



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU.
CIVIL APPEAL NO. 132 OF 2020.

CIC GENERAL INSURANCE CO. LTD.....APPLICANT

VERSUS

VERONICA GATHONI NDUNGU.....RESPONDENT.

RULING

1. The applicant's application dated 28th July 2021 prays that this court be pleased to review and set aside its orders dated 24th June 2021 and grant stay of execution in decree issued in **NAKURU CMCC NO 107 OF 2019** in light of stay granted against the appellants insured in **NAKURU HCA NO. 26 OF 2019** on 22nd July 2021.
2. The application is supported by the affidavit of Erastus Mbaka its legal officer dated the same day as well as his supplementary affidavit sworn on 3rd August 2021.
3. The respondent has opposed the said application vide her replying affidavit sworn on 2nd August 2021.
4. When the matter came up for hearing the court directed that the same be heard by way of written submissions which the parties have complied.
5. The issues which are agreed in the rival affidavits are that there was a primary suit no. **Nakuru CMCC 1008 OF 2016**. A declaratory suit no. **NAKURU CMCC 107 OF 2019** was later filed. The declaratory suit commenced by the respondent was to compel the applicant settle the amount so awarded in the primary suit.
6. The respondent was aggrieved by the decision in the primary suit and they filed appeal no **Nakuru HCA 26 OF 2019** which is still pending for determination before Hon. Justice Ngetich.
7. This court on 24th June 2021 declined to allow the applicants application dated 1st March 2021 hence the applicants were ordered to settle the decree in **CMCC NO. 107 OF 2019**.
8. My sister Justice Ngetich on 22nd July 2021 in **HCA NO 26 OF 2019** allowed the applicants application and ordered that it should deposit the decretal amount within 30 days in a joint interest account pending the determination of the appeal and in default execution should issue. It appears that as a result of that the applicant deposited the same.
9. What is the net effect of the application herein and in particular the orders of this court dated 24th June 2021.?

10. The respondent has argued that the same is res judicata and it ought to be disallowed as the court had earlier made a decision over the same. That having failed to honor the same it should not be allowed and the execution should be allowed to proceed.

11. The respondent deponed that the orders by Justice Ngetich bars execution against the insured and not the applicant, the insurer. She therefore urges this court to dismiss the application.

12. The court has perused the submissions by parties on record and it wishes not to reproduce the same. The only issue is whether in light of the orders issued by my sister this court ought to review its earlier orders.

13. Order 45 of the Civil Procedure Rules clearly spell out when to allow and application for review. My brother Gikonyo j in **SALAMA MAHMOUD SAAS V. KIKAS INVESTMENTS LIMITED & ANOTHER (2014) eKLR** captured it succinctly when he stated thus;

“the jurisdiction of the Court under Order 45 of the Civil Procedure Rules is restricted to the grounds set out in the said Order which are:1) there has been the discovery of new and important matter of evidence which, after exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the Order made; or 2) on account of some mistake or error apparent on the face of the record; or 3) for any other sufficient reason”

14. Can it be said that the orders of my sister Justice Ngetich were within the knowledge of the applicants as at the time of my ruling.? I do not think so since the same were issued afterwards.

15. The orders of this court of 4th June 2021 disallowed the applicant’s application. Apparently the respondent instead of executing against the applicant went on some correspondent’s mood till the 22nd of July 2021 when Justice Ngetich delivered her ruling in HCA NO. 26 OF 2019 ordering the applicant to deposit the decretal sum in a joint interest earning account.

16. The parties in CMCC 1008 OF 2016,107 OF 2019, HCCA NO. 26 OF 2019 and in this matter are all gravitating around the respondent’s claim pursuant to a road traffic accident. The question of who to settle the decretal sum if necessary should be either the insured which in this case is the applicant and or its insured. The common denominator is the respondent who respectfully does not care whether it is the insured or the applicant who should settle the decree. The decree in question is the same and has never changed.

17. My sister having ordered that the amount ought to be deposited in a joint account and if indeed the amount has been deposited would render my orders technically overtaken. What would be the purpose of the respondent executing over the same decree? It would be double jeopardy so to speak against the applicant. In other words, the applicant as submitted would be settling the decree twice which would be unconscionable.

18. Although the issue came way after this court’s ruling i find that the same resonates well with rule 45 above for the simple reason that it was not within the full knowledge of this court and that it was brought to it albeit later. It is therefore in the interest of justice that to avoid duplicity of orders this courts orders ought to be set aside. Further it would have been different had the respondent succeeded in executing against the applicant before justice Ngetichs ruling.

19. In the premises, this court finds the application meritorious. This is for a good measure and for orderly disposition of matters. As a matter of fact, the parties should consider this matter to be handled by one court instead of two as it may breed confusion in terms of its final settlement.

20. Consequently, the orders of this court issued on 24th June 2021 are hereby set aside in view of the orders granted in NAKURU HCCA NO 26 OF 2019 dated 22nd July 2021.

21. The applicants shall however meet the costs of the auctioneers if any which are to be agreed and or taxed. Costs of this application to the respondent.

DATED SIGNED AND DELIVERED VIA VIDEO LINK AT NAKURU THIS 4TH DAY OF NOVEMBER 2021.

H. K. CHEMITEI.

JUDGE