REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VIHIGA

CIVIL CASES NOS. 6 AND 7 OF 2021

(Formerly KAKAMEGA NO. E002 AND E003 OF 2020)

CHAIRMAN, BOARD OF MANAGEMENT,

GIVOLE SECONDARY SCHOOL.....APPLICANT

VERSUS

XPLICO INSURANCE COMPANY LIMITED.....RESPONDENT

AND

JOHN ALUVISIA alias

JOHN ALUVISIA MAGUVAJI.....INTERESTED PARTY

RULING

1. The applicant herein moved this court through applications dated 2nd November 2020, 9th November 2020, 12th November 2020 and 15th March 2021, seeking a variety of orders. The factual background to the matter is that a judgment was entered in Vihiga PMCCC Nos. 75 and 95 of 2017, where monetary awards of compensation were made against the applicant. The cases arose from a road traffic accident, involving a vehicle belonging to the applicant, which was insured with the respondent. The respondent failed to pay the decretal amounts awarded in the said suits, whereupon execution proceedings were commenced for attachment and sale of a bus belonging to the applicant, and for garnishee orders, for recovery of the decreed amounts.

2. Orders for attachment of the vehicle were made allowing auctioneers to attach the vehicle, effective from 5th November 2020. A garnishee order was made on 16th October 2020, to facilitate attachment of a sum of Kshs. 10, 450, 862.35. It was the making of these orders by the trial court that prompted the applicant to move this court, seeking stay of execution of the judgment of the trial court, and the variation or setting aside of the garnishee order *nisi* of 16th October 2020, and for an order to compel the respondent to pay the decretal amount.

3. The interested party responded to the applications, by his grounds of opposition, where he argued that the advocates for the applicant had not complied with Order 9 rule 9 of the Civil Procedure Rules, 2010, for they did not seek leave of court before placing themselves on record, and that the applicant had not yet furnished security for the judgment, and an order of stay was not available with respect to garnishee orders.

4. The issues that arise in this matter are whether a stay of execution of the judgment was available, whether the garnishee order ought to be stayed, whether the respondent ought to be ordered to pay the decretal amount, and who was to bear the costs of the applications.

5. On the issue of stay of execution of the judgment pronounced in Vihiga PMCCC No. 75 of 2017, Order 42 Rule 6(2) of the Civil Procedure Rules provides that a stay order ought not be made unless the court is satisfied that substantial loss may result to the applicant unless the order is made and there is no unreasonable delay; and that security for due performance of the decree as ordered by the court is given by the applicant. From the provision, three conditions have to be met before the court can consider making a stay order: These are the possibility of the applicant suffering substantial loss should stay not be granted, the applicant moving to court for stay without unreasonable delay, and the applicant furnishing security.

6. The applicant argues that it would suffer substantial loss should execution ensue because it stood to lose the school bus, upon which it was dependent for the normal operations of the school, the decretal amount in excess of Kshs. 10, 000, 000.00 was colossal, and loss of that amount would seriously hamper its operations, and the school risked closure should stay not be granted. It also argues that it moved to court timeously, shortly after the ruling on attachment and the making of the garnishee order. It had not offered any security despite it not being exempt from providing the same, by dint of Order 42 Rule 6(8) of the Civil Procedure Rules. See *Board of Management, Pumwani Girls*

Secondary School vs. Joseph Mbulula Mutwike t/a Lathemacs Engineering Works [2019] eKLR (Njuguna J). The security to be offered by an applicant, by virtue of that provision, is as may be ordered by the court, and in this case the court may order the applicant herein to furnish such security as it may deem fit.

7. It was stated in *Charles Makenzi Wambua vs. Africa Merchant Assurance Co. Ltd & another* [2014] eKLR (Aburili J) that in application of this nature the court must consider whether granting stay would in any way prejudice any of the other parties. The interested party in this case has opposed the stay applications for the reasons set out in his grounds of opposition. The applicant is entitled to file a declaratory suit against the respondent, under section 4(1) of the Insurance (Motor Vehicles Third Party Risks) Act, Cap 405, Laws of Kenya, to recover the decretal amount from the respondent. A successful prosecution of such a suit would benefit the interested party directly, in the sense that it would save him time and resources in trying to recover the money from the applicant, hence he would suffer no prejudice if stay is granted to facilitate the filing of such a suit.

8. I am this satisfied that a case exists, and has been made out, for stay of execution along the lines sought by the applicant. The same would not be detrimental to the interested party, who would stand to benefit from a favourable outcome of a declaratory suit brought against the respondent.

9. Let me consider next whether the garnishee order ought to be stayed or set aside. Should a stay order be made with respect to the garnishee order? I believe I should. The applicant had insured the subject bus with the respondent. It would appear from the record that the insurance policy was valid and binding, and, if that was the case, the respondent ought to have satisfied the decretal amount. If the stay order is not made the applicant would stand to lose the garnisheed amount, yet the respondent is statutorily bound to pay or settle the decretal amount.

10. On whether the respondent ought to be ordered to pay the decretal amount, there are averments to the effect that once the applicant was served with the pleadings at the commencement of the proceedings before the trial court, it furnished the respondent with the pleadings, the respondent instructed a firm of advocates to come on record for the applicant, and to enter appearance and file a defence on its behalf. The respondent further undertook to repair the bus, and instructed a firm of motor vehicle body builders to undertake the repairs and settled the costs for the said repairs. There is, therefore, evidence that the respondent was all along aware of the suit, but chose not to satisfy the decretal amount, when the case was concluded against the applicant. It would appear that there is a statutory obligation for the respondent to settle the decretal amount. See *Joseph Mwangi Gitundu vs. Gateway Insurance Co. Ltd* [2015] eKLR (Gikonyo J).

11. In the end I am satisfied that a case has been made for grant of the applications the subject of this ruling. The orders that I am moved to make are as follows:

> **(a) That I hereby order stay of execution of the judgements and decrees in Vihiga PMCCC Nos. 75 and 95 of 2017, to allow the applicant lodge a declaratory suit against the respondent, if it has not already done, with respect to the said judgments and decrees, to last during the pendency of the declaratory suit;**
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> **(b) That I direct the applicant to file and serve a declaratory suit against the said judgments and decrees within the next 30 days of the date of this ruling;**
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> **(c) That I hereby set aside the garnishee order *nisi* made on 16th October 2020, to enable the applicant access funds for the purpose of the running of the school; and**
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> **(d) That the costs of these proceedings shall be borne by the respondent.**

DELIVERED,DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 17th DAY OF SEPTEMBER 2021

W MUSYOKA

JUDGE