



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL CASE NO. E013 OF 2021

FLORENCE WAITHERA MWAURA.....PLAINTIFF/APPLICANT

-VERSUS-

KENYA ORIENT INSURANCE LIMITED.....DEFENDANT/RESPONDENT

AND

VEGPRO KENYA LIMITED.....INTERESTED PARTY

RULING

[1] This ruling is in respect of the Notice of Motion dated **14 April 2021**. The said application was filed herein by the plaintiff, **Florence Waitthera Mwaura** pursuant to **Article 159(2)(a), (b), (d) and (e)** of the **Constitution of Kenya; Sections 1A, 1B, 3A and 44** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya** and **Order 51 Rule 1** of the **Civil Procedure Rules, 2010**. As prayers (1), (2) and (3) are spent, the outstanding prayers are prayers (4), (5) and (6), of the said Notice of Motion, namely:

[a] That this Court be pleased to grant stay of execution of the decree in **Eldoret CMCC No. 681 of 2020** pending the hearing and determination of this suit;

[b] That this Court be pleased to grant stay of further proceedings in **Eldoret CMCC No. 681 of 2020** pending the hearing and determination of this suit;

[c] That the costs of the application be borne by the defendant/respondent in any event.

[2] The application is predicated on the grounds that the plaintiff is the registered owner of **Motor Vehicle Registration No. KCC 815W**; and that at all times material to this suit, the said motor vehicle was insured by the defendant vide **Policy No. KK/MV/0816/04213/2017**. The plaintiff further contended that it was a term of the said insurance policy that the defendant would indemnify her against any loss or injury occasioned to any third party as a result of any accident involving the said motor vehicle; and that the defendant would settle all claims and bear all liability against any third party against the plaintiff in connection with the insured motor vehicle.

[3] It was further the contention of the plaintiff that she paid the insurance premiums to the defendant as and when they fell due, and adhered to all the terms, conditions and warranties under the insurance contract; including using the insured motor vehicle only for the disclosed purpose. She complained that whereas an accident happened on **28 August 2017** during the validity of the insurance policy as a result of which the interested party sued her for compensation and obtained judgment in its favour, the defendant declined to indemnify her, thereby exposing her property to the risk of being sold in execution of the decree. It is her contention that the defendant's act of failing to settle the claim in **Eldoret CMCC No. 681 of 2020** is a breach of the contract of insurance between her and the defendant; and therefore that she is entitled to legal protection and intervention in the interim by way of stay of execution, pending the hearing and determination of this suit.

[4] The application is supported by the plaintiff's own affidavit, sworn on **14 April 2021** to which she annexed a copy of the Investigation Report prepared by **Leon Private Investigation Agency**. In addition, she attached copies of the Complaint and a Police Abstract filed in **Eldoret CMCC No. 681 of 2020**, among other pertinent documents.

[5] Whereas the defendant opted not to oppose the application, a Replying Affidavit sworn by **Abigael Kiarie** on **27 April 2021** was filed herein on behalf of the interested party, in which it was averred that the interested party is not privy to the insurance contract between the plaintiff and the defendant; and therefore should not be denied the fruits of its judgment. At paragraph 8 of the said Replying Affidavit, the plaintiff was urged to first satisfy the decree and thereafter pursue her indemnity suit against the defendant.

[6] Pursuant to the directions given herein on **4 May 2021**, the application was canvassed by way of written submissions. On his part, **Mr. Murimi** for the plaintiff proposed the following issues for determination:

[a] Whether the applicant has demonstrated that the subject motor vehicle was insured by the defendant;

[b] Whether this Court should grant the orders of stay of execution sought by the plaintiff.

[7] While acknowledging that the first issue is the key issue in the main suit, **Mr. Murimi** nevertheless urged that a consideration thereof be made at this stage; albeit for the purpose of demonstrating that the applicant has laid a sound basis for the issuance of the orders prayed for. He urged the Court to find, on the basis of the averments by the plaintiff and the annexures in support thereof, that indeed, the subject motor vehicle was insured by the defendant; and that in the Replying Affidavit, the interested party did not deny that the existence of the policy as at **28 August 2017** when the accident occurred. He particularly drew the attention of the Court to copies of the investigator's report and the police abstract annexed to the Supporting Affidavit; which in his view sufficiently prove that the subject motor vehicle was indeed covered by the defendant as at the time of the accident.

[8] On whether the Court should grant the orders of stay of execution as prayed for herein, counsel made reference to the List and Bundle of Authorities filed herein and underscored the point that it would be against public policy for the defendant, as an insurance company, to be allowed to collect funds from members of the public such as the plaintiff and yet decline to meet its obligations. He relied on **Apollo Ogunda vs. Africa Merchant Assurance Co. Ltd & 4 Others** [2015] eKLR and **Samuel Githinji Mwangi vs. Xplico Insurance Company Ltd & 2 Others** [2017] eKLR among others to buttress the argument that the plaintiff stands to suffer substantial loss should her property that has already been proclaimed be sold in execution of the lower court's decree.

[9] It was further the argument of **Mr. Murimi** that, while the plaintiff stands to suffer great prejudice, no prejudice of any kind will be suffered by the interested party. He urged the Court to note that the lower court suit was filed by the interested party on behalf of **Mayfair Insurance Co. Ltd** under the doctrine of subrogation. Counsel submitted that **Mayfair Insurance Co. Ltd** being a giant and reputable insurance company cannot be adversely affected by the proposed orders; and that in any event the decretal sum will be earning interest on a monthly basis.

[10] On behalf of the interested party, **Mr. Wekhomba** relied on his written submissions filed on **26 May 2021**. He proposed only one issue for determination, namely, whether the execution already in progress before the lower court should be stayed pending the hearing and determination of the suit. He took the view that there is no specific provision in law for stay of execution of a decree pending the hearing and determination of a declaratory suit; and therefore that an application of this nature would have to be looked at from the backdrop of the inherent jurisdiction of the Court. He relied on the decision by **Hon. Kemei, J.** in **Mary Nziza Muthini & Another vs. Directline Insurance Co. Ltd and Another** [2019] eKLR and suggested the following pre-requisites:

[a] Whether the plaintiff has a good case against the defendant so as to warrant an order of stay of execution pending the determination of the suit;

[b] Whether the interested party will be prejudiced by the stay;

[c] Whether the plaintiff will suffer loss and damage if an order of stay is granted.

[11] **Mr. Wekhomba** reiterated the interested party's stance that no sufficient material has been placed before the Court to demonstrate that the plaintiff had a valid contract of insurance with the defendant which was valid at the time of the alleged accident. He relied on the **Mary Nziza Muthini** case (supra) and submitted that no justification has been shown why the interested party should be precluded from realizing the fruits of its judgment.

[12] I have given careful consideration to the application, the parties' respective affidavits as well as the written submissions filed herein. There is no dispute that the plaintiff is the judgment debtor in **Eldoret CMCC No. 681 of 2020**; a matter in which the interested party had sued the plaintiff, in her capacity as the registered owner of motor vehicle **Registration No. KCC 815W**. It was alleged that the said motor vehicle had been involved in a head-on collision with the interested party's motor vehicle **Registration No. KCG 841K**, which was insured by **M/s Mayfair Insurance Co. Ltd**. Accordingly, the defendant prayed for compensation in damages for the loss suffered and asked for judgment in favour of **M/s Mayfair Insurance Co. Ltd** under its right of subrogation for special damages of **Kshs. 1,268,678/=** together with interest and costs. The lower court found for the interested party and a decree accordingly issued. In execution of that decree, the interested party instructed **M/s Eshikoni Auctioneers** to levy attachment on the plaintiff's movable property; hence the Proclamation dated **1 April 2021**.

[13] Upon her property being proclaimed as aforementioned, the plaintiff filed this suit seeking declaratory orders, *inter alia*, that the defendant is obligated to indemnify her in respect of the claim in **Eldoret CMCC No. 681 of 2020** and that the defendant should settle the claim and all interest and liabilities arising therefrom. The plaintiff simultaneously filed the instant application seeking interim relief of stay of execution pending the hearing and determination of the main suit. Thus, the only issue that emerges for consideration is the question whether, in the circumstances, the plaintiff is entitled to an order of stay of execution of the decree issued in **Eldoret CMCC No. 136 of 2018** and all consequential orders pending the hearing and determination of this declaratory suit.

[14] This is not an appeal and therefore the provisions of **Order 42 Rule 6** of the **Civil Procedure Rules** governing stay of execution are inapplicable. The plaintiff invoked **Article 159(2)** of the Constitution as well as **Sections 1A, 1B, 3A** of the **Civil Procedure Act** as the key enabling provisions. In my careful consideration, however, the application ought to have been brought under **Order 40 Rule 1** of the **Civil Procedure Rules**; for that Rule recognizes that:

"Where in any suit it is proved by affidavit or otherwise that any property in dispute in a suit is in danger of being wasted,

damaged, or alienated by any party to the suit, or wrongly sold in execution of a decree ... the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders." (emphasis added)

[15] In addition, Section 63(e) of the Civil Procedure Act gives the Court the powers to make "...such other interlocutory orders as may appear to the court to be just and convenient." Hence, looking at the application from the prism of Section 63(e) of the Civil Procedure Act and Order 40 Rule 1 of the Civil Procedure Rules, the issue for determination is whether sufficient cause has been shown for the issuance of an order of stay execution as sought by the plaintiff.

[16] For the general purposes of Order 40 Rule 1, it was held thus in Giella vs. Cassman Brown & Co. Ltd [1973] EA 358:

"The conditions for the grant of an interlocutory injunction are ...well settled in East Africa. First, an applicant must show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."

[17] As to what amounts to a *prima facie* case, the Court of Appeal, in Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 123 held that:

"A *prima facie* case in a civil application includes but not confined to a genuine and arguable case. It is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

[18] At this point, the Court need not examine the merits of the plaintiff's case too closely; but it must, nevertheless, be apparent that there is a right which has been infringed by the defendant. The Court of Appeal made this point in Nguruman Limited vs. Jan Bonde Nielsen & 2 Others, Civil Appeal No. 77 of 2012, when it held that:

"We reiterate that in considering whether or not a *prima facie* case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right, which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a *prima facie* case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right, which he alleges. The standard of proof of that *prima facie* case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed."

[19] The plaintiff has demonstrated that she took out a policy with the defendant in respect of the subject motor vehicle; and although she did not avail a copy of the policy or a certificate of insurance, the police abstract exhibited herein bears the Policy No. as **KK/MV/0816/04213/2017** issued by **Kenya Orient Insurance Co. Ltd**. The abstract further shows that the said policy commenced on **16 August 2017** and was to expire on **15 November 2017**. It is noteworthy too that in the investigation report commissioned by the defendant, it was reported as a matter of fact, at paragraph 5.0 thereof, that the plaintiff's motor vehicle was, at the time of the accident insured with Kenya Orient Insurance Co. Ltd vide Policy No. **KK/MV/0816/04213/2017**.

[20] From the standpoint of Section 10(1) of the **Insurance (Motor Vehicles Third Party Risks) Act**, it would appear that the plaintiff has a genuine cause for complaint, for that provision gives her a definite cause of action against her insurers. Thus, the plaintiff has demonstrated, on a *prima facie* basis, that "...there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

[21] In addition to the foregoing, the plaintiff has demonstrated that her property is on the verge of being sold in execution of the lower court's decree. She contends that such sale would be wrongful granted their contract of insurance with the defendant by which she expected indemnity from the defendant. She has consequently demonstrated that she stands to suffer irreparably should her attached property be sold in execution. I accordingly agree with the position taken by **Hon. Omondi, J. (as she then was)** in Apollo Ogunda vs. Africa Merchant Assurance Co. Ltd & 4 Others (supra) that:

"The tragedy and prejudice is that, were this suit against the Respondents to succeed, and were this Court to find that the Respondent has no basis for repudiating the contract, then I don't think the applicant would even have a way of recovering the property which will already have been sold to satisfy the judgment on CMCC No. 666 of 2011."

[22] Thus upon balancing the interests of the plaintiff and the interested party, I am convinced that no inconvenience or prejudice will be visited on the interested party for which costs and interest would not be adequate recompense. On the other hand, the plaintiff risks suffering immense prejudice should her attached property be sold in execution in respect of a peril for which she took out an insurance cover with the defendant.

[23] In the light of the foregoing, I am satisfied that the plaintiff's application is meritorious. The same is hereby allowed and orders granted as hereunder:

[a] That stay of execution of the decree in Eldoret CMCC No. 681 of 2020 be and is hereby granted pending the hearing and determination of this suit;

[b] That stay of further proceedings in Eldoret CMCC No. 681 of 2020 be and is hereby granted pending the hearing and determination of this suit;

[c] That the costs of the application be costs in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 21ST DAY OF SEPTEMBER 2021

OLGA SEWE

JUDGE