narok through Teams Application, this 19<sup>th</sup> day of July, 2021.

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F. M. GIKONYO

**JUDGE**

**In the presence of:**

1. Njoroge for the applicant
2. N/A for the defendant
3. N/A for the Interested parties
4. Mr. Kasaso – CA

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F. M. GIKONYO

**JUDGE**