



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

HIGH COURT CIVIL SUIT NO. E006 OF 2021

FRANCIS MWENDWA *Alias* PATRICK MWENDWA

FRANCIS *alias* VANILLA INVESTMENTS.....PLAINTIFF

VERSUS

XPLICO INSURANCE CO. LTD.....DEFENDANT

CATHERINE KAKWU FRANCIS (*Suing as the legal*

***representative of the estate of Francis Vonza*).....INTERESTED PARTY**

R U L I N G

1. Before this Court is an amended ***Notice of Motion dated 17th June 2021*** launched by Francis Mwenda alias *Patrick Mwendwa Francis T/A Vanilla Investment*, the Plaintiff/Applicant herein seeking the following reliefs namely:-

(i) ***Spent***

(ii) ***That there be a stay of execution of the judgment and decree in Kitui CMCC No. 88 of 2017 Catherine Kakwu Francis (Suing as the Legal Representative of the estate of Francis Vonza) versus Francis Mwendwa alias Patrick Mwendwa Francis T/A Vanilla Investments pending the hearing and determination of this application.***

(iii) ***That there be a stay of execution of the judgment and decree in Kitui CMCC No. 88 of 2017 pending the hearing and determination of the Main Suit.***

(iv) ***That cost of this application be provided.***

2. The Applicant has listed the following grounds on the face of his application as a basis for seeking the above prayers/reliefs:-

a) ***That Plaintiff/Applicant was the registered owner of motor vehicle Registration No. KBK 635J UD. Lorry as at 3rd July, 2014, when it was involved in an accident.***

b) ***That the Plaintiff/Applicant had taken out insurance cover with the defendant for the said motor vehicle under policy number 080/000684/2014/01/050 issued on 1/4/2014 and expected to expire on 28/2/2015.***

c) ***That the insurance cover was valid and subsisting when the said vehicle was involved in a road traffic accident on 3/07/2014 whereof one FRANCIS VONZA the Interested Party suffered fatal injuries.***

d) ***That the Interested Party's legal administrator filed a suit in the lower court against the Applicant vide Kitui CMCC No. 88/2017 Catherine Kakivu Francis (Suing as legal representative of the estate of Francis Vonza versus Francis Mwenda alias Patrick Mwendwa Francis T/A Vanilla Investments).***

e) ***That the Applicant reported the accident to the Respondent promptly as required by the law the policy of Insurance and that he even paid excess of fee of Kshs. 10,000 as required by the Insurance Policy.***

f) ***That the Plaintiff/Applicant notified the Defendant/Respondent about the suit by delivering summons, Plaint and that it promised to defend the Suit.***

g) That the Applicant was shocked when he was served with warrants of attachment sometime in 2019 and upon perusing the court file, it realized that the suit proceeded ex parte and the Interested party awarded Kshs. 3,288,758 plus costs and interests.

h) That the Applicant took up the matter personally with the Defendant who promised to act and that it filed an application to set aside exparte which was disallowed on 9.2.2021.

i) That the Applicant has sought to have the Defendant/Respondent to honor its 3rd Party obligations and pay up the decretal amount but it has failed to do so.

j) That the Applicant has not been served with a Notice to Show Cause) and risks being committed to Civil jail for non-payment of the decretal amount which now stands at Kshs. 4,038,165 which he claims is beyond what he can raise.

k) That the Defendant/Respondent should not be allowed to defraud the Plaintiff by taking policy money and failing to honour its obligations thus exposing the Plaintiff to financial condemnation.

3. The Applicant has filed a supporting affidavit sworn on 17th June 2021 where he has basically reiterated the above grounds.

4. In his written submissions done through Learned Counsel BM Mungata & Co. Advocates submits that, the Defendant/Respondent has a duty and obligation under **Section 10 of the Insurance of Motor vehicle Third-Party Risks Act 405 Law of Kenya** to satisfy judgment passed against its insureds.

5. He contends that there is no dispute that he had taken insurance cover from Defendant and that the cover was valid at the material time of the accident.

6. He submits that unlike an application for stay of execution under the provision of **Order 42 of the Civil Procedure Rule**, he is not required in application of this nature to deposit security. According to him, he is only required to demonstrate that he has a case with a high chance of success, that the application is brought without delay and to show that he will suffer loss unless a stay is granted. He further contends that the Interested Party herein will not suffer prejudice as in his view he can as well sue Defendant by way of a declaratory suit. He argues that if he succeeds in the suit herein, then the Interested Party stands to benefit and hence suffers no prejudice.

7. The Interested Party has opposed this application through grounds of opposition dated 16th June 2021 and replying affidavit sworn on 21st June 2021.

8. The Interested Party avers that she is not a party to the dispute between Plaintiff and Defendant herein and that the orders being sought would if granted, prejudice her by depriving her of fruits of a judgment delivered on 19th June 2018.

9. She further avers that both the Plaintiff and Defendant were aware of the suit filed by the Interested Party and that their attempt to set aside the judgment vide a Notice of Motion dated 2/09/2019 failed and that the Applicant and the Defendant have had sufficient time to engage to bring litigation to an end but failed.

10. The Interested Party argues that the Applicant/Plaintiff should just pay the decretal and recover the same from Defendant.

11. This court has considered this application and the response made by the Interested Party. For the record, the Defendant/Respondent has not filed any response perhaps unsurprisingly since it stands to suffer no prejudice in any event.

12. The Applicant has invoked inter alia the provisions of **Order 51 Rule 1 and Order 42 of the Civil Procedure Rule** in the prayers sought in this application. It is therefore ironic that in his submissions, the Applicants submits that unlike applications brought under **Order 42**; **“application of this nature does not require a deposit of security because it is not an appeal.”**

This begs the question as to why he invoked a cited Rule in the first place if he felt or opined that it was inapplicable to this application?

13. It is true that the Applicant and the Respondent have contractual dispute where the Interested Party does not have a role to play. The Applicant states that when he received the Plaint and summons from the Interested Party he forwarded them to the Defendant who are his insurer. That would in effect mean that if there was default of appearance and entry of defence, certainly the Interested Party was not at fault and so to the trial court when it entered judgement in default of appearance and defence.

14. The Applicant has stated that the amount that was awarded to the Interested Party was “colossal” but the suit filed has nothing to do with the sum awarded. The basis of the suit filed is that the Defendant simply failed to honor its obligation and while this court does not wish to delve into the issue at this stage, there are no reasons given why the Interested Party should be made to suffer the consequences of a disagreement between the Plaintiff on one hand and the Defendant on the other. I am persuaded by the Interested Party’s contention that she is not a party to their dispute.

15. The Applicant has argued that there would be no prejudice suffered if the prayers sought are granted but certainly, prejudice would be occasion due to delays. I am not persuaded based on the facts presented before me that the Applicant has demonstrated sufficient cause to delay the Interested Party and the estate of the late Francis Vonza from enjoying the fruits of their judgement. Furthermore, the Applicant has not shown any legal basis for the reliefs being sought in this application.

16. The Plaintiff/Applicant may in the end have a good case against the Defendant but the Interested Party is not privy to that cause. All she

wants is her fruits of judgement and ends of justice to be met.

In the premises, this court finds no merit in the amended Notice of Motion dated 17th June 2021. The same is **disallowed** in its entirety with costs to the Interested Party.

DATED, SIGNED, AND DELIVERED AT KITUI THIS 1ST DAY OF NOVEMBER, 2021.

HON. JUSTICE R. K. LIMO

JUDGE