



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

(CORAM: A.K. NDUNG'U J.)

CIVIL APPEAL NO. 123 OF 2019

OSUGO PAUL MAKOMBI.....APPELLANT/ APPLICANT

VERSUS

BRITAM GENERAL INSURANCE CO. (K) LTD..... RESPONDENT

SAMWEL ONDIEKI MOMANYI... INTENDED INTERESTED PARTY

RULING

1. The appellant' application dated 20th December 2019 is expressed to be brought under **Order 42 Rule 6 (1) &(6), Order 22 and Order 51 Rule 1** of the **Civil Procedure Rules** and **Section 1 A, 1B & 3A** of the **Civil Procedure Act**. The appellant prays for orders that;

1. Spent

2. This honorable court be pleased to enjoin **SAMWEL ONDIEKI MOMANYI** as an interested party to these proceedings by virtue of OGEMBO SPMCC NO. 61 OF 2016

3. This honorable court be pleased to issue an order of stay of execution of the judgment and the subsequent decree emanating therefrom in OGEMBO SPMCC NO. 61 OF 2016 pending the hearing and determination of the application

4. This honorable court be pleased to issue an order of stay of execution of the judgment and the subsequent decree emanating therefrom in OGEMBO SPMCC NO. 61 OF 2016 pending the hearing and determination of the appeal herein.

5. Cost of this application be provided for.

2. The appellant swore an affidavit in support of his application on 20th December 2019 and the intended interested party filed grounds in opposition to the application dated 6th February 2020 and swore a replying affidavit on even date.

3. The genesis of the matter according to the application, the intended interested party's response and the memorandum of appeal is a road traffic accident that occurred on 5th August 2015 involving the appellant's vehicle registration number KCA 002C and the intended interested party's vehicle registration number KCD 102 E. Following the accident, several suits were filed against the appellant including OGEMBO SPMCC NO. 61 OF 2016 which was filed by the intended interested party.

4. The respondent insurance company then filed Kisii CMCC No. 207 of 2016 seeking orders that it was not bound to pay claims emanating from the accident. The appellant filed a counter claim in response, seeking orders to compel the respondent to honor its contractual obligations under the insurance policy cover he had taken out for his vehicle. The trial court dismissed both the suit and counter claim, prompting the appellant to file this appeal.

5. The appellant claimed that the other parties who were involved in the accident that occurred on 5th August 2015, got judgment in their various suits after which they filed declaratory suits against the respondent. However, the intended interested party commenced execution proceedings against him having obtained judgment in SPMCC No. 61 of 2016. The appellant was apprehensive that he might be arrested at any time as the intended interested party had already obtained warrants of arrest against him. He claimed that since the intended interested party will be directly affected by the judgment of this court, it was necessary that he be enjoined in these proceedings and an order of stay of execution in SPMCC NO. 61 OF 2016 be issued pending the hearing and determination of the appeal.

6. The appellant deposed that the appeal was an arguable one and had been brought without unreasonable delay. He was also of the view that the orders would not cause hardship on the respondent. He was willing to abide by such conditions for stay as would be imposed by this court.

7. The intended interested party on the other hand averred that after obtaining judgment in his favour in SPMCC No. 61 of 2016 on 20th November 2018, the appellant lodged an appeal vide Kisii High Court Civil Appeal No. 146 of 2018 challenging the trial court's finding on liability and quantum. The appeal was heard and the court delivered its judgment on 4th April 2019. The appellant did not appeal against the decision of the High Court and there was therefore no basis in law to seek stay of execution.

8. It was the intended interested party's position that the decree which the appellant sought to stay had been issued against him and not his insurer and he was therefore obliged to satisfy it. He averred that he had no identifiable interest in the instant matter and there was no nexus between the applicant's cause of action in this appeal which was premised on a contractual dispute with the respondent and his cause of action against the appellant in SPMCC No. 61 of 2016 which was based on the law of torts.

9. The intended interested party averred that Ogembo SPMCC No. 251, 252 and 253 of 2015 had arisen from the accident that occurred on 5th August 2015 but the appellant had not sought a stay of execution or leave to enjoin the parties in those cases. That was, in the view of the intended interested party, a sign of malice towards him. He averred that the application before this court was an attempt by the appellant to thwart the execution process he had commenced. He claimed that he stood to suffer substantial loss if the application was allowed since he had already obtained judgment and decree against the appellant.

10. The intended interested party also raised the following grounds in opposition to the application;

1. The application was incurably defective, bad in law, incompetent and an abuse of court process;
2. The application was frivolous, vexatious and scandalous and lacked merit;
3. The applicant was guilty of unreasonable delay as he ought to have sought leave to enjoin the interested party in the primary suit that gave rise to the instant appeal;
4. The intended joinder of parties at this stage would be highly prejudicial to the interested party who was never given the opportunity to participate in the proceedings at the lower court;
5. The appeal was based on a contract between the applicant and the respondent in which the intended interested party was not a party to;
6. There was no nexus between the appeal and the matter whose judgment and decree the applicant was seeking stay;
7. The application was misplaced as the appellant had already appealed from the decision of the lower court in SPMCC NO. 61 OF 2016 vide Kisii High Court Civil Appeal No. 146 of 2018 which had since been determined and the appellant could not purport to seek remedies which ought to have been sought in Kisii High Court Civil Appeal No. 146 of 2018 in this appeal;
8. The application was misconceived and a waste of the Court's precious time and ought to be struck out.

11. The parties canvassed the application by way of written submissions which I have duly considered.

12. The issues that crystalize for determination are twofold. The first is whether the interested party should be enjoined to these proceedings and the second is whether stay of execution should be issued against the intended interested party in SPMCC NO. 61 OF 2016.

13. On the first issue, the parties referred to the case of **Communications Commission of Kenya and 4 Others vs Royal Media Services Limited & 7 Others Petition No. 15 of 2014 [2014]eKLR** which is an opposite authority on the joinder of an interested party to proceedings. In that case the Supreme Court held;

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 the 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 interests will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause. A party could be enjoined in a matter for the reason that;

- i. Joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings;
- ii. Joinder to provide protection of the rights of a party who would otherwise be adversely affected in law;
- iii. Joinder to prevent a likely course of proliferated litigation.

14. The substitution and addition of parties to a suit is governed by **Order 1 Rule 10 (2)** of the **Civil Procedure Rules** which provides;

“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. The above provision states that parties may be joined to proceedings at any stage. It has been held that in certain circumstances, a party may be enjoined to a suit at appeal stage. The applicant in *David Kiptugen v Commissioner of Lands, Nairobi & 4 others [2016] eKLR* filed an application before the Court of Appeal to be enjoined as an interested party to the appeal and for remission of the matter back to the trial court for hearing *de novo*. The court allowed that application and held;

“We agree with Ms Kirui that whatever the outcome of the appeal, if the applicant is not joined in this appeal, he will be deprived of an opportunity to be heard on his claim to the ownership of the suit land. That will of course be unconstitutional and against the rules of natural justice.”

16. However, the Supreme Court in the case of *Communications Commission of Kenya & 4 others v Royal Media Services Limited (supra)* in declining a similar application for joinder of an interested party held;

The applicant now seeks to be enjoined in this matter, even though it was neither a party at the High Court nor at the Court of Appeal. The applicant has not demonstrated how the ends of justice would better be served by enjoining it in the appeal...

We cannot exercise our discretion to enjoin a party that disguises itself as an Interested Party, while in actual fact merely seeking to institute fresh cause.

17. In this case, the appellant contends that it is necessary to include the intended interested party in these proceedings as when the appeal succeeds, he will execute against the respondent, Britam General Insurance Company. The appellant argues that the applicant will not suffer any prejudice if the application is allowed.

18. The respondent on the other hand submits that the cause of action of the appeal between the appellant and the respondent was based on a contract, thus the doctrine of privity of contract excludes him from having any burden under that contract that can be enforced against him. He argues that his claim against the appellant arose out of tortious acts committed by the appellant and the decretal sum awarded in his suit was against the appellant personally. Hence, there was no nexus between his claim and the appellant’s claim against the respondent.

19. It is common ground that the suit giving rise to this appeal was a matter between the appellant and Britam General Insurance Company, the respondent herein. The parties agree that the suit before the trial court concerned the duty of respondent insurer to satisfy judgments against its insured, the appellant. That suit was separate and distinct from SPMCC No. 61 of 2016 which was filed by the proposed interested party against the appellant for damages following the accident that occurred on 5th August 2015.

20. The appellant may be right in his argument that the respondent would be bound to settle judgments against him arising from that accident if the appeal is allowed, but he has not demonstrated the relevance of adding the proposed interested party to the proceedings. If he is included in this proceedings, the proposed interested party would only stand by as an onlooker as he has no say on the contract between the appellant and the respondent.

21. The only benefactor from the inclusion of the proposed interested party to this appeal would be the appellant whose sole reason for seeking the enjoinder is to get a stay of execution in SPMCC No. 61 of 2016. In my view, this application is merely an ingenious approach by the appellant to delay execution proceedings commenced against him by the intended interested party.

22. The appellant did not challenge the proposed interested party’s claim that he had appealed against the decision of the trial court in SPMCC No. 61 of 2016 vide Kisii High Court Civil Appeal No. 146 of 2018 which had been heard and determined and no appeal preferred against that decision to the Court of Appeal. There is therefore no appeal pending between the appellant and the intended interested party.

23. The appellant sought a stay of execution against the decree emanating from SPMCC No. 61 of 2016 pursuant to **Order 42 Rule 6** of the **Civil Procedure Rules** which provides as follows;

Stay in case of appeal [Order 42, rule 6.]

(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

24. Having found that there is no reasonable cause for the including the intended interested party to these proceedings, it follows that an application for stay of execution would fail as it cannot be granted in the absence of an appeal. This position finds support in the case of *Teachers Service Commission v Kenya National Union of Teachers & 3 others APPLICATION NO. 16 OF 2015 [2015] eKLR* where the Supreme Court held;

“The general stand of the law, therefore, is that there will be a pending, or an intended appeal, as a basis for this Court to entertain an application for stay of execution, or for grant of an injunction.”

25. In **Okiya Omtatah Okoiti v Central Bank of Kenya & 7 others APPLICATION NO. 33 OF 2018 [2019] eKLR** the Apex Court similarly held;

“In addition, there is no substantive appeal before us to enable us make a determination on this application for stay of execution one way or the other. Orders cannot be granted in a vacuum or on a whim. It is the Petition of Appeal that indicates the substratum of a party’s case and whether interim orders should be granted or not. Without it, no orders can ordinarily issue.”

26. The appellant also sought stay of execution under **Order 22 Rule 22** of the Civil Procedure Rules which provides;

22. When court may stay execution [Order 22, rule 22.]

(1) **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. **[Emphasis added]**

27. The above provision plainly states that an application for stay under order 22 rule 22 can only be sought from the court to which a decree has been sent for execution. Stay of execution under Order 22 can therefore only be sought in OGEMBO SPMCC NO. 61 OF 2016 where the execution proceedings are ongoing.

28. The appellant has neither established a basis for this court to consider his application for stay of execution nor demonstrated how the ends of justice will be served by including the intended interested party in this appeal. There is no reason to deprive the proposed interested party of the fruits of his judgment by being shackling him to these proceedings where he has no stake.

29. The application dated 20th December 2019 is thus found to be lacking in merit and is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED AT KISII THIS 8TH DAY OF JULY 2021

A.K. NDUNG’U

JUDGE