



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

CIVIL SUIT NO. E009 OF 2021

NJERU PATRICK.....PLAINTIFF

VERSUS

INVESCO ASSURANCE COMPANY LIMITED.....DEFENDANT

AND

GRANTON UKONDE MULALA.....INTERESTED PARTY

RULING

1. By a Motion on Notice dated 29th December, 2020, the Plaintiff/Applicant herein seeks the following orders:

(1) Spent.

(2) Spent.

(3) THAT pending hearing and determination of this suit this honourable court be pleased to issue an order staying execution of the judgment and decree in Kithimani P.M.C.C 317 of 2016, Granton Ukonde Mulala v Hanifa Mohamed, Alexander Muli Ngubi and Njeru Patrick.

(4) THAT this Honourable Court do make any such further and/or other orders and issue any other relief it may deem just to grant in the interest of justice.

(5) That the costs be in cause.

2. According to the Applicant, he is the registered owner of motor vehicle registration number KAG 633R which was insured by the Defendant on a third-party policy under the Insurance Motor Vehicle (Third Party Risks) Act Cap 405 of the Laws of Kenya and Policy Number P/NO 070/1/008054/2011/11 commencing on the 20th November 2012 and expiring on 19th October 2013. It was averred that the Defendant agreed to insure the motor vehicle in respects of all forms of liability including judgments entered against applicant, costs and/or expenses which he would become liable to pay in respect of death or bodily injury to any person(s) caused or arising out of the use on a road of the said motor vehicle.

3. The Applicant deposed that during the period of currency of the stated insurance policy, the motor vehicle was involved in a road accident with motor vehicle registration number KAV 294X on 27th September 2013 and the Applicant immediately reported the accident to the Defendant and paid the excess charges after the Defendant demanded the same upon which he was issued with a receipt dated 27th August 2014.

4. It was averred that on or about 8th June 2018, the applicant received a memorandum of appearance, statement of defence and accompanying documents in **Kithimani P.M.C.C 317 of 2016, Granton Ukonde Mulala v Hanifa Mohamed, Alexander Muli Ngubi and Njeru Patrick** from the law firm of Taibjee and Bhalla Advocates through Post Office and from the pleadings aforesaid, the Interested Party was the Plaintiff and the Applicant was the 3rd Defendant. On the same day the Applicant took the documents to the Defendant's offices and its officer assured him that it would instruct advocates to defend the applicant in the suit. On the aforesaid date the officer the applicant talked to at the Defendant's offices was one MS. Nawal of cell phone number 0727094683.

5. It was averred by the Applicant that the Defendant failed to contact him as earlier promised and though he made several phone calls and trips to the Defendant's offices, the Defendant's officers kept telling him to wait. Upon getting perturbed by the said action, the instructed his current advocates on record to peruse the court file in the case aforesaid and inform him of the progress of the case. Upon perusal of the court file, it was established that default judgment had been entered against the applicant on 28th May 2018. The applicant immediately visited the Defendant's offices and informed it of the developments in the aforesaid suit but it remained silent on the actions it would take to defend the applicant's interests.

6. The Applicant deposed that through his advocates on record, he made an application to set aside the default judgment and the same was allowed and through his advocates on record he informed the Defendant in a letter dated 2nd November 2018 that the aforesaid case was scheduled for Pre-Trial Conference on 28th November 2018 and requested the Defendant to take appropriate action. However, the Defendant failed to take any action in the aforesaid case and this forced the applicant to defend the suit through his advocates on record incurring advocate's costs which should have been met by the Defendant. In a judgment delivered on 3rd February 2021, the trial court in Kithimani P.M.C.C 317 of 2016, **Granton Ukonde Mulala vs. Hanifa Mohamed, Alexander Muli Ngubi and Njeru Patrick** found the applicant 50% liable for the accident which occurred on 27th September 2013 and the Interested party was awarded general damages of Kshs. 600,000 special damages of Kshs. 681,865.00 together with costs of the suit.

7. It was averred that the Defendant had been duly served with the mandatory Statutory Notice under Section 10(2) of Chapter 405 Laws of Kenya, by the Interested Party's Advocates on record, who notified the Defendant of the aforesaid accident. Though the applicant informed the Defendant of the aforesaid judgment, it has refused, neglected and / or failed to pay the decretal sum.

8. The Applicant's case is therefore that the Defendant has breached the insurance contract and has declined to meet its obligations as insurer under Cap 405 Laws of Kenya to his detriment. Pursuant to the said judgment, the Interested Party through its advocates on record wrote a letter dated 20th April 2021 where Kshs. 2,398,603.50 was demanded from the applicant.

9. In this suit the Applicant *inter alia* seeks orders that the Defendant be compelled to meet its obligations as stipulated in CAP 405 and the Policy of Insurance which include indemnifying the applicant and settling all judgments and decrees issued in favour of third parties and specifically the decree arising from **Kithimani P.M.C.C 317 of 2016, Granton Ukonde Mulala v Hanifa Mohamed, Alexander Muli Ngubi and Njeru Patrick**.

10. According to the Applicant, if interim relief is not granted barring the Interested Party from executing the decree aforesaid before this application is heard and determined, this suit will be reduced to a mere academic exercise. Further, if interim relief is not granted, the applicant will have been permanently ruined since his property will have been sold in satisfaction of a huge decretal sum whereas he took out a mandatory insurance policy with the Defendant for the very purpose of the Defendant paying liabilities which arose from use of KAG 633R and which policy of insurance he is seeking to enforce vide this suit.

11. The Applicant lamented that considering the huge decretal sum in the aforesaid suit he does not have money to satisfy the same and in the event his property is sold in execution of the decree he will suffer irreparable and irreversible prejudice.

12. In response to the application, the Interested Party filed a replying affidavit in which he deposed that the applicant was made in good faith and that the interested party is not a party to this suit and will be prejudiced if the orders sought herein are granted as he will be prevented from enjoying his lawfully obtained judgement. In his view, he is at liberty to enforce the judgement against the Plaintiff/Applicant unhindered and as the orders sought are not directed at him directly, being a stranger to the contract of insurance in question, he should not be made to suffer.

13. In support of the application, the Applicant relied on the case of **Charles Makenzi Wambua vs. Africa Merchant Assurance Co. Ltd & another [2014] eKLR** where the court applied the principles in stay pending appeal with regard to proof of existence of arguable case with a probability of success. Based on the facts deposed to in the supporting affidavit, it was submitted that the Plaintiff has proved a *prima facie* case against the Defendant based on the provisions of the ***Insurance Motor Vehicle (Third Party Risks) Act*** Cap 405 of the Laws of Kenya and should thus be given a chance to pursue this case to its logical conclusion before the decree is executed against him. In support of his submissions the Applicant relied on **Isaack Wakoli vs. Xplic Insurance Company [2021] eKLR** and **Charles Makenzi Wambua vs. Africa Merchant Assurance Co. Ltd & another [2014] eKLR**.

14. It was further submitted that from the evidence presented by the Plaintiff, he has demonstrated that he will suffer irreparable loss and the suit be rendered nugatory if the decretal sum in **Kithimani P.M.C.C 317 of 2016, Granton Ukonde Mulala v Hanifa Mohamed, Alexander Muli Ngubi and Njeru Patrick** which is at least **Kshs. 2,398,603.50** is executed against him before this case is heard and determined. In support of this submission the Applicant relied on the case of **Charles Makenzi Wambua vs. Africa Merchant Assurance Co. Ltd & another [2014] eKLR** and the case of **Dora Mbula t/a Tamarillo Junior Academy vs. Africa Merchant Assurance Company Limited; Hillary Nyabali Ndusu (Interested Party) [2020] eKLR** and submitted that the Interested Party suffers no prejudice since interest continues to accrue in his favour. It is to be noted that the Plaintiff has used his resources to sue the Defendant thus saving the resources of the Interested Party of also instituting suit against the same Defendant to pursue the decretal sum aforesaid.

15. The application was however opposed by the interested party. According to the interested party, since he is not a party to this suit he stands to be prejudiced if the stay of execution is granted as he will be prevented from enjoying his lawfully obtained judgement. In his view, he is at liberty to enforce the judgement against the Plaintiff unhindered and that the orders sought are not directed at him directly hence he ought not to suffer.

16. On behalf of the interested party it was submitted that the Applicant does not stand to suffer any substantial loss should the Application be denied and on the flipside, it is the Interested Party on the losing side should the orders sought be granted as the Interested Party would be kept away from enjoying the fruits of his judgment rendered by a competent Court. It was further submitted that the Applicant has been silent on the issue of security in this matter and reliance was placed on **Joseph Gathanwa vs Dr. Lawrence Gakuu**, HCCC No. 138 of 2009,

Equity Bank Ltd vs. Taiga Adams Company Ltd [2006] eKLR it and it was contended that the Interested Party herein will be denied the fruits of his judgment should this Application be allowed. According to the interested party, it is in the interest of justice that litigation be brought to an end, and that the Applicant settles the decretal amount.

17. Based on **Alton Homes Limited & Another vs. Davis Nathan Chelogoi & 2 Others [2018] eKLR**, the interested party submitted that the application ought to be dismissed with costs.

Determination

18. I have considered the application, the affidavits both in support of and in opposition to the application herein as well as the submissions filed.

19. In this case it is not disputed that the Plaintiff/Applicant is the judgement debtor in the primary suit where the Interested Party is the decree holder. The Applicant contends that the Defendant was the insurer of the vehicle which caused the accident the subject matter of that primary suit and that contention is not challenged by the Defendant herein. In this suit, the Applicant seeks to compel the Defendant to meet its obligations under the contract of insurance by satisfying the said decree. In the meantime, he seeks to have the execution and proceedings in the primary suit stayed. There is no doubt that the said order of stay if granted will affect the interests of the Interested Party herein. In **Brek Sulum Hemed vs. Constituency Development Fund Board & Another [2014] eKLR** the court held that;

“As necessary parties, the provisions of rule 10 Order 1 will apply to require that their involvement to be necessary for the court to effectually and completely adjudicate upon and settle all questions involved in the suit’. As Interested parties, the applicants need only demonstrate interest in the subject of the suit or in other relevant matter affecting the suit...and in giving effect to the Article 159 principle of substantial justice without undue regard to technicalities of procedure, I allow the applicants’ application for them to be joined in the suit, as necessary or interested parties.”

20. In **Departed Asians Property Custodian Board –V- Jaffer Brothers Ltd Supreme Court of Uganda (1999) I.E.A 55** it as held that:

“A clear distinction is called for between joining a party who ought to have been joined as a defendant and one whose presence before the court is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit A party may be joined in a suit, not because there is a cause of action against it, but because that party’s presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all the questions involved in the cause or matter.”

21. Similarly, the Supreme Court of Kenya in **Trusted Society of Human Rights Alliance –vs- Mumo Matemo & 5 Others (2014) eKLR** held as follows with regard to an interested party:

“Suffice it so say that while an interested party has a ‘stake/interest’ directly in the case, an amicus’s interest is its ‘fidelity’ to the law: that an informed decision is reached by the Court having taken into account all relevant laws, and entertained legal arguments and principles brought to light in the Courtroom. Consequently, an interested party is one who has a stake in the proceedings, though he or she was not a party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause. (emphasis added).

22. Further, in **Gateway Insurance Co. Ltd –v- Moses JaikaLuvai (2008) eKLR**, Ibrahim, J (as he then was) stated that:

“The plaintiffs in the suits which the insurer seeks to avoid liability under Section 10(1) by way of declaratory suit must be notified of the institution of the declaration suit and after which the said Plaintiffs are entitled to be made parties to the Insurer’s suit if they think fit. The provision is mandatory and the Court has no discretion on the matter. The discretion and election lies with the Plaintiffs who have sued the insured for damages and losses arising from motor accidents. It is a right which none of the parties or the Court can take away.”

23. In **Fidelity Shield Insurance Company Limited vs. Joseph IhaWanja [2018] eKLR** it was held that:-

“An interested party is the one who has a stake in the proceedings though he was not a party in the cause ab initio. This is in line with the definition quoted above. The party must demonstrate that it is necessary for him to be joined as a party to enable the court to settle all the questions involved in the suit. It is not sufficient for a party to state he has an interest he must convince the court that his being enjoined in the suit is crucial and will be necessary to assist the court in the determination of the questions involved in the suit. The applicant has stated the factual basis for this application which she has indicated is not in dispute and the facts are pleaded in the plaint. The pleading by the plaintiff is alleging a breach of the policy. Simply stated the plaintiff is seeking to avoid liability to pay the interested parties. It is based on a claim that the defendant was not using the motor vehicle on that particular day for the insured purpose. The plaintiff seeks a declaration that he is not bound to settle decree in Baricho R. M. C.C. 36, 37, 38, 39, 40 & 41 of 2013 or any other suit that maybe filed in future on account of suits having arisen in breach of the express provisions of the own goods master comprehensive policy No. MC 03312 887. There is no doubt that the decision of this court will affect the rights and interests of the interested party. The interested party has a stake and or interest in the case. This was well stated in the Supreme Court in *Trusted Society of Human Rights Alliance –v- Mumo Materu& Others*, (Supra). The applicant will be affected by the decision and has a stake in the proceedings. The interest of Justice demands he be party in the proceedings. This matter is brought under section 10 of the Insurance Motor Vehicle 3rd Party Risk) Act. The provision makes it mandatory for the Insurer to settle the Judgment(s) in respect of persons it has insured against claims by 3rd parties. Such claims are where death or bodily injuries

has resulted from an accident involving the vehicles insure under the Act. Section 10(4) is mandatory that a person who has been given notice of the proceedings to repudiate liability shall be entitled if he thinks fit to be made a party thereto. It means that if such a party wishes to be enjoined in the suit, the court has no discretion, it has to allow such a party to be enjoined in this suit. I am in agreement with the decision of Justice Ibrahim as he then was in the case of *Gateway Insurance Co. Ltd –V- Moses Jaika Luvai*, (Supra) that if the party applies to be joined in the suit the court is without discretion, it must allow him. Where a party has been given a right by a statutory provision to be enjoined in a suit, the plaintiff or the party cannot take away the right. I am in agreement with the counsel for the interested parties that the interested party has the legal basis in Section 10(4) of Insurance Act to be enjoined in this suit.”

24. Based on the said decisions I am satisfied that the Interested Party is properly joined to these proceedings.

25. In the instant application, the Applicant seeks stay execution of the decree in the primary suit pending the determination of this suit. However, whereas an insured may well be entitled to seek a declaration that its insurer is entitled to settle the claims covered under the insurance policy, that statutory right of action does not bar a person who is injured from executing the decree issued in his favour against the insured directly.

26. However, one cannot close his eyes to the fact that the Applicant is in effect seeking that the Defendants pays the Interested Party the sum due to the Interested Party from the Applicant. Unless some measure of protection is given to the Applicant, his suit as presently framed may well be an academic exercise. To that limited extent I agree with the reasoning in the case of Charles Makenzi Wambua vs. Africa Merchant Assurance Co. Ltd & Another [2014] eKLR where the court stated as follows:

“Secondly, that unless such stay is granted, the intended suit shall be rendered nugatory. In my analysis, I have found that if stay is not granted, the court will be assisting the defendant to avoid a contract whose terms are dictated by statute, to compensate the interested parties herein then revert to the plaintiff to recoup any extra sums that they may have paid to third(interested) parties...I must also consider whether granting the stay sought will in any way prejudice the interested parties who have opposed this application. The interested parties being persons covered under Section 4 (1) of the Act-Cap 405 Laws of Kenya, the liability of the defendant is preserved as against them and they could as well, sue the defendant by way of a declaratory suit to recover the sums due as per the decrees in their favor...However, the plaintiff has opted to carry that burden on their behalf. If the suit herein is determined in favor of the plaintiff, then the interested parties stand to benefit directly. They need not file any other declaratory suit against the defendant. For that reason therefore, time and resources, will also be saved for the interested parties. Therefore, no prejudice will be caused to them.”

27. I must however state that the primary obligation of settling the decree falls squarely on the Applicant and in the event the Defendant as his insurer fails to satisfy the decree, the Applicant will still be called upon to satisfy the same. The mere fact that the Defendant is bound both contractually and statutorily to satisfy the decree does not absolve the Applicant from meeting his obligations under the tort of negligence. Therefore, I respectfully disagree with the view that by not granting the stay herein, the Court will be assisting the defendant to avoid a contract whose terms are dictated by statute, to compensate the interested parties herein then revert to the plaintiff to recoup any extra sums that they may have paid to third (interested) parties. It must be noted that nothing prevents the Applicant from settling the decretal sum and then suing the Defendant for compensation or reimbursement.

28. It is my view that in these circumstances, justice would be done to all the parties if there was a stay of proceedings for a short period to enable the Applicant prosecute his case. Accordingly, I hereby grant an order staying execution in Kithimani PMCC No. 317 of 2016 pending the determination of this suit on condition that the Plaintiff/Applicant secures a bank guarantee or any other form of security, movable or immovable, for the said decretal sum as security for the due performance of the decree or order as may be ultimately be binding on him within 30 days of this order. In default the stay will automatically lapse.

29. The costs of this application will be in the cause.

30. Liberty to apply granted.

31. It is so ordered.

RULING READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 8TH DAY OF NOVEMBER, 2021.

G V ODUNGA

JUDGE

In the presence of:

Mr Ngethe for Mr Mwaniki for the Plaintiff

CA Susan