



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. E124 OF 2021

GEOFFREY GICHOMO MWANGI.....PLAINTIFF

VERSUS

XPLICO INSURANCE COMPANY LTD.....1ST DEFENDANT

ROSELINE KAGENDO NJIRU.....2ND DEFENDANT

RULING

1. The plaintiff/applicant herein took out the motion dated 27th May 2021 whereof he sought for the following orders:

i. THAT this application be certified urgent and heard ex-parte in the first instance.

ii. THAT this honourable court be pleased to grant a temporary stay of execution exparte in the interim and/or stay of further execution against the judgment/decree in Milimani MCCC no. 4610 of 2019 and all consequential orders and/or proceedings arising therefrom pending the hearing and determination of this application interpartes.

iii. THAT this honourable court be pleased to order that in the interim the motor vehicle registration number KBW 060D Isuzu Minibus be released to the applicant pending the hearing and determination of this application interpartes.

iv. THAT this honourable court be pleased to grant a stay of execution and/or stay of further execution against the judgment/decree in Milimani MCCC No. 4610 of 2019 and all consequential orders and/or proceedings arising therefrom pending the hearing and determination of this suit.

v. That the warrants of attachment and sale of moveable property issued to M/s Compliance Auctioneers in execution of a decree for money be set aside pending the hearing and determination of this suit.

2. The plaintiff filed a supporting and a further affidavit he swore in support of the motion. The 2nd defendant filed a replying affidavit she swore to oppose the application.

3. I have considered the grounds stated on the face of the motion and the facts deponed in the rival affidavits. It is the averment of the plaintiff that on 27th January 2021 judgment in the sum of ksh.715,290 was entered against him and in favour of the 2nd defendant in Nairobi Commercial Courts C.M.C.C. no. 4610 of 2019.

4. It is further stated by the plaintiff that Compliance Auctioneers have attached the plaintiff's motor vehicle registration no. KBW 060D in execution of the decree. The plaintiff avers that he took an insurance cover with the 1st defendant to cover such risks but the 1st defendant has failed to settle the decree forcing the 2nd defendant to execute the decree.

5. The plaintiff has urged this court to stay further execution of the decree and sale of his motor vehicle pending the hearing and determination of this suit. It is stated that the 1st defendant has been sued to compel it settle the decree pursuant to the provision of Section 5(b) of the Insurance (Motor Vehicle Third Party Risks)Act.

6. The 2nd defendant has urged this court to dismiss the plaintiff's application stating the she has a lawful judgment which the plaintiff has not challenged on appeal hence there are no good reasons to enable this court grant the order to stay. The 2nd defendant further argued that

there is no privity of contract between her and the 1st defendant and therefore the application cannot stand.

7. Having considered the material placed before this court over the plaintiff's application, it is clear first, that the judgment obtained by the 2nd defendant vide C.M.C.C no. 4610 of 2019 has not been challenged on appeal. Secondly, it is also not in dispute that the 1st defendant is not a party to the suit where the 2nd defendant obtained judgment against the plaintiff. Thirdly, that the 2nd defendant is not privy to the insurance contract between the plaintiff and the 1st defendant.

8. This suit cannot be used to stay proceedings and or the execution of the decree in Nairobi Milimani Commercial Court C.M.C.C no. 4610 of 2019. The dispute in this suit arose out of an insurance contractual relationship between the plaintiff and the 1st defendant.

9. In the end, I find no merit in the motion dated 27th May 2021. It is dismissed with costs to the 2nd defendant.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 1ST DAY OF OCTOBER, 2021

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant